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ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NEW ORLEANS.

JANUARY, 1856.

JUDGES OF THE COURT.

HON. E. T. MERRICK, *Chief Justice.*

HON. C. VOORHIES,
HON. A. M. BUCHANAN,
HON. H. M. SPOFFORD,
HON. J. N. LEA,
} *Associate Justices.*

JANE COWAND, wife of A. K. AKEN, *v.* JOSEPHINE PULLEY, wife of ELIJAH COX, and HER HUSBAND.

Suit on a due bill.

It was objected that the plaintiff did not allege in her petition that she was separated in estate from her husband. *By the Court:* No such allegation is necessary. The evidence shows conclusively that the debt originated in a loan of money made by the petitioner, in her own name, out of funds which were paraphernal. She had a right to assume at any time the administration of her paraphernal property, and the taking of this due bill for money lent by herself was itself an act of administration.

Parties engaged in the purchase of materials, and the manufacture thereof into carriages for sale, are liable as commercial partners; but mechanics, who make carriages to order, or repair them, would not necessarily be commercial partners.

The prescription of three years, applicable to a loan of money, does not apply to a due bill given at the time for such a loan.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Phillips, for plaintiff. *G. B. Duncan*, for defendants and appellants.

LEA, J. The plaintiff sues upon a due bill given by the late firm of *Aken & Cowand* for the sum of $464 20. The petitioner, who is a married woman, alleges that the due bill sued upon is her paraphernal property, that it was given to her for money lent to the late firm of *Aken & Cowand*, who were commercial partners, and are bound *in solido*, and that the defendant, the widow in community of *Joseph O. Cowand*, one of the firm, having never renounced the community, is bound for the community debts. Various matters of defence are set up, which will be considered separately.

1st. It is urged that there is no allegation that the petitioner is separate in estate from her husband. No such allegation is necessary. The evidence hows conclusively that the debt originated in a loan of money made by the

petitioner in her own name to the late firm of *Aken & Cowand* out of funds which were paraphernal. She had a right to assume at any time the administration of her paraphernal property, and the taking of this due bill for money lent by herself was itself an act of administration.

2d. It is objected that it is not proved that the firm, which the petitioner avers signed the bill, is a commercial one, and that the firm being an ordinary partnership, the liability of the partners is joint, and that the joinder of the other partner is a necessary prerequisite to a judgment. As we are of the opinion that there are other reasons why there must be a judgment of nonsuit, we shall dispose of this point with the remark that if the evidence established that the defendants were engaged in the purchase of materials and the manufacture thereof into carriages for sale, they would, under our law, clearly be liable as commercial partners; but mechanics, engaged in making carriages to order, or in repairing them, would not necessarily be commercial partners. The evidence is not as full on this point as would be satisfactory. Persons associated in the mechanical employments are not, as a general rule, commercial partners, though they may, and generally do, so conduct their business in this city as to be merchants also.

3d. The defendant objects that no proof whatever has been offered showing that she was the wife of *Cowand* at the date of the loan, and, moreover, that neither the note nor protest sued upon have been offered in evidence.

These objections appear to be well founded, and as they are urged upon the consideration of the court, we cannot overlook them. We have searched the record in vain for any evidence showing that the defendant was the wife of *J. O. Cowand* at the date of the alleged loan, and whatever may have been intended on the trial of the case, the note of evidence does not show that either the due bill or the protest thereof were offered in evidence. It is true the evidence establishes the *loan of money* for which the note was given, but if the action is to be considered as based upon the loan *as such*, the plea of the prescription of three years would bar the action and extinguish the debt. It is only as the holder of the due bill, existing in a negotiable form, that the petitioner can escape the plea of prescription; and this brings us to the consideration of the question whether this plea, to wit: the prescription of three years, is applicable to a loan of money for which, at the time of making it, a note or due bill, in a negotiable form, was given.

It is urged that the debt itself consisted in the borrowing of the money, and that the due bill is merely the evidence of the debt. The same remark, however, will apply with equal force to all bills of exchange or promissory notes, transferable by endorsement or delivery, originating in loans of money. Even in the hands of third parties they are merely evidences of debt which have been assigned or transferred to the holders. The fact, as is often the case, that they originated in loans, would not bring them within the operation of the prescription of three years.

We think it was the intention of the Legislature to protect the holders of debts evidenced by negotiable paper against the operation of any prescription but that of five years.

It is ordered, that the judgment appealed from be reversed, and that upon the plaintiff's demand there be judgment as in case of nonsuit, and that the plaintiff and appellee pay costs in both courts.

X. Mathis and Madeline Roll v. Magdalena Gerantz, Tutrix, and in her own right.

The will of the testator not having been dictated to the notary in the presence of the three attesting witnesses, is null and void.

Facts constituting bad faith in a purchaser or possessor.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

McKay, for plaintiffs. *Michel & Gilmore*, for defendant and appellant.

Spofford, J.* It is amply proved, that the testator, *Joseph Mathis*, did not dictate his will to the notary in presence of the three attesting witnesses. The District Court, therefore, did not err in holding the testament to be null and void. C. C. 1571. *Mouton* v. *Cameau's Heirs*, 5 An. 565.

The plaintiffs are the duly recognized heirs at law of their deceased son, *Joseph Mathis*.

They are therefore entitled to recover identically such property belonging to his succession, as has not been legally alienated.

In this suit, they claim a particular lot of ground in the faubourg Livaudais, parish of Jefferson, which is alleged to be in possession of the defendant. This lot belonged to the succession of *Joseph Mathis*, but it was community property, having been acquired during the marriage between him and his wife, *Mary Gerantz*. The defendant is sister and heir of *Mary Gerantz*.

The plaintiffs, as heirs of *Joseph Mathis*, cannot of course recover more than his interest in the property sued for. The judgment is erroneous in giving them the whole, instead of one-half of the lot. See *Cresse* v. *Marigny*, 4 M. 54.

But the defendant contends that notwithstanding the nullity of the will, as the property has been sold under judicial order, she is a purchaser in good faith, and cannot be disturbed.

We do not find her to be a purchaser or possessor in good faith. The lot in question was never sold as a part of the succession of *Mathis*. It remained in the possession of his widow and executrix, until her death, and was afterwards sold as part of her succession, at the instance of her creditor, *Henry Markle*, who was administrator thereof, and who, it is admitted, had notice of the plaintiffs' claims. But *Markle*, administrator, was the husband of the present defendant. He was incompetent, by reason of his office, to purchase at the succession sale; but it appears that one *Burdette* bought the lot in controversy, and within two weeks conveyed it to *Markle*, for the same sum he bid for it at the probate sale. Under the circumstances, we must regard *Burdette* as a person interposed and purchasing for the benefit of the administrator, *Markle*, who is since deceased. The sale was therefore null. The defendant, *Markle's* widow, claims the property as tutrix of their minor children, inheriting their father's title; she is entitled to retain one-half the property as heir to her sister, *Mary Gerantz*, widow in community of *Joseph Mathis*; and the plaintiffs are entitled to the other half as heirs of *Joseph Mathis*, whose succession has never been legally divested thereof.

*Merrick, C. J., not being present at the argument of this case, took no part in this decision.

MATHIS v. GERANTZ.

It is therefore ordered, that the judgment of the District Court, so far as it annuls the pretended will of *Joseph Mathis*, be affirmed; and that in other respects, it be avoided and reversed. It is further ordered and adjudged, that the plaintiffs be decreed to be the owners of one undivided half of the lot of ground and improvements thereon, described in their petition as situated in the faubourg Livaudais, parish of Jefferson, in square No. 5, bounded by Levee, Rousseau, Fourth and Washington streets. It is further ordered, that the plaintiffs have judgment against the defendant for fruits and revenues at the rate of ten dollars per month, from the 20th September, 1852, the day of judicial demand, until delivery of possession of one-half the premises aforesaid. And it is further ordered, that the costs in the District Court be paid by the defendant, and the costs of this appeal by the plaintiffs and appellees.

LOUIS MATHE *v.* GEORGE MCCRYSTAL.

An appeal lies from an order of seizure and sale based upon an authentic act importing a confession of judgment.

A note was executed by M. to his own order, and by him endorsed in blank, secured by mortgage in favor of C., *or any holder* of the note. *By the Court:* There was no matter *in pais* to be proved. The execution of the note, its endorsement in blank, and the act of mortgage, importing a confession of judgment in favor of the holder of the note, were all proved by authentic evidence. The exhibition of the note and mortgage by the plaintiff, identified him as the holder, who, by the terms of the contract, was entitled to the order of seizure and sale.

C. P., 733, 734.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Legardeur*, for plaintiff. *Dunlap*, for defendant and appellant.

SPOFFORD, J. (MERRICK, C. J., absent.) This is an appeal from an order of seizure and sale.

The appellee contends that no appeal lies from such an order based upon an authentic act of mortgage, importing a confession of judgment.

The point is not a novel one, and the practice of allowing appeals in such cases, is now too well settled to be disturbed. *Harrod* v. *Voorhies*, 16 L. R., 254; *McDonogh* v. *Fort*, 14 L. R., 350, and the cases there cited.

The appellant contends that the plaintiff alleges a novation of the debt by the execution of a new note of which there is no authentic evidence.

We do not find any allegation of novation. On the contrary, the proceeding is based upon the original note duly identified with the act of mortgage, and, instead of a novation, nothing but a prolongation of the term is alleged, and a release of a portion of the interest. These judicial admissions are all favorable to the appellant, and as he has had the full benefit of them in the order appealed from, he complains of it with bad grace.

The only question is, was there sufficient authentic evidence to justify a resort to the executory process? The note was executed by *McCrystal* to his own order and by him endorsed in blank, all which is shown by authentic evidence. The note thus became payable to bearer. The act of mortgage was executed by *McCrystal* in favor of one *Clay, or any holder* of the aforesaid note, which the mortgage was intented to secure, and which was identified therewith.

The holder of the note could do no more than exhibit the note and a copy of the act of mortgage given to secure the holder. This has been done, and

we are of opinion that it was a sufficient compliance with Articles 733 and 734 of the Code of Practice, for the plaintiff was "in possession of the act." There was no matter *in pais* to be proved. The execution of the note, its endorsement in blank, and the act of mortgage importing a confession of judgment in favor of the holder of the note, were all proved by authentic evidence. The exhibition of the note and mortgage by the plaintiff, identified him as the holder who, by the terms of the contract, was entitled to the order of seizure and sale.

There are some remarks in the case of *Lea* v. *Dearmond*, 4 L., 321, and perhaps elsewhere, which would appear to be inconsistent with the doctrine we here lay down. The former case is not parallel in all its circumstances; but so far as its decision conflicts with this, it must be considered as overruled.

The summary process awarded by the Code of Practice upon securities of this class, greatly enhances their value, and we are not disposed to throw any unnecessary impediment in the way of their free circulation in a commercial city.

Moreover, we think the doctrine we have announced was impliedly recognized in the case of the *Commercial Bank* v. *Poland*, 6 An., 477.

The judgment is therefore affirmed, with costs.

VIRGINIE HERMANN *v.* THE NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

Decision in *Hubgh* v. *The New Orleans and Carrollton Railroad Company*, 6 An., 495, affirmed.

The Statute of March 1st, 1855, (Acts of 1855, p. 271,) having been passed since the act complained of, can have no effect on this case.

The assessment of damages to the wife and children from the homicide of the husband and father, can only be the balancing of probabilities and chances.

APPEAL from the Fourth District Court of New Orleans, *Reynolds* J.

Ogden & Leovy and *Legardeur*, for plaintiff. *Benjamin, Bradford & Finney* and *Eustis*, for defendant.

R. N. Ogden, for plaintiff: *

Chief Justice EUSTIS, in *Hubgh* v. the same defendants, 6th An., says:—

"But the ground on which Grotius, with whom the idea originates, places it, excludes all idea of its forming a part of the civil law, or being the basis of an action. Speaking of the indemnity to be made in cases of injury, he goes on to state some examples, of what the indemnity, which the party committing the wrong is bound to make, consists: A man who has unjustly killed another, ought to pay the expenses incurred for his physicians, and give to those whom the deceased was bound to support, as his father and mother, his women and his children, the amount of their maintenance, according to the age of the deceased. Thus Hercules, having slain Iphytus, paid a fine to his children, in order to secure more easily an expiation of his crime. A commentator of Aristotle says, that one gives to the wife, the children, and other dependents of the person slain, is given in some sort. When I speak of homicide, I mean an unjust homicide, that is, one committed by a person who had no right to do the act from which the death has ensued. If one has the right to endanger the life of another, however one may have sinned against charity, as in case of not taking to flight, he is not responsible for the death, so far as relates to the indemnity of which we are now treating. Besides, a price may be put upon the

(*) A large portion of the argument for plaintiff is a reprint of the argument for the re-hearing in *Hubgh's* case, 6th An., and is therefore omitted.

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life of a slave, who can be sold, but the life of a free person is not susceptible of valuation. The author refers in a note to the title in lib. 9 of the Digest, which is the title *De his qui Effunderint*," which, in case of a free man's having been injured by an object thrown into the street, provides, cicatricem, cautem aut deformitatis nulla sit estimatio, quia liberum corpus nullum recipit ostinatiosum, etc. "There is no estimate made of the scars, or deformity produced, because the value of the body of a free man cannot be estimated in money." This author did not profess to treat of "Jurisprudence, but he declared the principles of natural law, and the laws of nations, from the writings of the philosophers, poets, historians and orators of antiquity. He does not confound one with the other, and distinguishes both from the civil or municipal law. He, it will be observed, is obliged to consider this indemnity rather as a matter of gift or liberality; an affair of conscience, rather than an obligation of strict duty. Rutherford, in his Institutes of Natural Law, dissents from the opinion of Grotius, in his discrimination between the valuation of the life of a free man and of a slave, and thinks that in case of the slaying of either, his life can be estimated according to the interest which those who survive have in it." Book 1, Ch. 17, § 9.

We have fairly transcribed the whole passage, in order to do the opinion full justice, and also that our comments upon it may be more easily understood.

If this be a correct statement of the views of Grotius, it is certainly fatal to the plaintiff's case. No more respectable authority could be cited, nor one entitled to more weight in a court of justice. If indeed he "places it on a ground excluding all idea of its forming a part of the civil law, or being the basis of an action;" if indeed "he considers this indemnity rather as a matter of gift or liberality; an affair of conscience, rather than an obligation of strict duty," then it would seem unnecessary to enquire into the Roman law, of which his treatise is so full, and from which fountain of jurisprudence he drew so largely. But let the passage of which this quotation professes to be a translation, speak for itself. It is in the § 13th of chapter 17th, of the Rights of War and Peace.

Exemplo hæc sint. Homicida injustus, tenetur solvere impensas, si quæ factæ sunt in medicos, et iis quos occisus alere exofficio solebat, puta parentibus, uxoribus liberis dare tantum, quantum illa spes alimentorum, ratione habita ætatis occissi, valebat—sicuti Hercules legitur Iphiti a se occissi leberis mulctam pependissi, quo facilius expiaretur. Michael Ephesius ad quintum Nicomachiorum Aristotilis: Alla kai o Phoneuthies elabe tropon tina—O gare e gune e oi paides, e oi suggenies tou phoneuthentos elabe tropon tina ekeino dedotai. Sed et qui occisus est accipit aliquo modo. Quæ enim uxor ejus et liberi et cognati accipiunt, ipse quodammodo accipit. Loquimur de homicida injusto, id est, qui non habuit jus id faciendi unde mors sequitur. Quare si quis jus habuirit sed in caritatem peccavirit ut qui fugere noluit, non tenebitur. Vitæ autem in libero homine æstimatio non fit, secus in servo qui vendi potuit.

The mistake in the translation will be readily perceived; and we are convinced would not have been committed, had the original been consulted: but, as the original is extremely rare, we must presume that the Judge was misled by some erroneous translation.

We submit the following, as a correct and literal translation of the passage. The following may be for example: A man slaying another, unjustly, is bound to discharge the expenses, if any are contracted, for physicians, and to give to those whom the slain was in duty accustomed to maintain—such as parents, wives, children—as much as that hope of maintenance—regard being had to the age of the deceased—was worth: thus, Hercules is said to have made reparation (paid a fine) to the children of Iphitus, slain by him, in order that expiation might more easily be made.

Michael, the Ephesian, says, upon the 5th of the Nicomachii of Aristotle: "but also the person slain receives, in some sort, for what the wife or children or relations of the person slain receive is, in some sort given him." We are speaking of an unjust man-slayer: that is, one who had not the right of doing that from whence death follows.

Wherefore, if any one may have had the right, but has sinned against charity, as when one (being assaulted) has been unwilling to flee, he shall not be bound. But of life, in case of a free man, no valuation is made, otherwise, in case of a slave who can be sold.

The quotation, from the commentator of Aristotle, is a glaring mistake. That was the only part of the passage, even as translated in the opinion, which countenanced the idea that this indemnity is a mere gift or liberality. On this mistake alone, is founded the assumption that Grotius treats it as a gift or liberality; and it means exactly the reverse—it was intended to enforce it more strongly as a duty. An offence, a wrong had been committed, which demanded expiation. This expiation could only be made by repairing, as far as possible, the damage it had caused to those whom the deceased was bound to support, and the idea is conveyed in this way: But also the person slain receives in some sense, because that which is given to his dependants is, in a certain sense, given to him. All the rest of the passage enforces it as a duty, by the strongest language, *tenetur solvere*—is bound to pay or discharge—*tenetur dare*, is bound to give—*mulctam pependisse*, to have paid the fine. These are applied to the case of unlawful killing. But the passage itself clearly draws the distinction between such a case and one where the killing was justifiable, though contrary to the duty of charity, or a tender regard to the life of an enemy—as where the necessity might have been avoided by flight, but the party assailed, chose to stand on his legal right of self-defence.

In the first case, he incurs the responsibility; in the second, he incurs none, although he may have sinned against charity. Indeed there is a singular contradiction in the very terms employed to convey the meaning of Grotius. At the same time that he is represented as considering it as a mere matter of gift or liberality, it is said that: "Speaking of the indemnity to be made in cases of injury, he goes on to state some examples of what the indemnity, which the party committing the wrong is bound to make, consists." Now, on the one hand, no man is bound to give or to be liberal; and on the other hand, no man who has inflicted an injury, or committed a wrong, can claim exemption from responsibility, and affect to be liberal.

Such a contradiction, in a writer so generally distinguished for fluency and precision, can only be ascribed to that confusion which is the constant handmaid of error.

We must believe there is some ambiguity in the sentence in which the judge would seem to say, that the "*idea*" that indemnification is due in cases of homicide, originated with Grotius. It was familiar to the people of remote antiquity. Grotius flourished in the seventeenth century, and died in 1645. His great master piece, this treatise *de jure belli et pacis*, was therefore modern. In that treatise, and near the place from which the quotation is made, Grotius cites a treaty between the English and the Danes, in which it is stipulated that if an Englishman should kill a Norwegian, or a Norwegian an Englishman, each King bound himself, respectively, to take such measures as that the heirs of the deceased should obtain just satisfaction, and that he who had killed him should pay them the indemnity; and this fine or indemnity is supposed to be the weregild of the ancient Saxons. But the learned Grotius deduced, as the court justly says, the principles of natural law, and the laws of nations from the writings of the philosophers, poets, historians, and orators of antiquity. From none of the ancient poets did he draw more largely than from Homer, and he must have seen this "*idea*" emblazoned on the shield of Achilles, as a faithful picture of a still earlier age. Pope thus renders the passage:

"Two cities radiant on the shield appear
The image one of peace, and one of war.
Here sacred pomp and genial feast delight,
And solemn dance, and hymenial rite;
Along the street, the new made brides are led,
With torches flaming, to the nuptial bed;
Through the fair streets, the matrons in a row,
Stand in their porches and enjoy the show—
There in the forum swarm a numerous train
The subject of debate, a townsman slain:
One pleads the fine discharged, which one denied;
And bade the public and the law decide—
The witness is produced on either hand,
For this or that the partial people stand—
The appointed heralds still the noisy bands,
And form a ring with sceptres in their hands,

On seats of stone within the sacred place,
The reverend elders nodded o'er the case;
Alternate each the attesting sceptre took,
And rising solemn each his sentence spoke,
Two golden talents lay amidst, in sight,
The prize of him who best adjudg'd the right."

Now supposing it to be true, as stated in the opinion, that this author did not profess to treat of jurisprudence, but merely deduced the principles of natural law, and the laws of nations from the writings of the philosophers, poets, historians, and orators of antiquity, not confounding one with the other, but carefully distinguishing both from the civil or municipal law; yet here was an example before him, both of the recognition of this indemnity as a civil obligation, and of its actual enforcement in a court of justice. Strange indeed, then, would it be, if Grotius *really* had placed it on "any ground, excluding all idea of its forming a part of the civil law, or being the basis of an action." Strange if he had *indeed* treated this indemnity as "a matter of gift or liberality, an affair of conscience, rather than an obligation of strict duty." But such is far from being the case, and we regret to be forced to say that all these views of his doctrines are, as we respectfully contend, totally erroneous. Grotius certainly did treat of jurisprudence, not only in its application to States and Empires, but to individuals, their rights and their obligations. His writings are and have always been quoted by lawyers in courts of justice.

The title of the very chapter 17th, of book 2d, quoted by the court, is, de damno per injuriam dato, et obligatione quœ inde oritur. "Of the damage done by an injury, and of the obligation thence arising. This chapter is divided into 22 paragraphs, in which the subject is treated in its natural order, and as a practical legal question. It is unnecessary to quote the original, in this argument; and I shall, instead of giving my own translation, use an approved one made in 1715, by an association of scholars in London:

§ 1. We have already shown, that a "man may have a right to a thing three several ways: either by contract, by injury done him, or by law. Of contracts we have fully treated. Let us now come to the right, which arises by the law of nature, from an injury received. We here call any fault or trespass, whether of commission or omission, that is contrary to a man's duty, either in respect of his common humanity or of his particular quality or station, an injury. From such a fault or trespass, there arises an obligation by the law of nature, to make reparation for the damage, if any be done."

The provisions of our own Code are almost identical with this. It will be seen in the further development of the principle in this chapter, that Grotius not only does not, as it is erroneously supposed, consider the indemnity in case of unjust homicide as an imperfect obligation, from which no civil action can arise, but that he most clearly enforces the very reverse. In the second paragraph, he says, "the word *damnum*, damage, probably derived from *demo*, to take away, is when a man has less than his right, whether that right be merely from nature or some superadded human act—such as property, contract, or *law*. A man's life is his own by nature, (not indeed to destroy, but to preserve it,) and so is his body, his limbs, his reputation, his honor, and those actions that peculiarly belong to him as a man." He then clearly distinguishes the obligation arising from this damage or injury to a right from imperfect obligations; "but from a mere aptitude or fitness, which is less properly called a right and rather belongs to distributier justice, arises no true property, and consequently no obligation to make restitution, because a man cannot call that his own, which he is only capable of or fit for." "For," as Aristotle observes, "he does not transgress the rules of justice, who out of tenaciousness refuses to relieve a poor man with his riches." He further illustrates the principle, that the obligation to make restitution is founded on the violation of a right; "a citizen, not unqualified, although he has no proper right to a place or office, yet the right of being a candidate truly belongs to him, and if he be hindered, either by force or fraud, from exercising this right, he may require satisfaction, not according to the full value of the place, but the uncertain damage he sustained thereby."

"He has the same right to sue for satisfaction, to whom a testator would have left a legacy, but by force and fraud was hindered. For to be qualified to receive a legacy, is a certain right, and consequently to deprive a testator of his liberty of bequeathing it is an injury."

In the 9th paragraph, it is laid down, that "he that doth not dissuade when he ought, or conceals the fact when he ought to have discovered it, is liable in damages. In all which cases, the word ought, has only respect to that right which is properly so called, and is a part of commutative justice, whether it arises from the law, or from any quality in the person. For if it be due only by the rules of charity, the omission of it is indeed a sin, but does not oblige him to make reparation, which, as before said, arises only from right, properly so called."

In the 12th paragraph, it is stated, that "he that is bound to make reparation for the fact, lies under the same obligation in regard to its consequences. In one of Seneca's controversies, this question is handled, in an instance of a plane tree set on fire, whereby a house was burnt; when he gives us this as his opinion upon it. Although you were unwilling to have done part of the injury, yet you are bound to make reparation for the whole, as much as if you had intended it. For he ought to have been unwilling as to the whole, who would excuse himself through ignorance or unwittingness. Ariarthes, King of Cappadocia, damming up, through wantonness, the passage of the river Melenes, forced its waters out of their channel, whereby they so swelled the river Euphrates, that it swept away part of the Cappadocian lands, and did great damage to the Galatians and Phrygians, whereupon the case being referred to the Romans, he was adjudged to pay 300 talents damage."

Having thus explained the general principle, Grotius proceeds to state several instances of its application. Let it be borne in mind that he had explicitly declared that the obligation to make reparation for the damage caused by an injury, arises only in cases of the violation of a right: where the party injured has less than is his right, or is deprived of something which belongs to him absolutely; and that in order to remove all doubt, he had also declared that this obligation did not arise from the breach of any of those duties which are imposed upon us only by religion or humanity—as charity, benevolence, gratitude and the like. And let it be also noticed, that each and every instance he now enumerates, is one of a violation of what he had already classed as a right, and that in almost every instance he indicates the measure of the damages or reparation, and the standard of estimation.—§ 13, *Exemplo hæc sint.* Take these instances that follow, as examples: he that kills a man unjustly, is bound to pay all expenses which may have been incurred for physicians or surgeons, and to give to those whom the person slain was from his relation accustomed to maintain—such as his parents, wife and children—so much as their hope of that maintenance was worth, regard being had to the age of the person slain. § 14. He that maims another, is obliged in like manner to pay for his cure and to make him satisfaction for the loss of his limb, because he is hereby rendered incapable of getting so much by his labor as he might otherwise have done. Several other injuries are cited, in which reparation may be required, and among them, assault and battery, slander, theft and robbery, procuring a contract or promise, by force, fraud or unjust terror.

It is nowhere intimated that the case of unjust homicide stands on a different footing from the other cases. The obligation to make reparation in damages and in money, is treated in every case as a civil obligation which may be enforced, and is deduced from this general principle, viz: "that from any such fault or trespass, there arises an obligation by the law of nature to make reparation for the damage, if any be done." A principle which is identical with that embodied in our Code. We have then the authority of Grotius for asserting that an action of damages for unjust homicide, is fully warranted by the Articles 2294 and 2295 of our Code; and it will be recollected that we have no "special statute," other than those provisions authorizing actions of slander, false imprisonment, assault and battery, and the like.

The opinion also says: "Rutherford, in his Institutes of Natural Law, dissents from the opinion of Grotius in his discrimination between the valuation of the life of a free man and of a slave, and thinks that in the case of the slaying of either, his life can be estimated according to the interest which those who survive have in it." Book 1, c. 17, § 9.

The views of Rutherford seem to us to be clearly correct. He says: "Grotius here distinguishes between the murder of a free man and the murder of a slave. The life of the former cannot, he says, be reckoned in settling the damage done by his death, because no person has any claim to it but himself; but the life of the latter is to be reckoned, because, if the slave had been alive,

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the master might have sold him, and consequently his life itself is of value to the master. But if we observe that the life of the slave can no otherwise be looked upon as the master's property, than, as he had an interest in it, we shall find that there is no occasion for this distinction, since, as far as the relations of a free man had an interest in his life, the person who murdered him is obliged to make them reparation. So that in either case, in settling the damages, the life of the deceased is estimated according to the interest which those who survive him might have in it."

We rely ourselves on Rutherford to show to this court more fully, if need be, the true doctrine of Grotius on this subject. His work is one of standard authority, and is the substance of a course of lectures delivered in an English University on *Grotius de jure belli et pacis.* In this particular chapter, which is on the subject of reparation for damages done, he shows how carefully Grotius had distinguished between those imperfect rights, the violation of which is no foundation for demanding reparation, and those perfect rights, for a violation of which a civil obligation to repair them arises, and may be enforced by a civil action. He also shows that Grotius classes this among the perfect rights, to be vindicated by an action.

In the very paragraph quoted in the opinion, he says: "Grotius has applied these general rules concerning reparation to several particular instances. He who kills another unlawfully is obliged to defray such expenses as the person killed may have been at in endeavoring to have his wounds cured. He is obliged, likewise, to make amends to those who had a right to be maintained by the deceased, such as his wife, his children, or his parents, according to the value of what they might have expected to receive from him, considering his age, his fortune or his employment. It may, perhaps, be questioned whether they had a strict right to such maintenance or other benefits as they might have received from the deceased; and if they had not, it may be asked, what restitution can be due for the loss of that maintenance or of those other benefits? But to this we answer, that however they might have been disappointed in their expectations, yet the expectation itself was their own, and it is a real injury to take it from them. All, therefore, which can be proved from this objection, is no more than we allow, that the reparation is to be estimated, not according to the worth of their maintenance or of their probable benefits, but according to the worth of their expectations."

The Chief Justice proceeds (6 An., 510): "It is understood that the present action is founded upon the direct injury to themselves by the death of *Hubgh*, from the causes alleged in the petition, and is not attempted to be maintained as a right transmitted to them through the deceased. The right of action is claimed on the same ground on which it has been allowed in France, the Articles of the Codes of that country and of Louisiana being identical, which provide that every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it. (Code Napoleon, 1383; L. C., 2294.) A very thorough consideration of the subject brought us to the conclusion that the interpretation and application of the Article 1382 of the Code Napoleon, adopted by the Court of Cassation, in relation to the responsibility of the slayer to the widow and heirs of the deceased, were not consistent with our jurisprudence, and consequently inadmissible."

Now, under these admissions, it would seem to be incumbent on the learned Judge to point out in what respect and for what reasons the interpretation and application by the Court of Cassation of so important an Article of the Code Napoleon, from which ours is literally copied, is "not consistent with our jurisprudence, and consequently inadmissible."

That our Supreme Court has always accepted assistance from the Court of Cassation, and from eminent French jurists, in the construction and application of Articles of our Code, similar to those of the Napoleon Code, is well known, and is admitted in this opinion. It has also exercised full independence, and rejected such authority when our own jurisprudence differed. But it is believed no case has arisen in which it has rejected such authority without being able to show, either that there was something opposed to it in our jurisprudence, or that their reasoning was fallacious or unsound. In this instance there was a peculiarly strong necessity for showing this dissimilarity, because it was not doubted that an action for damages for the killing of a slave, *a human being*, was, under this very Article, sanctioned in Louisiana. In the very volume containing this opinion is found the case of *Carmouche* v. *Bouis*, p. 95, in which

it was decided by the same court that where "one of the defendants, the father of the other, had directed the other to guard the sugar cane field from depredations of negroes, the field having been previously visited by such trespassers; and while on the watch, the son saw a gang of negroes mounting the fence to enter the field, and wounded one of the negroes, so that he died; that both father and son were liable to the owner for the value of the negro, and that it was immaterial whether the slave was wounded carelessly or intentionally. If the son fired without taking aim, and in pursuance of the instructions of his father, to frighten the negroes, he must have fired carelessly, and is responsible for the injury;" and the court relies on Article 2295, one of those on which we rely.

The case of *Bibb et als.* v. *Hebert*, 3 An., 132, is referred to in this decision. In that case, Chief Justice Eustis said: "We do not think the killing of the slave in the act of committing larceny within the enclosures of defendant was necessary for the defence of his person, his family, or even his property, and consequently was not justifiable, and that he is bound to pay the owner for his loss by reason of his death."

The reason given in the opinion why the interpretation of this Article by the Court of Cassation is inadmissible here, is that the system of laws prevailing in Louisiana is materially different from that prevailing in France. In proof of this supposed difference, it is said that our laws were derived from Rome and from Spain, and not from France. That although the Article of our Code was copied literally from the Napoleon Code, it merely embodied a principle well known in the Roman and the Spanish laws, and was enacted at a time when the Spanish law was the law of Louisiana, that they can find no trace of such an action in the Roman or Spanish laws. That various customs prevailed in the different territories of France before the empire of the Code which "sought to make a compromise, as it were, between the customs and the Roman law." This, surely, does not prove the difference. It is well known that the laws, both of France and Spain, were mainly derived from the Roman law. This very Article, (1382) this opinion tells us, was found in principle and even in terms both in the Roman and Spanish laws. It was, therefore, necessary to show that there were limitations affixed to it in Spain and in Rome, which have been disregarded in France, but which are binding with us. Judge Rost's views would seem to be the more logical, when he says: "The dispositions of Article 2294 are found in the Roman and Spanish laws, so far from being new legislation, that Article embodies a general principle as old as the science of jurisprudence itself, and it must be understood with *the limitations* affixed to it by the jurisprudence of Rome and Spain." p. 497. What were those *limitations?* That is precisely what it is incumbent on any one to show who contends that it should receive a different interpretation here from what the most enlightened jurists have given it in France, when it is conceded that both countries derive it from Rome, and as the principle itself, without limitation, would embrace such an action. Neither of these opinions mention any such limitation, nor do they undertake to say positively that no such action was allowed in Rome or in Spain. The language is peculiar: "It is certainly incumbent on the plaintiff to show that, under our laws, the death of a free person can be the ground of an action of damages. That as a general principle, no such rule prevailed under the Roman law, we think, may be affirmed. If it existed, it has escaped the research of Gibbon and Makelday." "Far be it from us to undertake to state affirmatively that any given text is not to be found in the mass of matter composing the Corpus Juris Civilis. Finding no rule laid down in any of the elementary writers on which the action could be maintained, and bearing in mind the principle so frequently recognized in the Digest, that the life of a free man cannot be made the subject of valuation, we thought that an action of this kind could not lie under the Roman law." "We can find nothing in the laws of Spain which authorizes this action, or which presupposes any such right of action to exist, and are satisfied that, as a general rule under both systems, actions for injuries to the person are strictly personal; and that there is no recognized principle in either on which the plaintiff's action can be maintained." p. 510.

But let us go to better authorities on this subject that the Compendium of Makelday, or the condensed chapter of Gibbon. They both, however, speak of the principle on which such an action is founded. Gibbon says: "The general duties of mankind are imposed by their public and private relations;

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but their specific *obligations* to each other can only be the effect of, one, a promise; two, a benefit; or three, an injury. And when these obligations are ratified by law, the interested party may compel the performance by a judicial action." 4th vol. c. 44, p. 287. And again: "Nature and society imposes the strict obligation of repairing an injury; and the sufferer, by private injustice, acquires a personal right and a legitimate action."

The Roman and the Spanish laws, cited in this opinion, show the application of this principle to cases of homicide, both in Rome and in Spain. As to Rome, the opinion says: "The Acquillian law gave actions for injuries done by slaves and certain animals, which it mentions by name. The title, *de his qui effunderint vel dejecerint*, thus provides for the case of a free man killed by something being thrown in the public way from a building. If it is a free man who has been killed, damni œstimatio not fit in duplum, quia in homine libero nulla corporis œstimatio fieri potest; but in this case the fine is of fifty pieces of gold, ff., lib. 9, tit. 3. § 3. The law *de suspensis* is to the same effect, and had for its object the prevention of accidents in the public way. They were penal laws, and the special provision they contain are rather in affirmance of the non-existence of the principle which would give an action to the heir for damages caused by the death of his ancestor." Now this passage intends to convey the idea, and indeed it almost expresses it in terms, that these two last laws authorized merely criminal prosecutions, and not civil actions for damages, and that the express provision for one is a strong negation to the other as to which they are silent.

In this there is great error. To show it, we need go no further than the authority of Merlin in the passage cited in this opinion, where he gives conclusions, as the Imperial Attorney General, in the case of *Mitchel* v. *Reynier et al.* "Every one knows," says Merlin, "that in the Roman law, the word *accusater* answers to what we call plaintiff (*plaignant*) or civil party (*partie civile*). Every one knows that in the Roman law the prosecution of crimes was not reserved, as among us, to the magistrates, and that it belonged to all private individuals." Merlin Rep., Reparation Civile, § 2, 3, bis.

Under the Acquillian law, the owner of an injured slave might not only bring his civil action, but prosecute criminally. Brown's Civil Action, vol. 1, p. 401, speaking of this law, *de his qui effunderint, etc.*, this author says: "The next kind of trespass which the civil law especially dwells upon, is the careless throwing or pouring down (though without mischievous design) of any thing, whereby damage is occasioned to the person, goods or clothes; and here it is minute in ascertaining whether the owner of the house or his tenant inhabiting therein, or the occasional sojourner, or the immediate agent where many dwell in the same house, shall be liable to the penalty recoverable for the negligent precipitation of the instrument of mischief. This penalty, if damage was done only to the property was double the estimate of the damage done. If the person was injured, the penalty of accidental homicide was ascertained by law at fifty aurei; that of wounding was left to the discretion of the *judices;* but the law was extremely liberal in valuing the lost time and labor of the man who was thus perpetually rendered unable to work, since it estimated his life at an hundred years, the utmost extent of probability." Vol. 1, p. 408.

The edict of the Prætor, referred to in the opinion, is as follows: "Prætor ait de his qui dejecerint vel effunderint; unde in eum locum, quo vulgo iter fiet, vel in quo consistetur dejectum vel effusum quid erit, quantum ex ea re damnum datum factumve erit, in eum qui ibi hebitavert, in duplum judicium dabo. Si eo ictu homo liber perisse dicetur quinqua gento areorum judicium dabo. Si vivit nocitumque ei esse dicetur, quantum ob eam rem œquum judici videbitur, eum cum quo agitur, condemnari, tanti judicium dabo." Dig., lib. 9, tit. 3.

On this Ulpian comments: "Summa cum utilitate, id Prætorum edixisse, nemo est, qui neget: publice enim, utile est sine metu et periculo per itenera commeari."

Which may be rendered: That this edict was of the highest utility no one denies, for it is of public utility that the highways may be traveled without fear or danger.

It will be seen by looking into the commentators, that this edict applied not only to cities and villages but also to all places where people were accustomed to pass.

Voet, in his commentary on the Pandects and on this edict, lib. 9, tit. 3—de his qui effunderint vel dejecerint, says:

No. 1. Non privatim modo, sed et publice interest, ut tuta, et sine damni metu, commiantibus via set. L. 1, § 1, ff. 12. Tuta vero non est, si quid illic dejiciatur aut effundatur, ponatur aut suspendatur, ex quo contingere læsio posset quo de re, edictum pretoris ad viarum securitatem propositum est, in duas divisum partes.

Which means: That it is important, not only to individuals, but to the whole public, that the public highways should not only be safe but free from the apprehension of injury. But they would not be safe if anything was thrown or poured, placed or suspended upon them, from which injury might happen. Hence the edict of the Prætor, respecting the security of highways, was promulgated, divided into two parts.

On this edict Ulpian further comments:

§ 4. Hæc in factum actio in eum datur qui inhabitat, etc.

§ 5. Sed cum homo liber periit damni estimatio non fit in duplum: quia in homine libero nulla corporis æstimatio fieri potest, sed quinquagenta aureorum condemnatio fit.

That is; This action for the injury is given against the person who inhabits the house.

But if a free man is killed, the estimation of the damage is not made in double, because no estimation of the body of a free man can be made, but judgment is rendered for fifty aurei.

This action, it will be seen on consulting the commentators, resembled the English *qui tam* action. It might be brought by any one. If the freeman, who was injured, survived, he might bring it at any time. If another wished to bring it, he must do so within the year. But among several persons claiming this action in case of the killing of a free man, it must be given to him whose right is the best, or who was related to the deceased by affinity or consanguinity. The words of Ulpian are:

"Dummodo sciamus, expluribus desiderantibus hanc actionem ei potissimum dari debere, cujus interest; vel qui acfinitate cognationere defunctum contingit."

Voet, in his commentary on this edict, says (§ 4, lib. 9, tit 3) *de his, etc:*

"Quod si homine libero per dejectionem vel effusionem nocitum sit, cuivis quidem expopulo intra annum popularis actio datur, sed læso ipso in perpetuum, ad impendia in curationem facto, et æstimationem operarum quibus læsus caruit et in posterum carituras est, nulla cicatricum, deformitatis, dolorisive habenda ratione."

Si liber homo inde perierit ad quinquginta aurios actio in factum comparata est, eaque annalis et popularis:—Dummodo sciamus, ex pluribus desiderantibus hanc actionem ei potissimum dari debere, cujus interest, vel qui affinitate cognationeve defunctum contingit.

These last are the exact words of Ulpian, already quoted. Voet then immediately adds: ut tutu uxoris, liberis, quos etiam hodie non præcise ad aureos quinquaginta agere obtinuit, sed ad id, quanti judicii videbitur ob victum, quem occisus potuissit iis probabiliter præbere. Groenewegen, et Parens p. mem. Paulus Voet, add § 1, Instit. de obligat. quæ quasi ex delicto mem. 2. Qualis eteam hæc petendo, non videri se gessisse pro herede, dicetur plenius, tit. de acquirer vel omit. hæred.

From this it is seen that Voet mentions the wife and children as those standing nearest to the deceased and as best entitled to the action, and that when he wrote they were not limited in their demand to fifty aurei, but might recover so much as might appear to be just and equitable, on account of the support which the deceased could probably have afforded them. These citations might be multiplied, but it has been sufficiently shown that in Rome a civil action was given for the killing of a free man, in which those nearest to him, as his wife and children, were preferred, although the recovery was limited, and that in Holland, whose jurisprudence was drawn from Rome, the restriction of the claim to fifty aurei was abandoned and a more rational rule substituted. It is sufficient for our purpose to show that the principle was applied in Rome to the case of the killing of a free man. Having fully shown it, then there is nothing in the Roman law to prevent the application of the principle here to the case of the killing of a free man. If in this case the claim of the wife and children was for fifty aurei, it would be in exact conformity with the

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Roman law. Our law makers have not thought proper to prescribe any such limitation, but have left it as in all other cases of damages for offences or quasi offences, to the discretion of the Judge and jury. C. C. Art. 1928.

As to the Spanish law, the 25th law, tit. 15, Partida seventh, is evidently taken from this edict; it is as follows:

LEY XXV.—Como el que echare de su casa huessos, o estiercol, en la calle, deue pechar el daño que fiziere a los que passaren por y.

Echan los omes a las regadas de las casas donde morau, de feura en la calle agua, o huessos, o otrás casas semegantes; e magur aquellos que las echan non lo fazen con intencion de fazer mal, pero si acaesuesse, que aquello que asso echassen fizies e daño, o en paños, or en ropa de otras, tenudos son de lo pechar doblado los que en la casa Moran. E si por auentura, aquello que assi echasse motasse algun ome, tenudo es el que mora en la casa de pechar cenouenta maruedis de oro; la meytad a los herederos del meurto, e la otra meytad a la camara del Rey; porque son en culpa, echando alguna cosa en la calle pos do passan los omes, de que puede renir daño a otri. E si muchos omes morassen en la casa, donde fuesse echada la cosa que fiziesse el daño, quier fuesse suya, o la tuniessen alogada, o emprestada, todos de so vuo son tenudos de pechar el daño, si non sufriessen ciestamente qual era aquel por quien rino. Pero si le sufriessen, el solo es tenude de fazer emienda dello, e non los otros. E si entre aquellos que morassen cotidianamente en la casa, oniesse alguno que fuesse huesped, aquel non es tenudo de pechar ninguna cosa en la enuenda del daño que assi acaesciesse; fueras ende, si el niesmo lo oniesse fecho.

It will be seen that in the English translation known as Moreau & Carleton's Partidas, an important part of this law is omitted. It is this: "and if by chance something thus thrown out should kill some man, he who dwells in the house shall be bound to pay fifty gold maravedis; the half to the heirs of the man killed, and the other half to the treasury of the king."

The case of the barber, referred to in the opinion, also shows the application of the principle in Spain to a civil action of damages, for the killing of a freeman. See Law 27, tit. 15, Partida 7, most of which was omitted in the translation of Moreau & Carleton.

We quote a part of the note of Gregorio Lopez on this law:

"Barbitonsor exerceat officium suum in locis separatis non publicis. Et si alicujus culpa damnum dedit, dum exercebat officium, tenetur occassionans damnum ad illud; si autem sequatur mors, ad damnum, et etiam ad homicidii pœnam," etc.

Partida 7, tit. 9, law 21—"Whoever receives a wrong or injury, may demand reparation in either of the two following ways—at his option. The first, by causing the party who does the injury, to make amends in money; the second is by criminal prosecution, praying that the Judge inflict upon the wrong-doer such punishment as, in his discretion, he shall think he deserves. And one of these actions destroys the other, inasmuch as when once the party injured has selected one of them, he cannot abandon it and have recourse to the other." By law 11, Ibid—When a man is sick, of the disease of which he died, and in that condition is wronged, his heirs after his death may sue for damages for the injury done, both to him and them. And so by the 13th law, if creditors "detain the body of a dead man or refuse it burial, or dishonor it, or if one maliciously defame the memory of a person deceased, his heirs may demand reparation therefor in the same manner as if the words had been uttered against themselves, because in law the deceased and his heirs are considered as but one person." And by law 23, the heir may demand reparation for injury done to the person from whom he inherits, if the deceased had instituted a suit therefor, before he died, and issue had been joined upon the same. Or if the injury had been done to the deceased while he was afflicted with the infirmity of which he died, or if the injury or wrong was committed after his death. 7 Partida, tit. 15, law 3. "He who causes damage, shall make reparation therefor, to the person who received it—whether it had been done by himself or by his command or advice, or had happened through his fault."

From these citations it will be seen that it was not a rule in the Spanish nor Roman laws, to the extent intimated in this opinion, that actions for injuries to the person were strictly personal. See also Domat of Hs. and Ex. in gen. tit. 1, sec. 10.

In aid of the argument, that the construction put upon Art. 1382, by the Court of Cassation, cannot afford a safe guide to the courts of Louisiana, be-

cause the jurisprudence of the two countries in regard to it are materially different; the opinion, quotes Merlin, "in giving his conclusions before the Court of Cassation, in the case of *Michel Reynier et als.*, respecting the Art. 1382 of Code Napoleon, which is identical with the Art. 2294 of our Code. Merlin Rep. *verbo* Rep. Civ., § 2, 3 bis. 6 An. 511.

An examination of the case referred to, and the circumstances under which Merlin used the expressions quoted in the opinion, will show, we think, that instead of supporting the supposed difference between the jurisprudence of Rome and France, it proves their exact conformity with each other.

Michel had instituted his suit, making himself civil party (*partie civile*) in 1812, against *Reynier*, *Boissiere* and *Guille*, accusing them of forgery, to his injury.

They were acquitted, and in their turn sued *Michel*, each for 600,000 francs, as damages for his false accusation.

Michel was condemned by the jury to pay these damages, and after judgment rendered, an appeal was taken; and the principal question before the Court of Cassation, as stated by Merlin was, whether from failing in his suit, *Michel* must necessarily be considered as having acted, in accusing the defendants, with such rashness, imprudence, and negligence, as to make him responsible to them in damages.

Merlin says: "No; because he might, notwithstanding their acquittal, have had very good reasons for prosecuting them. He may have been determined to do so, by reasons which would have determined the most cautious and conscientious man, and, in that case, no reproach can attach to him, and no damages be demanded." Then he says, as quoted in the opinion, "the principle which is written in the Article 1382 of the Civil Code, is not new. It is drawn from the natural law; and long before the Civil Code, the Roman laws had solemnly proclaimed it; long before that Code, the French laws had recognized and assumed it." He then proceeds: "Well then, did the Roman laws and our ancient jurisprudence, attach of full right to this principle, the consequence which *Reynier* and *Boissiere* pretended now to derive necessarily from the Article 1382 of the Civil Code. No, and very far from it. The Roman laws distinguished three cases, where the accused failed in his action: one where he was convicted of having accused falsely and knowingly; another where he was convicted of having accused rashly (*temerairement*); a third, where he was acknowledged to have had just reasons for accusing, although his accusation was rejected for want of sufficient proofs."

"In the first case, the accuser suffered the public punishment denounced by the law, *Remnia*, against calumny. In the second case, the punishment for calumny could not be afflicted on the accuser. But then there remained to the accused, who had been acquitted, a private action *actio injuriarum* against the accuser convicted of rashness, and he was condemned to pay damages. In the third case, the accuser was protected, not only from the public punishment of calumny, but even from all actions of damages."

Merlin, after citing several texts of the civil laws, proceeds: "Let it not be said that these decisions of the Roman law are only applicable to officers of the public ministry. Every one knows that in the Roman law, the word *accusator*, answers to what we call complainant, (*plaignant*) or civil party (*partie civile*); every one knows that in the Roman law, the prosecution of crimes was not reserved, as with us, to the magistrates, and that it belonged to all private individuals. As to our ancient jurisprudence on this matter, it is necessary to its correct knowledge, that we should fix our attention upon two different epochs—that which preceded the ordinance of 1670, and that which commenced with the ordinance. Before the ordinance of 1670, our ancient jurisprudence was absolutely chalked out (*calquée*) on the decisions of the Roman law, which we have just recalled to memory. If, like the Roman law, it punished by a public penalty the accuser whose accusation was judged calumnious; if, like the Roman law, it punished with damages the accuser, whose accusation was judged not calumnious but rash (*téméraire*); like the Roman law, also, it freed from all responsibility the accuser whose accusation, although rejected for want of sufficient proof, had been prompted by just causes."

We think it has been shown, that there is no such dissimilarity between the jurisprudence of Louisiana and that of France, as this opinion endeavored to establish. That far from having had their origin in the customary laws of France, the article of the French Code, and its "application and interpretation by

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the Court of Cassation," can both be traced to Rome. That even in Rome the principle was applied in cases of homicide of a free man, though with a limitation founded on an artificial maxim, which can have no controling authority with us.

For the laws of Scotland on this subject—we refer to Erskine's Institutes (by Ivory); Bell's Principles of the law of Scotland; The Dictionary of Decisions, under the head Reparation. To show how this subject is viewed in England, in relation to the statute 9 and 10 Vict., we refer to *Blake* v. *The Midland Railway Company*, 10 Eng. Law and Equity Reps. 443. This case shows that the Court of Queen's Bench, considers the loss and injury sustained by a widow and children, by the death of the husband and father, as susceptible of pecuniary estimate.

As to the argument of the presumed general opinion of the bar, that no such action can be maintained, drawn from the fact, that up to the case of *Hubgh*, no such a suit had been brought—it will require but brief notice—it seems to be a very forced conclusion. The fact that no such suit had been brought, might easily be accounted for, without presuming any such "uniform understanding of the bar." It is only of late years, and since the introduction of railroads, that the necessity of such a remedy has been forced upon the public attention in this country and in England. But granting to this argument its utmost weight, it will only prove, that if indeed our laws do authorize the action, the bar has labored under a general mistake. The probability is, that the subject had never engaged, to any extent, the inquiries of the bar; and it would be more satisfactory to know what their opinion is now, since their attention and researches have been attracted to it.

Lord Chief Justice Pratt, in answer to an objection of novelty, said:

"Torts are infinitely various; there is nothing in nature which may not be an instrument of mischief; and the special action on the case was introduced, because the law will not suffer any injury without affording a remedy, and there must be new facts in every special action on the case."

Justice Ashurst said:

"That when a case was only new in instance, and the only question is on the application of a principle recognized by law to such new case, it will be just as competent to courts of justice to apply the acknowledged principle to any case which may arise two centuries hence, as it was two centuries ago."

The late Supreme Court declared: "That it was equally the boast of our law and the English law, that there is no right without a remedy, and no wrong without adequate redress." If then, under this Article 2294, no action can be allowed in this case, it can only be because the act complained of cannot cause damage, or wrong and injury to the widow and children, and is as to them *damnum absque injuria;* a conclusion which this honorable court would not adopt.

It being evidently impossible in any Code to provide specific rules for every case: our Code, Article 21, provides, that "in civil matters, where there is no express law, the Judge is bound to proceed and decide according to equity. No suitor then need go unredressed. "To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." The concurrence of mankind in different ages and countries, is regarded as the highest evidence of what is natural law and reason. There has been such general concurrence, in regard to the right of relations to claim damages for homicide, in all nations and ages of which we have records.

From the earnest manner in which this action has been opposed, it might be supposed that it was a legal heresy—an innovation fraught with mischief. "The present state of things on this subject," says this opinion, page 514, it would not be proper to disturb for light reasons, or, for anything short of a clear and decided command of the law."

And what is the present state of things? Let the numerous steamboat and railroad disasters—launching hundreds of human beings into eternity, and filling the land with mourning—answer the question. Let this opinion answer it, when it says—page 509—"The frequency, of late, of deplorable accidents of this kind, has created a general sentiment of indignation against those who, by their neglect or recklessness, are the causes of so much suffering among the relatives of the unfortunate victims. The impression that they ought to be indemnified, results from a sense of justice which all right-minded men must acknowledge."

Experience has proved that this crying evil cannot be corrected by the criminal prosecution of subordinate agents; and that the only plan is, to enlist on the side of safety the vigilance of those who reap the profits, by holding them responsible in damages.

We ask nothing new. In the case of *McGary* v. *The City of Lafayette*, 4 An. 440, the late Supreme Court said: "The general rule of law under which damages are allowed in our system of jurisprudence, is in these words: "Every act whatever of man that causes 'damage to another, obliges him by whose fault it happened, to repair it.'" C. C. 2294. "Under that rule, the reparation made must be equal to the injury inflicted." The case is, in the language of Justice Ashurst, "only new in instance." "The only question is on the application of a principle recognized by law to such new case."

We ask the court to apply it to this case of undeniable injury, in the same way that it was applied, as we have shown, to the case of injury by the unlawful killing of a slave. We ask the court to apply it, as it has always been applied in that enlighted country, from whose Code we copied it. And so far from its being at variance with any thing in the laws from which our jurisprudence is derived, we show that it was so applied in Rome and in Spain, and that in this instance it is in the very spirit of that Pretorian edict, which had for its object the security of highways.

The examples of England and of the States of this Union are referred to in these opinions, in support of the opposition to this right of action. And yet, at the very time they were written, England and these States had, under the influence of improved civilization, thrown off the ancient shackles of the common law, which had previously denied civil redress for this great injury, and had by express statues, provided the remedy so loudly called for by justice and by policy.

Counsel for defendants made the following argument:

It does not seem to the undersigned, to be necessary to make any reply to a large portion of the brief of the learned counsel. His observations concerning the erroneous translation of the quotation from Grotius, may be correct; but this has no possible bearing on the question of the existence of the legal obligation on the part of the defendants to compensate the heir. The court recognizes it as a natural obligation, and whether Grotius considered it as a mere liberality or charity, or an imperfect or a natural obligation, seems really to have little bearing on the main question, because it is conceded in the opinion, that the obligation is considered by the most approved writers on natural law, to be a duty. Under this view of the subject, the undersigned will have to leave the first forty pages of the brief of counsel without any other reply than that afforded in the opinion itself, being certain that the whole will receive the attentive consideration of the court.

The decisions of the Court of Cassation have never been recognized as authorities in this State. The first jurists of France give them no such weight, even in France, and on many subjects the difference of government, manners, usage and race, and origin of laws between the two countries, render them quite inapplicable here. Besides this, they are frequently changed, and those among us most familiar with that jurisprudence, never have insisted on them as any thing more than expositions of the law of France by the highest court.

The court came to the conclusion, that as no valuation of the life of a freeman could be made under the Roman law, no action of this kind could be maintained under that system. The principle is laid down as elementary in the Digest and the commentators on the Roman law. The court conceded there were laws which seemed to be in conflict with this principle; but on an investigation of the whole subject, the court came to the conclusion that these laws were exceptions which proved the rule. That the court was right in stating the principle to be an elementnry one, cannot be questioned. To this day, the principle stands as a rule in the law of insurance and the maritime law.

The Roman law establishes this general rule, that every thing preserved by the jettison is to contribute to the payment of the value of the object thrown overboard. Placuit omnes quorum interfuisset jacturum fieri conferre oportere. It exempts from the rule only the persons of freemen, *capita libera*, and things intended for consumption on the voyage, such as provisions; but it subjects to contribution the garments of every passenger, and even the ring he wears on his finger.

Since the person does not contribute to the jettison, why should the garments and ring which are accessories of the person contribute? Faber answers, that the person of the freeman is exempt from contribution, because it is without price. Duaremus, on commenting on this law, begins by establishing the general rule, that all that is preserved and is susceptible of being valued, is to contribute to the jettison. Thence he concludes, that the person of the freeman is not subjected to contribution—Quia liberum corpus non recepit æstimationem, &c.

Emerigon on Insurance, chap. xii, sec. xlii.

The late Chief Justice of England, Lord Tenterden, in his Treatise on Shipping, thus states the law on this subject:

"Slaves, also, who are considered as a species of merchandise, their proprietors formerly contributed according to the value; although this dreadful trafic had not extended so far as to authorize the casting of these unhappy persons into the sea. But as no estimation can be made of the value of the life of a freeman, neither passengers nor crew are to contribute for their personal safety. Abbott on Shipping, p. 403."

Thus we find that so unbending is this rule as a general principle of law, that to maintain its operation, the first principles of right and equity are sacrificed. A man is exempted from contributing to the means of saving his life, because his life is beyond all price, and the stern policy of the law prohibits any attempt to fix its value.

Texts in the Roman Digest and Codes are to be found wherever the subject called for them, in which the principle is repeated, so that the court was bound to assume it to be elementary.

Every thing which was within the research of diligent inquirers after truth, was before the court, and the opinion of the court is the conclusion drawn from the very thorough examination of the writers on the Roman law. Indeed, it seems that in this branch of the argument of the counsel, the authorities adduced by the court are his main reliance in the attempt to refute its opinion.

The undersigned can have no objection to submit the subject to the deliberate judgment of this tribunal, on this state of argument. A few remarks, however, are perhaps due to the convictions and zeal of our opponent, as manifested in his elaborate argument.

The submission of the matter in this form of discussion, will simplify the subject and relieve it from the incumbrance of texts and commentators, in the labyrinth of which the most learned become bewildered and the wisest lose their scent. In an inquiry like this, the only safe course for a court is, to follow some great well established and leading principle, and not be led off in inquiries which, however they may seem to the superficial observer, have no real bearing or effect upon the desired result. In so vast a system, under the recent profound investigations of the civilians, all that can be required from the time and industry at our command, is to consult carefully their works, and ascertain and learn not only what is in them, but what is not in them, as well as the cause or reason of any favorite doctrine of ours not being recognized by them. Labors of this kind give greater aid in the investigation of principle than any effort that we, with our limited means of knowledge, can make in attempts to point out their errors.

No text of the Roman law has been exhibited, which authorizes any form of remuneration for the death of a person, other than that referred to in the opinion of the court in *Hubgh's* case. If any such text existed, it would have been found; the presumption then is, that no such text exists.

That the provisions in the title of the Aquilian law affecting this case and those in the titles *de his qui effunderint* and the law *de suspensis*, were not general laws, but special laws, that is, that they did not establish any general principle, cannot be questioned. They were of a police character, imposed a penalty and were of a restricted import. The actions given were called popular, and any citizen had a right to prosecute them, and it may be admitted for argument's sake, that they gave the preference to the party most interested.

The question then occurs, how were the proceedings in the *actio popularis* classed among the actions of the Roman law?

Mackelday says, that penal actions are those resulting from a delit by which a penalty—*une peine*—is sought to be recovered, which, with the Romans, con-

sisted principally in the right the plaintiff had to recover the double, the triple or the quadruple of the damage, caused by the defendant.

The following collection of texts is found in the work of Brissonius de verbo. signific. lib. xiv, p. 1598.

Popularis utique actio cuilibet ex populo cui per edictum postular licet, datur: ita tamen ut is cujus interest præferatur. L. 3, § ult. D. de popular. action. et ex pluribus simul agentibus prætor eligit idoneiorem. L. 2, D. eod. tit. Per se autem, non per procuratorem populares actiones exercendæ erant, mulierique ac pupillo non debantur, nisi cum ad eos res pertinebat: neque in heredes dabantur, nec supra annum extendebantur. L. 5. L. 6. L. § 1. D. eod, tit. Licet in popularibus actionibus procurator dari non possit, &c. L. 42 D. de procurator. Hujus-modi populares actiones pœnalibus adnumerat actionibus. L. 32, D. ad leg. Falc.

As the author, Brown, quoted by the counsel on page 46 of his argument, states, in speaking of the law *De His*, "the penalty of accidental homicide was fixed at a sum, to wit, fifty aurei, because, by the Roman law, no estimate could be made of damage suffered by death," consequently, there could be no double, triple or quadruple of the damage, and the fine was fixed at a specific sum.

Where, then, is the error of the court in considering those laws to be of a police or penal character and exceptions to that general rule which denies an action to a party for the death of a freeman?

If the heir had the right, on general principle, to sue for damages occasioned by the death of his ancestor, where was the necessity of giving him the right to exact this penalty, or any portion of it, in those particular cases? Does not a provision to that effect, by a special law of this character, prove that without the special law the right had no existence.

Voet, it is said, in his commentary on this title—*De His*—extends the remedy of the wife and children beyond the penalty of fifty aurei. The word *hodie* sufficiently explains the meaning of that author. Is not the proposition that, at his time, they were not limited to the penalty of fifty aurei, pregnant with the direct implication that, in his opinion, they were so limited before that period?

What was Voet writing about? What is the object of his work? Let its title speak. Commentarius ad Pandectas, in quo præter Romani juris principia ac controversias illustriores *jus etiam hodiernum* et præcipue fori questiones excutiuntur. He wrote in Holland, and the first edition of his work was published at the Hague in 1716. In his preface, he says: Ceterum sociandum censui Romanae jurisprudentæ explanationem cum *hodierni juris* tractatione, iis inductus rationibus, &c.

The summary or head note of the title makes the distinction too plain for argument.

Ad quid agatur, si homo liber dejectione lœsus vel occisus sit, *jure civili et hodierno;* et quinam tunc agere possint?

But supposing the opinion of Voet was as supposed, of what consequence is it? Is not the title there and cannot the court read it? Vide Muhlenburg, *Doctrina Pandectorum*, § 451, 452. This work contains the most correct exposition of the Pandects we have; it is frequently quoted with approbation by Savigny.

Conceding for argument's sake, therefore, the position urged by the learned counsel to be correct, that in the event of the accidental death of a freeman from causes stated in these laws, the Roman law gave the heir or party most interested, the right to sue for and recover the penalty fixed by them; is this an exception to the general principle, that no estimate can be made of the value of the life of a freeman, or does it overturn and extinguish it, and establish the antagonist principle that, by the Roman law, the value of the life of a freeman could be calculated?

The court, in *Hubgh's* case, determined that the law was of a penal character, and was an exception to the general rule, which allowed no action for the death of a freeman, and this court is called upon to reverse this doctrine.

As the argument stands, it cannot be presumed that a right of action existed under the Roman law; concerning which, one word of recognition is not found in the voluminous body of that law. If the right existed, how does it happen that no mention is made of it in those works which have treated on the subjects of rights and remedies under the Roman law.

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It is not for every injury that an action will lie, or that a remedy is provided. So said Blackstone and Pothier, and the quotation from Gibbon in the counsel's brief, tells us, when the obligation is ratified by law, the interested party may compel the performance by a judicial act; but not until then. Where is this action recognized in the Roman law? The remedy given by the Roman law for accidental death from certain causes, was in the recovery of a penalty. Is this in conflict with the general principle? If it is an exception to it, by what form of logic can the exception be made to override and extinguish the principle?

The special laws under consideration presuppose, in all cases but one, a right to recover damages, and double, treble, and quadruple them as a penalty.

In that one case of homicide, why is the penalty of fifty pieces of gold fixed? Because no damages were due or could be recovered, and therefore the necessity of establishing the amount of penalty numerically.

The policy of this principle of the Roman law, which has been incorporated in the English law and followed in the American States, is obvious.

It was necessary in order to preserve the sanctity of the family—an institution upon which the Roman civilization was based, and over which Christianity extended its blessed protection. The scrutiny, enquiries and calculations as to value of human life to a wife or heir, lead to scandal, to the disturbance of the family peace, and in most cases are impotent, absurd and utterly fruitless. They surpass the limit which Providence has assigned to human knowledge and action. But a contrary system has been recently established. Its operation, its effect, remains to be tried. In Louisiana the law is unchanged; she stands to the ancient policy of Rome and of England, and to a conservative principle which has exercised its salutary influence for nearly two thousand years.

Respecting that portion of the opinion of the court which relates to the Spanish law, it is hardly worth while to solicit the attention of the court at much length.

The translation of the Partidas into English, in 1820, was published at the expense of the State and under its patronage. The work was executed under a law authorizing it, by Moreau Lislet and Henry Carleton, who were, at the time, men of high standing at the bar. The former, as a learned civilian, was perhaps at the head of the profession, and thoroughly versed in the jurisprudence of the State, having been a practitioner of law from the period of the occupation of Louisiana by the Americans. The latter was a well educated and very successful lawyer, and, from his reputation at the bar, was afterwards raised to the bench of the Supreme Court.

The laws in force in the State only were translated. These parts which relate to the Catholic faith and to matters of a criminal nature having been repealed. Vide Preface.

The important part of 7 Partida, tit. 15, lex. 25, which was omitted in the translation, was left out, because, in the opinion of those jurists, it was of a criminal nature, and therefore repealed, and no longer in force in Louisiana. Thus at the time when this Spanish law prevailed, we have the opinion of those jurists of the character of this part of the law. As no action has ever been brought in Louisiana to recover damages for the death of a man, and no dissent has ever been shown to the correctness of this omission, it is not a strained inference by any means to suppose that the sentiment of the bar concurred in it.

The court examined this omitted part, and considered it as providing a punishment for homicide, and not affecting at all any general principle of civil right.

The 5th Partida, in most of its laws, is copied from the Roman law. The rule that a freeman's life was beyond all price and could not be estimated, was a principle of Spanish as well as of the Roman law, as appears from an examination of the text, Partida 5th, tit. 9, lex. 3, which treats of contribution in cases of jettison, says: "And if any of the merchants should have slaves on board, he will be obliged to appraise them, and pay for each of them, in the same manner as for other things that remained in the vessel. But if there be freemen on board, who brought nothing but their persons, whatever may be their number, they will not be obliged to contribute for what was thrown overboard; for a freeman neither can or ought to be valued like other things."

Gregorio Lopez in his commentary on this principle, refers, among other texts of the Roman law, to the very title under discussion, *de his qui effunderint*.

The Institutes of the law of Spain, by Asso y del Rio and Manuel, is a work of great thoroughness and exactness, so much so, that by a law of the Novissima Recopolicion, daily lectures, of an hour and a half for the space of two years, on these Institutes, are directed to be given by the professors of law in the Universities of Spain.

In this work, the acts for which a reparation can be sought by law, are described with great minuteness and particularity, as well as the remedies to be exercised by and against heirs. No allusion is there found to any such right as that pretended by the plaintiff. The book is as silent as the Roman law, as to any such action. Vide page 158 of translation, book 2, tit. 19.

A comparison of the Spanish and Roman jurisprudence will result in the conviction that there is no material difference between them in relation to this subject.

The undersigned therefore submit that the opinion of the court in *Hubgh's* case is correct, so far as it decides that by the Spanish and Roman law, no civil action for the recovery of damages for the death of a free person, can be maintained.

A few observations will be added concerning the Article 2294 of the Code.

One of the main purposes and objects of the Code Napoleon was to establish an uniform system of law throughout France, in which discrepant usages, laws and customs prevailed according to the different origin of the communities of which that empire was composed. The formation of our Codes was not for that object, and it is not at all strange that similar articles should receive a different interpretation and application in the two countries. But it would be strange, indeed, if an interpretation of similar articles in the two Codes by the Court of Cassation, were to be forced upon us in direct contradiction to the interpretation given to the articles by our own courts. Within the last seven years the interpretation given to the Article 2294 by the court in *Hubgh's* case, has been acted upon, it is believed, without exception. It has been declared from the bench to be the settled law, at least twenty times during the administration of the Supreme Court of 1846.

The decisions on the Code Napoleon, referred to in 13 Locré, were all examined in *Hubgh's* case. The discourse of Mr. Tarrible did not escape attention. The court will find it of little aid in the decision of the subject under consideration. His notion proves too much; it goes too far; it conflicts with the acknowledged theory of the law of legal actions.

Would a sneer, which should annihilate the matrimonial prospects of a damsel or widow, be actionable? Could a suit in damages be brought for a significant shrug of the shoulders of a capitalist, with the accompanying manifestation of distrust, by a young shop keeper, whose bills were refused in consequence of it? Would an action for damages be maintainable for a man's refusal to do business or trade with another? No, there is a law of actions, and our system of jurisprudence has not lost all claims to a reasonable science. This part of the case is so fully treated in the opinion in *Hubgh's* case, that nothing further is deemed necessary to be stated in relation to it.

The undersigned therefore conclude that the rule in *Hubgh's* case must stand, because:

1st. It has been deliberately decided, after full argument and consideration, by the court in the last resort.

2d. Because it is a correct exposition of the law, and nothing has been urged which would authorize its reversal.

MERRICK, C. J. This suit was instituted by the plaintiff, the widow of *Dr. Joseph Ursin Landreaux*, deceased, and tutrix to his four minor children, to recover damages for the negligent and careless conduct of the agents of the defendant, in running their railroad cars, by means of which *Dr. Landreaux* was killed, and his widow and children deprived of all means of support.

The verdict of the jury and judgment of the lower court were in favor of the plaintiff, awarding her twenty thousand dollars damages. The defendant has appealed.

This case therefore presents for our reconsideration the question decided by our predecessors in the case of *Elizabeth Hubgh* v. *The New Orleans and Car-*

rollton Railroad Company, (6th An., 495,) whether Article 2294 of the Civil Code gives any remedy for the loss of the life of a free person against the person occasioning such loss of life.

The question has been discussed with great ability and research by the counsel who have argued this case, both on the part of the plaintiff and defendant. The authorities on which the decision in the case of *Hubgh* was based, have been subjected to the severest tests of examination and criticism, and were the question *res nova*, we should feel great difficulty in arriving at a satisfactory conclusion.

Our predecessors, however, have held that this Article of the Civil Code was not introductory of a new rule, but merely the enunciation of a principle well known and often acted upon under the jurisprudence of the country, prior to the introduction of the Civil Code.

They have also held, that under the former jurisprudence of the country, no action like the present was given the surviving wife and children.

Whatever difficulties the learned argument of plaintiff's counsel may have created in our minds, we do not think in a matter merely doubtful we are called upon to overrule, or are justified in disregarding a decision of our predessors, pronounced after a full consideration of the subject, and by men who, from their long experience and great learning and acquirements, must not only have been thoroughly acquainted with the jurisprudence of the country, but also with the general sentiment of the profession upon a subject which must have occasionally engaged the attention of almost every practitioner.

Whether the recent Act of the Legislature approved March 15th, 1855, (Sess. Acts 1855, p. 271,) has changed the law in this respect, we do not consider it necessary to decide. The statute having been passed since the acts complained of, cannot have any effect upon this case.

The difficulty in assessing damages in a case like the present, is not without its weight upon our minds. Had the jury returned a verdict for $50,000 instead of $20,000, it would have been difficult to say that the verdict was excessive, in view of the age, standing and profitable practice of *Dr. Landreaux*; yet, with all these circumstances in his favor, no man could take upon himself to say, that he would have lived any given period, or that had he remained at home on the 11th of September, 1852, or had travelled by some other conveyance or in some other direction, he would have survived a week or a day longer. At most, the assessment of damages in a case like this, is but the balancing of probabilities and chances.

If the Legislature has intended or shall hereafter introduce a new rule on this subject, it is to be hoped it will provide the criterion by which such damages are to be estimated, and limit the extent to which they may be allowed.

We have not deemed it important to introduce into this opinion the texts of the Roman and Spanish law relied on by defendant, nor the citations from the civilians pressed upon our attention by the plaintiff's counsel. It is sufficient to repeat in conclusion, that we have not been convinced that the construction of Article 2294 C. C., by our predecessors, is erroneous, and we therefore consider it our duty to follow their decision.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the plaintiff and in favor of the defendant, and that the plaintiff pay the costs of both courts.

Re-hearing refused.

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A bench warrant need not be signed by the Judge. The entry on the minutes is the judicial order; the affixing the seal and signature of the Clerk are merely ministerial.

"Selling liquor to slaves, without the consent of their masters," is a penal offence under the statute of 1852.

In a bail bond it is not necessary to describe an offence with the certainty required in an indictment. The statute of 1852 punishes the offence of "selling liquor to slaves, without the consent of their masters," by fine and imprisonment. The State has the right to the presence of the accused on the trial for such offence, and the accused cannot plead, or be tried by attorney, at least without consent on the part of the State.

APPEAL from the First District Court of New Orleans, *Robertson* J.

Morse, Attorney General, for the State. *Haynes*, for defendant and appellant.

MERRICK, C. J. The appeal is taken by the principal in an appearance bond, from a judgment thereon, condemning him to pay the sum of five hundred dollars. His surety does not appear to have appealed.

The warrant upon which the defendant, *M. Martinez*, was arrested, issued under the seal of the court, an order having been previously entered upon the minutes directing such warrant to issue. We are bound to presume that the court had before it the presentment of the Grand Jury, or other sufficient ground upon which to issue its process. There is no law which requires the bench warrant, (which is usually issued only after indictment or information filed, upon an order entered upon the minutes,) to be signed by the Judge. The entry upon the minutes is the judicial order, the affixing the seal and signature of the Clerk are merely ministerial.

The objection, however, that the bond itself, as well as the warrant upon which it is founded, does not charge the defendant with having committed, or require him to answer any offence known to the law is more serious. He is held by his bond to answer "the complaint brought against him of selling liquors to slaves without the consent of their masters."

It is a penal offence to sell spirituous and intoxicating liquors to slaves without the consent of their masters, so is it also, by statute of 1852, to sell them any corn, hay, fodder, meal, spirituous liquors, or other produce or commodity whatsoever, without the consent, in writing, of the master. See Session Acts of 1855, p. 225.

It is evident that the charge of selling liquors to a slave does not come under any of the classes of things the sale of which to negroes is prohibited, except the last, viz: commodity. It may be replied that all liquors do not possess value in market, as water, for instance, and therefore the court cannot presume that which has not been stated, that the liquor in question is a commodity. The answer is, that the term liquor, in its common acceptation, means spirituous, or intoxicating liquors, (and so it was doubtlessly understood by defendant,) and it must in this instance be presumed to have been a *commodity*, because the defendant placed a value on it, and received a price when he *sold* it to the slaves.

It has already been decided that it is not necessary to describe the offence in the bond with the certainty required in an indictment. We think it sufficiently

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appears from this bond that the defendant was bound to answer for having sold some sort of liquor to slaves, and that the thing sold possessed value as an article in market, and was embraced under the general term commodity. 9 Howard, 351.

The statute of 1852 punishes the offence with fine and imprisonment. The State had the right to the presence of the accused on the trial, and he could not plead or be tried by attorney, at least without consent on the part of the State; and there was no error in the refusal to try the case in the absence of the accused. As the offence is punishable with both fine and imprisonment, the bond was legal, though taken in a sum larger than the maximum of the fine. On the whole, we discover no error in the proceedings of the lower court.

Judgment affirmed.

SUCCESSION OF WILLIAM BRONSON and ELIZABETH BRONSON, his Wife.

A relation, who if present in and a resident of the State, would have been entitled to the tutorship of a minor, cannot be permitted, after coming to the State, to displace the tutor regularly appointed.

C. P. 958.

APPEAL from the District Court, Second Judicial District, parish of Plaquemines, *Rousseau*, J. *Emerson & Huntington*, for appellants. *Foulhouze & Lombard*, for appellees.

MERRICK, C. J. *William Bronson* and his wife *Elizabeth Bronson*, died of the cholera in August, 1854, in Illinois, within a few days of each other, leaving two minor children.

The domicil of *William Bronson*, and consequently of his wife, was, at the time, in the parish of Plaquemines, in this State.

On the 15th day of October, 1854, the Clerk of that parish (a family meeting having been called and advising the same) appointed *Columbus Caulfield*, tutor, and *Edward Cole Bannon*, under-tutor to the minors.

At the time of this appointment, it does not appear, that there was any other relation in the State to whom the tutorship could have been given. *Mary Bronson*, the opponent, up to that date, resided in Hartford, Connecticut, and of course did not arrive in Louisiana until some time after the appointment of *Caulfield*.

On the 9th day of November, 1854, *Mary Bronson* applied for, and obtained letters of tutorship to the minors, from the District Court for the parish of Jefferson, and *M. G. Davis*, was appointed under-tutor.

On the 16th day of the same month, she filed her petition in the District Court for the parish of Plaquemines, praying that *Caulfield* and *Bannon* be destituted from the office of tutor and under-tutor to the minors. The judgment of the lower court being adverse to her pretensions, she has appealed.

The appellee has furnished no brief in this case, but has simply filed a motion to dismiss the appeal, which it is not necessary to notice.

The appellant has urged various objections in this court, but we shall confine our attention to such only as are set up in the pleadings, and consequently were urged in the lower court.

I. The first ground set forth is, that the petitioner is the only surviving ascendant of the minors, being their grandmother, and entitled to the tutorship in preference to all other persons. We do not think this ground sufficient to justify us in disturbing an appointment which, at the time, was properly made.

Petitioner was not a resident of the State when the appointment was made, and the Judge of the domicil of the father and mother of the minors, with the advice of a family meeting, appointed the nearest relation within the jurisdiction of our courts, to be their tutor. The fact that a nearer relation, one who had she been present, and a resident of the State, would have had a legal right to the tutorship, has since arrived in the State, will not displace the tutor regularly appointed. See *Succession of Nicholson*, 5 An. 359. C. C. 351. 15 L. R. 74, *Percy* v. *Provan*.

II. The second ground stated (which seems to have been abandoned in the the lower court) is, that petitioner was appointed tutrix by the District Court for the parish of Jefferson. It is evident that the Judge of the domicil alone could make the appointment.

III. The third ground for the removal was, that in provoking the call for said family meeting, and the appointment under the advice of the same, said *Caulfield* did not make the oath required by law, although he knew that petitioner was grandmother of said minors, and residing in the parish of Jefferson.

As the entire record is not before us, we are not prepared to say that the oath was not taken. The Judge seems to have acted upon sufficient evidence of the residence and relationship of the parties at the time he made the decree. The irregularity complained of, if it existed, would not vitiate the appointment of a person who was really entitled to the tutorship. C. P. 953.

The remaining objections to the proceedings of the family meeting, urged by the appellants counsel in this court, do not appear to have been alleged in the pleadings.

Judgment of lower court affirmed.

Re-hearing refused.

Thomas H. Barker *v.* S. W. Fullerton.

Notary certified that notice to the defendant, endorser, was given through the post-office, by letter directed to "the parish of St. Charles, opposite the Red Church." There was no post-office at that place, but it was proved that a letter addressed to defendant, and directed as above, would have been sent to Taylor's post-office, some eight or ten miles from the Red Church, and seven miles from defendant's house, where most letters directed like this were sent. *Held:* that the notice was sufficient.

Demand of payment at the place where note is payable is sufficient.

The certificate of the Notary did not show in what post-office the notice to the endorser was placed, but the protest being dated at New Orleans, it was held that the only reasonable inference was, that the notice was placed in the post-office at New Orleans.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Gaither*, for plaintiff. *Mott & Frazer*, for defendant and appellant.

Voorhies, J. The defendant is appellant from a judgment in favor of the plaintiff, holding him liable as endorser of a promissory note. His defence

rests on the ground that he was not legally notified of the demand and protest of the note.

The note is payable at the Louisiana State Bank, and endorsed by the payee and defendant. The Notary certifies that he notified both the endorsers by letters addressed to them respectively, through the post-office: the one to the defendant at the parish of St. Charles, opposite the Red Church. It is shown that there is no post-office at this point, the nearest, that of Taylor's, being about eight or ten miles from it, and seven miles above the defendant's house. It is proved by *Mr. Guibert*, who then acted under Post-Master *Muson* as Chief Mail Clerk, that a letter addressed at that time to *S. W. Fullerton*, parish of St. Charles, would have been sent to Taylor's post-office. When the principal office was known, the letters were invariably sent there. Taylor's was the principal one where letters, directed as in this case, were sent to, and to which most letters were sent.

It is urged by the appellant's counsel that the note was not presented for payment, nor protested for dishonor, at the residence of the maker. It was presented at maturity for payment at the bank, where it was made payable. This we consider sufficient.

It is also urged by the defendant's counsel that the certificate does not show in what post-office the Notary placed the notice addressed to the defendant. The notice was addressed to the defendant, through the post-office. The only reasonable inference deducible from this, it appears to us, is, that the notice addressed to the defendant, through the post-office, must have been placed in the post-office in New Orleans, where the protest was made. Upon the whole, after a careful perusal of the evidence, we are not prepared to say that the Judge *a quo* erred in considering it sufficient to fix the liability of the defendant as endorser.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

JOSEPH HUFTY v. HIS CREDITORS.—YOUNG & LEAVITT, Opponents.

The right to require security, conferred by Article 3060 of the Code on the creditor, who has not consented to the respite applied for by his debtor, etc., appears to be absolute, and the creditor is not limited to a period of time beyond which he is debarred from its exercise.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

A. N. Ogden & Stansbury, for *Hufty*. *Emerson & Huntington*, for opponents.

LEA, J. The only question in this case, is whether a debtor, who has obtained a forced respite, can, by a creditor who did not oppose his application for a respite, be compelled to give security that his property shall not be alienated, or if alienated, that the proceeds shall be appropriated to the payment of his debts existing at the time of the respite, and if so, in what amount. It is urged, on behalf of the debtor, that the proceedings for a respite having been homologated, amount to a judgment in his favor, granting an unconditional respite, and that the rule to furnish security not having been taken within ten days after the proceedings were had, the plaintiff is barred by the lapse of that time.

The Article 3060 of the Civil Code provides, that unless the respite is granted on the express condition that the property of the debtor is to be hypothecated for the payment of the mass of the debts, the creditors, who are obliged to abide by the will of the majority, may require that the debtor shall furnish security that the property, of which he is left in possession, shall not be alienated, or in case it is, that the money arising from the sale shall be employed in paying the debts existing at the time of the respite. We take this to be a personal right, given for the security of the creditor, who has not given his assent to a forced respite, and one which, in the nature of things, could not be exercised by the dissenting creditor until after the majority had granted the respite. The right conferred appears to be absolute, and the creditor is not limited to a period of time beyond which he is debarred from its exercise.

It appears, however, that the debtor was compelled to give security in the sum of $5000. The debt due to the complaining creditor does not exceed the sum of $900, and we think a bond for $1200 would be amply sufficient to secure the creditor in whose favor it is to be given; no other creditor having exacted the security provided by the Code.

It is, therefore, ordered, that the judgment appealed from be reversed, and that the rule taken on the 6th June, 1855, be made absolute, so far as to order that *Joseph Hufty* do, within ten days from the rendition of this decree, furnish bond in the sum of $1200, with one or more solvent sureties, having all the legal qualifications of judicial sureties, in favor of the appellees, that the property left in his possession shall either not be alienated, or if alienated, that the money arising from the sale shall be employed in paying the debts existing at the time of the respite.

It is further ordered, that the costs of this appeal be paid by the appellee, and the costs incurred in the District Court be paid by the appellant.

Thomas D. Johnson v. Mathew Martin.

The deposit of a letter in one's box at the post-office is not a delivery of the letter to such person: and where a clerk, who had been discharged by defendant for dishonesty, obtained a letter containing money out of defendant's box at the post-office, which money he kept, defendant held not liable to the party remitting the money.

An agent may properly be held responsible for a neglect to provide against the risks or perils to which property entrusted to his care may, in the ordinary course of business, be exposed, but he cannot be held liable for not anticipating a danger altogether out of the ordinary course of business or natural events.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Bonford, for plaintiff and appellant. *H. & J. A. Gaither*, for defendant.

Lea, J. In this case the plaintiff seeks to make the defendant responsible for the loss of certain bank notes sent by mail, and addressed to the defendant, which were taken from the post-office by a third person, (one *Brownjohn*,) who had previously been in the employ of the defendant, but who had been discharged, as the petition alleges, for cause of dishonesty.

It is urged that the amounts remitted were delivered to the defendant by their deposit in his box in the post-office; and further, that the defendant was guilty of gross and culpable neglect in not giving notice to the post-master that he had discharged his clerk, and in not instructing him not to deliver his letters to said *Brownjohn*.

The arrangement by which letters are deposited in boxes specially set apart for particular individuals, is one which has been adopted for the convenience of their delivery, but the letters so deposited are under the exclusive control of the officers in the post-office, and are not delivered until they are handed to the person for whom they were intended, or his agents. There was, therefore, no delivery of the remittances to the defendant.

The next question to be determined is whether the defendant has been guilty of neglect.

An agent may properly be held responsible for a neglect to provide against the risks or perils to which property entrusted to his care may, in the ordinary course of business, be exposed, but he cannot be held liable for not anticipating a danger altogether out of the ordinary course of business or of natural events.

The plaintiff undertook to send a certain sum of money to the defendant: until it is received the latter cannot be held accountable for it. At the time the robbery took place, it was no more under the defendant's control than that of the plaintiff, and though we are not prepared to say, that under the peculiar circumstances of this case, as disclosed by the evidence, the plaintiff himself was guilty of neglect, yet nothing in the record justifies the assumption that the defendant was bound to protect the plaintiff against acts of fraud or violence which might be perpetrated upon the post-office by one who was not in his employ or under his control. We think the plaintiff is not entitled to claim from the defendant a reimbursement of the money of which he has been robbed by a third person, the act by which the loss was occasioned not being one which, under the circumstances, the defendant could reasonably have anticipated.

Judgment affirmed, with costs.

OCEAN TOW BOAT COMPANY *v.* SHIP OPHELIA, CAPTAIN AND OWNERS.

Demand of payment of a check made in business hours, on the day succeeding that on which the check is dated, is a sufficient presentment.

Plaintiffs were directed to apply to the agents of defendants for payment. The agents gave plaintiffs a check which was dishonored. *Held:* That the defendants were not discharged.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Emmerson & Huntington, for plaintiffs. *McKay*, for defendants and appellants.

LEA, J. This suit is brought to recover the amount of a bill for the towage of the defendants' vessel from the sea to the city of New Orleans. For answer, the defendants admit the debt, but aver that when called upon by the plaintiffs for payment, they gave them an order upon their agents, the consignees of the ship, for payment, and that said agents paid to the plaintiffs the amount of their claim for towage, and took their receipt therefor. It is impossible to define the position of the defendants in clearer language than is found in the following quotation from their own answer: "and further answering, your respondents aver and say the truth is that for the payment of the claim of said plaintiffs, they gave an order to ———, the collecting agent of the Ocean Tow Boat Company, on the house of *Messrs. Jenkins, Williams & Co.*, and re-

ceived a receipt in full of all demands; that the said order was presented and duly paid by the said *Jenkins, Williams & Co.*, and a receipt for the said payment was taken by them."

As above stated, therefore, the defence is, that they (the defendants) referred the plaintiffs to their agents for the payment of their claim, and that said agents paid the debt, as shown by the plaintiffs' receipt.

The only payment made by their agents, (if payment it may be called,) was the giving of their own check for the amount upon *Matthews, Finley & Co.*, bankers, which, when presented in the due course of business transactions, (to wit: on the morning of the ensuing day,) was dishonored; of which due notice was immediately and on the same day given to the agents who drew the check.

Now, if the taking of a bad check from the agents of the defendants, amounts to a payment of the debt, the defendants are discharged, but not otherwise; for it is not pretended that payment has been made in any other manner. A reference to authorities will scarcely be deemed requisite to show that a demand of payment made in business hours on the day succeeding that on which a check is drawn, is a sufficient presentment. It is urged, however, that by giving a receipt in full at the time of taking such a check, the debt was novated, and that the creditor must be left to his action upon the check against the agent, defendants being discharged. The transaction, it is urged, is analogous to the taking of a bill or note from a third party, in payment of a pre-existing bill or note.

We think, however, that a reference to familiar authorities will show that no such analogy exists. A creditor for goods sold, or (as in the case at bar) for services rendered, does not stand in the same relation towards his debtor, as that which exists between the holder of a bill of exchange and the drawer or endorsers thereof. The obligations of the latter are conditional, as is also that of an endorser upon a promissory note; they are not primarily bound upon the bill, their obligation is to pay only in a contingency. The obligation of the defendants is absolute until it is discharged.

In reference to this point, Mr. Chitty remarks: "If a creditor, on *any other account than a bill of exchange*, is offered cash in payment of his debt, or a check upon a banker from an agent of his debtor, and prefer the latter, this does not discharge the debtor if the check is dishonored, although the agent fails with a balance of his principal in his hands to a much greater amount." See Chitty on Bills, chap. 9, edition of 1833, p. 433, 434; so also Lord Eldon in exparte Blackburn, 10th Vesey, 506. "In a sale of goods, the law implies a contract that those goods shall be paid for. It is competent for the parties to agree that the payment shall be by a particular bill. In this instance, it would be extremely difficult to persuade a jury under the direction of a Judge, to say an agreement to pay by bills, was satisfied by giving bills, whether good or bad."

"Checks," says Mr. Chitty, "on account of their being payable on demand, are considered as cash, whether payable to order or to bearer; but if presented in due time, and dishonored, they will not amount to payment." In this case, the plaintiffs have done precisely what their debtors told them to do: they applied to their debtors' agents for payment, as a substitute for which they were given a check which, on due presentment, was dishonored. There was no laches on their part. All due and legal diligence was used. To say that under such circumstances the original debt has been paid, would establish a doctrine

replete with danger in a commercial community where, from motives of safety and convenience, nearly all important transactions, involving the receipt and payment of money, are conducted through the instrumentality of bank checks.

It has been urged in argument, that the defendants are *charged* with the amount of the check by their own agents, in their account with them; but nothing in the evidence shows that the defendants have *settled* with their agents upon the assumption of any such payment, and the absence of any evidence in support of any such settlement, renders it extremely improbable that it was ever made.

After the dishonor of the check, the agents of the defendants could not either legally or in good conscience have made such a charge, and it is not to be presumed that, as between persons standing in a confidential relation to each other, such a demand was either made or recognized.

For a further illustration of this subject, a reference may be had to the following authorities: *Everett* v. *Collins*, 2d Campbell, 515; *Wyatt* v. *The Marquis of Waterford*, 3d East's Reports, 147; Story on Agency, § 433, 434, also 16th L. R., p. 475, and 11th Rob., 511.

It is ordered, that the judgment be affirmed.

EZRA HIESTAND *v.* D. C. LABATT.

The five per cent. allowed by statute to the Assistant City Attorney, on the amount of all fines and penalties *collected*, in full compensation for his *services*—has reference to his services anterior to the collection, and to the general understanding of the profession, that an attorney has earned his fee when he has prosecuted or defended a case to judgment; so that the Assistant City Attorney who obtains the judgment, is entitled to the commission, although the actual collection of the debt may be made by his successor.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Benjamin, Bradford & Finney, for plaintiff. *Roselius*, for defendant and appellant.

LEA, J. The question presented for the consideration of the court in this case is, whether the former Assistant City Attorney of the city of New Orleans, is entitled to recover the five per cent. commissions on tax bills, fines and penalties which remained uncollected at the time he went out of office. This question is not free from difficulty, but we think the statute which provides that a commission of five per cent. on the amount of all fines and penalties *collected*, shall be allowed the Assistant City Attorney in full compensation for his *services*, has reference to his services anterior to the collection, and to the general understanding of the profession, that an attorney has earned his fee when he has prosecuted or defended a case to judgement. This view of the case is presented with the greater force, when it is considered that the judgment itself includes the attorney's commissions, which the statute says, shall be received by the said Assistant Attorney. It was not, we think, in the contemplation of the legislator, that a judgment should be rendered for a remuneration of services not yet performed by a person not yet in office, when the officer who himself obtains the judgment, is to go unpaid. It is proper, however, that a dividing line should be drawn somewhere in the course of the proceedings, at which the retiring officer should be considered as entitled to

his fees, and beyond which his claim should not be recognized; and we think the rendition of the judgment when considered in connection with the legislation on this subject, presents an equitable line of demarkation.

The defendant had, in our opinion, no right to interfere in any manner with the exclusive control which his successor has over the management of the suits in which the city was interested; but the evidence fails to establish the fact, that he has so interfered, except by giving notice to the Sheriff not to pay over to his successor, the attorney's commission collected in cases in which he, the defendant, had obtained judgment, which we think he was entitled to receive. In cases not prosecuted to judgment, his successor would be entitled to the entire compensation.

It is ordered, that the judgment appealed from be reversed; that the injunction herein issued be maintained, so far as to order that said *D. C. Labatt*, abstain from acting in any manner as Assistant City Attorney of the city of New Orleans, but that the defendant be recognized as entitled to his commissions as Assistant Attorney of the city of New Orleans, in all cases prosecuted by him to a judgment, and not otherwise, and that his right be reserved to resort, if necessary, to all and any proceedings known to the law for the collection of the same. It is further ordered, that the plaintiff pay costs in both courts.

W. W. Frasier and C. Adams, Jr.—W. W. King, subrogated, *v.* Thomas Banks—Henry Ferris, Garnishee.

A debtor of the bankrupt, garnisheed by the bankrupt's creditor, cannot, under the Bankrupt Act, plead the bankrupt's discharge—nor assert the rights of the assignee—nor dispute the creditor's right, on the ground that the creditor has proved his claim under the fifth section.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

W. W. King, in *pro. per. Elmore* and *Bonford*, for plaintiff. *Benjamin, Bradford & Finney*, for garnishee, appellant.

Buchanan, J.* *Henry Ferris* was cited as garnishee in execution of the judgment in this case. He answered interrogatories, denying indebtedness to defendant. His answers were traversed by plaintiff, who alleged that *Ferris* had been receiving, for a number of years, rents for certain property which belonged to defendant, and was bound to account for the rents so received.

To this traverse, *Ferris* filed exceptions, which were in reality exceptions to the garnishment process itself. They were three in number:

1st. That *Banks*, the defendant, had made a surrender of his property in the United States Court under the bankrupt law; by which, his property was vested in his assignee in bankruptcy.

2d. That plaintiff had proved his claim in the United States Court, in the proceeding in bankruptcy, and thereby relinquished this judgment, which thereby became null and of no effect.

3d. That defendant has departed this life, and therefore it is not competent for plaintiff to proceed without making his representatives party hereto.

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*Merrick, C. J., not being present at the argument of this case, took no part in its decision.

FRASIER v. BANKS.

The curators of *Banks*, the defendant, were made party and appeared and joined in the claim of plaintiff. Judgment was rendered overruling the exceptions, and that garnishee pay to the curators of *Banks*' vacant estate, the sum of $560. The garnishee appealed; and the plaintiff and the curators of *Banks*, join in the appeal, and pray that the judgment in their favor be increased.

We agree with the District Court, that the exceptions should not be sustained. The bankrupt himself might, under the 4th section of the Bankrupt Law of 1841, have pleaded a certificate of discharge granted by the bankrupt court, in bar of any action against him; but there is nothing in the statute which authorizes a debtor of the bankrupt to plead it; and, in the present case, the debtor has not even pleaded such a discharge and certificate. So that the plea is technically bad, even if the party were competent to plead it. We view the garnishee as likewise without competency to assert the rights of the assignee in bankruptcy, even if there were such an officer in existence in this case, which it is admitted there is not.

On this head, it may also be observed, that, by the eighth section of the Bankrupt Law, the assignee could not institute an action against any debtor of the bankrupt, or against any person claiming an adverse interest in property which should have been surrendered by the bankrupt, after two years had elapsed from the institution of the proceedings in bankruptcy; and the cause of action against the garnishee herein did not arise until about five years after the institution of *Banks*' proceedings in bankruptcy; the date of *Ferris*' first receipt of rent for the property in question, being fixed by the evidence, in February, 1847.

The second exception is to some extent involved in the first. By the fifth section of the Bankrupt Law, it is provided, "that no person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." This is one of the incidents of the bankrupt proceedings which would seem, like the discharge or the assignment, to be duly pleadable by the bankrupt or the assignee. It may be that this exception would also be competent to a creditor of *Banks*, who had not made himself a party to the proceedings in bankruptcy, although on this point we do not express an opinion. But no such party is before us; and we are clear, that a debtor of *Banks* has no right to avail himself of this plea.

Proceeding to inquire into the merits, the appellees, who have prayed for an amendment of the judgment, seem entitled to a larger sum than that awarded by the District Court.

The answer of the garnishee to interrogatories, acknowledges the receipt of rent for the premises, which have been seized and sold by the Sheriff in this case, from the 1st October, 1850, only. But the garnishee's title—a sale from *F. B. Conrad*, of the 16th of February, 1847—mentions a lease as existing and unexpired, at the rate of one hundred dollars a month; and, although the limits of the land conveyed, do not include the property sold by the Sheriff, yet it is in proof that *Conrad* gave *Ferris* possession of this property, and that the same was included in the lease of one hundred dollars a month. Neither was it an inconsiderable portion of the leased premises, being a two story brick

house with appurtenances. The lessee proves, that she always paid rent on these premises, to the agent of *Ferris*, from the date of the sale to the latter, in 1847, up to July, 1850, when the buildings were injured by a fire, and she moved out until the damages were repaired, three months later, in October, 1850, when, as stated by the garnishee, she took a new lease.

This testimony of *Mrs. Diederich*, the lessee, is corroborated by another witness, as well as by *Ferris'* title, and must be considered as outweighing, so far as it contradicts, the answer of the garnishee. The period for which rent is chargeable to *Ferris*, as having been received upon property belonging to *Thomas Banks*, according to this evidence, and excluding the three months, from July to October, 1850, is five years and eight months. And the allowance of twenty dollars per month made by the District Judge, as a *pro rata* estimate, seems reasonable, after deduction made of taxes and insurance. The garnishee is also entitled to a deduction upon the aggregate sum charged to him, for the repairs proved by *Diederich*, being ninety dollars.

It is therefore adjudged and decreed, that the judgment of the District Court be amended; that *Henry Judson*, curator of *Thomas Banks*, deceased, recover of *Henry Ferris*, appellant, twelve hundred and seventy dollars, with cost of the garnishment process, and of the appeal, to be administered in due course of law; and that *W. W. King*, subrogated to the rights of the plaintiff, be recognized as having the privilege of seizing creditor, on said fund; without prejudice to the right of any other creditor of *Thomas Banks*, not a party to the proceedings in bankruptcy, to contest plaintiff's claim upon the account of administration to be rendered to the court in which the succession is opened.

JEAN LACOSTE v. F. J. ROBERT.

Where the counsel for plaintiff and defendant have an agreement to take testimony without a commission, and submit the cause,—and this with the knowledge of plaintiff, who made no objection—and afterward plaintiff, without discharging his counsel, set his cause for trial, in the absence and without the knowledge of the opposite party, or either counsel, it was *Held*: That a judgment obtained under such circumstances, might be annulled under Article 607 of the C. P.

Such an agreement is within the discretion of counsel.

The instances of "ill practices" mentioned in Art. 607 of C. P., are given *exempli gratiâ*, and are not to be viewed as excluding other cases.

APPEAL from the District Court, Third Judicial District, parish of Jefferson, *Burthe*, J. *Latour*, for plaintiff. *Biron*, for defendant and appellant.

BUCHANAN, J. This is an action to annul a judgment, obtained under the following circumstances: The suit in which the judgment was rendered, was instituted in the parish of Jefferson, upon two promissory notes. The defendant in that suit, plaintiff in this, pleaded various special defences to the action; and pending this issue, it was agreed by the counsel of plaintiff and defendant, that, in order to save costs, they would take the testimony of defendant's witnesses, who resided in New Orleans, in writing, without a commission, and would thereafter submit the cause to the court for its decision. This agreement was communicated by his counsel, to the plaintiff, (the present defendant,) who made no objection thereto; but some time afterwards, without having discharged his counsel, went himself to the parish of Jefferson, set the suit for

LACOSTE v. ROBERT.

trial, and obtained judgment, in the absence and without the knowledge of the opposite party, or of either counsel.

This action is defended upon the want of authority in the counsel of defendant, to make such an agreement as the one proved; and the case of *Robert* v. *Commercial Bank*, 13 L. R. 532, is relied upon to sustain this defence.

We do not view the case of *Robert* v. *The Commercial Bank*, as a case in point. That was an agreement of counsel, not to try a cause during the summer months, (or from June to November,) during which the court was in session, and the case might have been tried. On being informed of the agreement of his counsel, it was promptly repudiated by the client, who discharged his counsel; and the trial took place in the presence of both parties; the agreement being made the ground of an application for a continuance, and on its refusal, of a bill of exceptions. Besides, the agreement in that case was avowedly made with a sole view to the convenience of counsel, and no less avowedly for the purpose of delaying the decision of a cause, and thereby of injuring that party whose interest it was that the cause should have been tried. But the present case is an agreement of counsel which had no effect of that sort; and in making it, the counsel of *Robert* did not, in any manner, transcend the limits of that discretionary control over the management of the cause, which has been recognized by the decisions in *Paxton* v. *Cobb*, 2 La. 140, and of *Calmes* v. *Stone*, 7 An. 133.

It is scarcely necessary that we should notice the objection, that the petition in this case does not disclose the particulars of the defence which the plaintiff had against the original action. The issue in this is, whether the defendant obtained a judgment in the other suit by "ill practices," in the sense of Article 607 of the Code of Practice; and the effect of our judgment, if for plaintiff, will be, simply to place the parties in the situation in which they were previous to the first judgment.

The instances of ill practices mentioned in Article 607, are given *exempli gratiâ*, and are not to be view as excluding other cases. We consider the evidence as making out a case under that article. The defendant was guilty of duplicity and unfair dealing in disregarding the agreement of his counsel—an agreement apparently made in his interest, after the same had been communicated to him, and he had not signified his disapprobation of it.

Judgment affirmed, with costs.

RACE & FOSTER *v.* OWEN BRUEN.

An authentic act identifying a note with the mortgage to secure it, which recites that B. mortgages &c. to C. & M., or *any holder of said note*, and further shows the note to be endorsed in blank by the payee, will entitle the holder, on this proof alone, to an order of seizure and sale.

The subsequent endorsement of the note in blank by another—which is a matter *in pais*—could not affect plaintiffs' right to executory process, as such endorsement could be stricken out—possession of the note being sufficient to identify them as holders and owners.

A stipulation in the Act of Mortgage that the mortgagor, in the event the debt has to be made by suit, shall pay five per cent. to the attorney, is not usurious; and the circumstance that the holders of the note are attorneys at law is no bar to their recovery of the five per cent.

C. C. 1952, 2615, 3251; C. P. 733, 734.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Race & Foster*, in *p. p.* *Duncan & McConnel*, for defendant and appellant.

VOORHIES, J.* The defendant relies upon the following assignment of errors apparent upon the face of the record for the reversal of an order of seizure and sale, from which he is appellant:

1st. There is no authentic evidence in the record of the plaintiffs' title to the note sued on.

2d. There is no legal nor authentic evidence that the plaintiffs are the assignees or owners of the mortgage.

3d. There is a stipulation in the act of mortgage to pay usurious interest. This appears from the following clause recited therein: "that in default of punctual payment of said note, all the fees of the attorney employed by the holder thereof, to recover the same by suit or otherwise, &c.;" and further, said attorney's fees being fixed, however, at five per cent.

I. The allegation in the plaintiffs' petition is, "that they are the holders and owners of a certain mortgage promissory note, executed by *Owen Bruen* to his own order, and by him endorsed." The note thus declared upon is shown by authentic evidence to have been endorsed in blank by the maker, and is identified with the act of mortgage by the notary. The act recites, "that he (*Bruen*) does hereby mortgage and hypothecate, specially and by privilege, in favor of the said *Cook & Morehouse*, (the original creditors,) or *any holder* of said notes," &c. It is clear that such a note, accompanied with the act of mortgage, makes full proof of itself. Under the requirements of Articles 733 and 734 of the Code of Practice, the mere production of the note and mortgage in question by the plaintiffs, constituted in our opinion sufficient authentic proof of ownership or title in them to authorize the issuing of the order of seizure and sale. The subsequent endorsement of the note in blank by *Cook & Morehouse*—which is a matter *in pais*—it is evident, could not affect the plaintiffs' right to resort to the executory process, as such endorsement could have been stricken out—possession of the note being sufficient to identify them as holders and owners thereof. See the case of *Louis Mathé* v. *George McCrystal*, ante, lately decided by us.

II. In the language of the Code, Article 3251, "the mortgage is accessory to a principal obligation, which it is designed to strengthen, and of which it is to secure the execution." "The sale or transfer of a debt includes everything which is an accessory to the same, as suretyship, privileges and mortgages." C. C., 2615. Hence the transfer of the note to the plaintiffs in this case included the mortgage as its accessory; and this was the contract also, for the mortgage was consented in favor of any holder of the note, and there was a special stipulation that it should entitle all holders to the executory process.

III. The defendant's objection on the score of usury is, we think, untenable. Interest for money is the compensation which is paid by the borrower to the lender for its use. It is clear, therefore, that the stipulation in this case cannot be considered as the compensation for the use of the lender's money, but the means only of securing that compensation. Thus, if the lender were obliged to pay at the expiration of the year the attorney's commission of five per cent., it is evident that the interest for the use of his money would be reduced from eight to three per cent. The equity of such a stipulation is obvious: it secures to the lender nothing more than the legal rate of interest stipulated for the use of his money. It does not enure to his benefit, but is allowed as compensation for professional services required to enforce the payment of the debt by

* Merrick, C. J., not being present at the argument, took no part in this decision.

suit. Had the defendant performed punctually his obligations as he had stipulated in the contract, it is certain that he would have had no just cause of complaint. But it is argued that the plaintiffs, being attorneys at law, are not entitled to recover the commission, inasmuch as the services in this suit have been performed by themselves. If such services were necessary, which is not denied, we are unable to discover any good reason why there should be any difference in regard to the compensation between those performed by the party himself and those by other counsel. The fees stipulated are usual, and there is no ground to suspect any device for concealing the charge of unlawful interest.

It is also assigned as error, that the writ directs the Sheriff to sell the defendant's property to satisfy the amount of a certain promissory note for the sum of $1000, with interest at the rate of eight per cent., &c., and five per cent. attorney's fees on the *aggregate* amount, &c. In this we do not think there is any error. The words of the contract, it appears to us, do not fairly warrant the inference contended for, that the intention of the parties was to restrict the five per cent. to the sum of $1000. In the collection of claims, the usual practice of the bar is to charge commission on the aggregate amount of principal and interest. This may well be invoked in aid of the interpretation of the contract, which is by no means free from doubt. Besides, "in a doubtful case, the agreement is interpreted against him who has contracted the obligation." C. C., 1952.

It is therefore decreed that the judgment of the court below be affirmed, with costs.

MATTHEWS & FINLEY *v.* THEIR CREDITORS and THE CREDITORS OF MATTHEWS, FINLEY & CO.—N. B. KEENE, Opponent.

Commissions allowed to a provisional syndic, and not opposed in the District Court, cannot be assigned as error in the Supreme Court.

Cases might arise in which a provisional syndic would not only be authorized, but required to institute suits, or defend them. The expense of counsel fees in such would be chargeable to the mass surrendered to the creditors.

The opposition to a voluntary surrender, under the 18th section of the Act, approved February 20th, 1817, must be made within ten days. The 10th section of the Act of 1840, which allows one year for proceedings under it, has no application to cases of voluntary surrender.

No opposition can be filed, under the 18th section of the Act of 1817, after the lapse of ten days, though the creditor did not know of the fraud complained of within that time.

The maxim *contra non valentem agere, non currit prescriptio* has been admitted in some instances, where a party was acting to recover or protect his property, but never in order to enable him to inflict a penalty on his adversary.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Durant & Hornor, for *Keene*. *Walker & Pierce*, for appellees.

MERRICK, C. J. This case is before us on an assignment of errors.

We will notice such of the assignments as we deem important for the correct decision of the cause.

I. The first assignment is "That the commission of one per cent. upon the assets, as stated in the schedule and in said account, is calculated on an entirely erroneous basis, and should be reduced from $2,197 10 to one per cent. on the appraised value of the goods and effects confided to the care of the provisional

syndic, as evidenced by his bond as such, and five per cent. on the rents and income, which he has recovered during his administration.

This assignment of error is made upon the account rendered by the *provisional* syndic. The appellant did not choose to oppose this account in the lower court, but suffered it to be homologated, and now he seeks to revise the same on an assignment of errors. It is clear that everything stated in the account which could have been established by testimony, if directly opposed in the lower court, must be held here on an assignment of errors as fully proved. Any other rule would enable a party to obtain an advantage by an assignment of errors, which he could not obtain by filing an opposition to the account in the lower court, and thereby giving the opposite party an opportunity of proving the correctness of the charges made by him.

Applying this rule to the case before us, we are obliged to assume the value of the assets in the hands of the provisional syndic was the full sum of $219,710 51. The appraised value cannot, therefore, be considered less than this sum. The statute allows the provisional syndic one per cent. on the appraised value, which is $2,197 10, the amount charged in the account. We discover no error in the judgment of the lower court in this particular.

II. We think cases might arise in which the provisional syndic would not only be authorized but required to institute suits or defend them. The expense of counsel fees in such cases would be chargeable to the mass surrendered to the creditors. There is nothing in the record to show that the fee of five hundred dollars allowed *Messrs. Walker & Pierce* was not such a charge.

III. The third error assigned which we consider it important to notice is that assigned in reference to the plea of prescription of ten days filed by the syndic to the application to remove him from his office, on account of having given fraudulent preferences previous to his surrender, and to have the syndic declared guilty of fraud, and condemned to the penalties in such case provided.

It is proper to remark, that the Act of 1855, pages 435, sec. 21, which has been passed since the institution of this suit, cannot have any influence upon it.

We find no difficulty, therefore, in construing the statutes in force at the time of the acts complained of, and at the institution of the suit.

The tenth section of the Act of March, 1840, applies to another class of persons, namely, those who had not made a surrender, or had not been proceeded against for a surrender under that Act, and the limitation is one year. This is not in any manner repugnant to the 18th section of the Act, approved February 20th, 1817, which requires, in cases where there has been made a voluntary surrender of property, that any creditor of the insolvent debtor, who should deem it necessary to oppose the surrender on the ground of fraud, or because the appointment has not been legally made, shall, within ten days following the appointment of syndic, lay before the court, which has cognizance of the case, his written opposition, stating the grounds of nullity of said appointment, or the fraud alleged against the insolvent debtor. The statute of 1840 provides for cases where there has been no surrender; the statute of 1817 provides for frauds where there has been a surrender. It would violate every rule of construction to apply a highly penal statute like that of 1840 to a case not embraced in it.

IV. But it is further contended that if the Act of 1817 governs this case, still, as the creditor did not discover the fraud until long after the ten days had expired, therefore he could not be required to do an impossible thing, to allege

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a fraud of which he was ignorant, and that, therefore, prescription of ten days could not run against him, until he had discovered the fraud, according to the well known maxim "*contra non valentem agere non currit prescriptio.*

In the matter of the surrender, it is important that all opposition to the surrender should be made at once, and determined in order that the administration of the surrendered effects, and the consequent payment of the debts, should not be interrupted or delayed. Hence the prescription of ten days. The surrender itself notifies the creditor that the debtor is unable to pay the debt in the ordinary course of business. The creditor is, therefore, put upon his guard, and it is his duty to search for evidence of fraud, and make his charges within the time allowed by law. We do not think that the maxim cited applies to the case. The suspension of prescription has been admitted in some instances under this maxim, where a party was acting to recover or protect his property, but never, we believe, in order to inflict a penalty upon his adversary.

The utmost length to which our courts have gone is in the case of *Robinson v. His Creditors*, 1 Rob., 451, where a creditor was permitted to intervene and prosecute an opposition filed within ten days, which the opponent (who had been bought off,) had discontinued.

We discover, therefore, no error in the judgments of the lower court, from which the appeal has been allowed, and the same are affirmed, with costs.

R. F. NICHOLS *v.* HIS CREDITORS.—LANATA GANDOLFO & Co., Opponents.

Where a debtor applies for a respite, and any of his creditors make opposition, and he is required to give security under Article 3060 of the Code, the opposing creditors must be made the obligees in the bond, and the bond should be for a sum sufficient to satisfy their claims.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.
Goold & Stansbury, for *Nichols*. *Dufour*, for Opponents.

VOORHIES, J. At a meeting of the creditors of *R. F. Nichols*, convened on his petition praying for a respite, *Michael Pojero*, of Palermo, Sicily, appeared as one of the creditors, through his agent, and voted against the application, declaring that if the same were granted, he would require security of the plaintiff, according to Article 3060 of the Civil Code.

After the proces verbal of the deliberation of the creditors was returned to the clerk's office, *Pojero* filed his opposition, founded on the reasons already stated, and prayed that the respite should not be granted and approved by the court until the plaintiff furnished good and valid security for the whole amount of his claims, in conformity with Article 3060 of the Code.

The court below rendered the following decree: "It is ordered, that a bond be given by *R. F. Nichols* for all the amount prayed for, deducting therefrom the sum of $1686 41, the bond to be made in favor of *Pojero*, and according to Art. 3060 of C. C., within ten days from this day."

The second paragraph of the Article referred to is in these words:

"But the creditors who are obliged to abide by the will of the majority, may require that the debtor shall furnish security that the property, of which he is left in possession, shall not be alienated; or, in case it is, that the money arising from the sale shall be employed in paying the debts existing at the time of the respite."

There is some obscurity in the meaning of the English text of this article, as to whom the debtor should furnish the security; but, construed with reference to the French text, we feel ourselves relieved from any doubt as to the intention of the law-giver:

"Mais les créances, qui sont forcés à passer par le vœu de la majorité, peuvent exiger que le débiteur *leur* donne caution, etc."

This is manifestly intended for the benefit of the creditors who are forced to abide the will of the majority. The law is silent as to the amount of the security which may be thus required. We think it should be adequate to the claims of those who are entitled to it. In the words of the law, the condition of the bond should be "that the property of which he (the debtor) is left in possession shall not be alienated; or in case it be, that the money arising from the sale shall be employed in paying the debts existing at the time of the respite." The object of the law is to secure to the obligee of the bond the share to which he may be entitled in the distribution of the property of the debtor, as the common pledge of his creditors.

We are, therefore, of opinion there is no error in the judgment of the court below decreeing the bond to be given in favor of the opponent *Pejero*, according to to Article 3060 of the Civil Code.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed with costs.

F. DUSUAN DE LA CROIX *v.* CALISTE VILLERE.

The destruction of forest and other trees is an irreparable injury from which parties may be restrained by injunction, and such injunction cannot be set aside *ex parte* under Article 307 of the Code of Practice.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Janin*, for plaintiff and appellant. *Lavergne*, for defendant.

MERRICK, C. J. The plaintiff claims to be the owner of a plantation on the Mississippi river, adjoining that of the defendant. He alleges that he has had possession of the same since 1801, and that the boundaries between plaintiff and defendant had never been finally established. He prays that the boundary between himself and defendant may be surveyed and determined.

By a supplemental petition filed in June, 1853, the plaintiff alleges that by an agreement between himself and the defendant, they had caused at their joint expense the line to be run and marked between them by a surveyor selected by themselves.

He further alleges, that the defendant, in defiance of plaintiff's rights, has cut and carried away from the land of the petitioner, as exhibited on said survey, and as owned and possessed by him for many years, a considerable quantity of wood, and that petitioner has just reasons to apprehend that such of the wood cut, as still lies upon the ground, will be carried away, and more will be cut and carried away, unless he be prevented by the court.

Plaintiff prayed for an injunction as well as for damages, which he alleged he had sustained, amounting to $1000.

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The injunction having issued, the defendant, on the 11th of June, 1853, obtained an order *ex parte* to set aside the injunction upon the execution of his bond in favor of plaintiff, in the sum of $1200.

On the 24th day of August following, the plaintiff applied for and obtained another writ of injunction. In his second supplemental petition, he alleges, that the defendant, since his first injunction was set aside, has cut a large quantity of wood on petitioner's land, and that he employed almost all his slaves, both male and female, in cutting and carrying the wood away, and that he designedly ruins petitioner's land; and further alleges, that he verily believes the amount of wood cut upon plaintiff's land, by defendant, amounts to three thousand cords.

A second injunction issued as prayed for, and the wood which had been cut was sequestered.

On the 26th day of August, 1853, the defendant obtained another order *ex parte*, by which the writs of sequestration and injunction were set aside upon executing his bond in favor of the plaintiff, in the sum of $10,000.

The plaintiff then applied to the court for a rule upon the defendant to show cause why said *ex parte* orders should not be annulled, as having been issued *ex parte* and contrary to law, and why, in the meantime, the execution of said two orders should not be suspended.

The court refused to suspend the execution of the orders until the hearing of the motions, and the plaintiff appealed from the orders setting aside the injunction and the refusal of the Judge to suspend said orders.

The case in this court has been argued by brief on the part of the appellee alone.

The *ex parte* orders of the court setting aside the writs of injunction, were an erroneous application of Article 307 of the Code of Practice to this case. This Article allows the Judge to set aside the injunction whenever the act prohibited by the injunction is not such as may work an irreparable injury to the plaintiff, provided the defendant give bond, &c.

But it has always been held both in England and this country, that the destruction of forest and other trees was an irreparable injury from committing which the courts will restrain parties.

The defendant, however, contends that the damages to the land can be estimated in money, and that the bond is ample protection to the plaintiff. He cites the cases of *Jure* v. *First Municipality*, 2 An., 321; *Cobb et al.* v. *Parham*, 4 An., 147; and *Stetson et al.* v. *First Municipality*, 12 Rob., 488, in support of this position. By an examination of the cases referred to, it is apparent that they were cases in which the injury was readily appreciable in money, and where the continuance of the injunction was likely to work a more serious injury to the other party. The injury to real estate is a very different thing from that apprehended in the cases cited. It is often the case that a present estimate in money by witnesses of the damage done by cutting down trees belonging to another, would furnish no adequate compensation to the proprietor.

It may be that the timber trees threatened to be cut, are the only trees remaining upon a man's estate, and that he expects to obtain from them the timber for many years to come for the annual repairs of his buildings. It may be that the wood threatened to be cut is the only wood belonging to a sugar estate, and that the proprietor by care hopes to make the annual growth of the wood supply his yearly wants. To him his forests and cypress swamps have a

greater value than the mere amount in cash which his trees if cut would now bring in market. The future value of his other lands and his money invested in improvements depend in a great measure upon the appendage of forests and the standing timber of his cypress swamps.

It may be that the tree threatened to be cut, is one which he values as an ornament to his dwelling, or one which, in his eyes, is sacred by its associations. There are some things which bonds will not cover and which cannot be estimated in dollars and cents, and if our law cannot fully protect the proprietor in cases like these, it but poorly earns the encomiums which are bestowed upon it.

But we have no doubt that it does furnish that protection, and that the destruction of forest trees is one of the most obvious cases of irreparable injury to which its aid can be invoked.

It is therefore ordered, adjudged and decreed by the court, that the orders setting aside the injunctions issued in this case, be annulled, and said injunctions be reinstated, and that this cause be remanded to the lower court, there to be proceeded in according to law, and that the defendant and appellee pay the costs of the appeal.

CITY OF NEW ORLEANS v. SOUTHERN BANK.

The general banking law, approved April 30th, 1853, in regard to the privileges and immunities granted under it, is as much a contract with the individual corporations formed under the Act, as would be a special Act of incorporation containing the like provisions.

The 35th section of the general banking law is a guarantee to the capitalist that, if he invests in the stock of the banks created under this law, his stock shall not be taxed in any other manner that other personal property; and thus far is an obligation binding on the State and all municipal or other corporations deriving their authority from the State.

The provision of the 1st section of the Act of 1842, which authorizes the city of New Orleans to fix the rate of licenses for "*all other callings, professions or business*" not enumerated therein, includes corporations as well as natural persons. VOORHIES, J., (with whom concurred BUCHANAN, J.,) dissenting.

The 35th section of the Free Banking Law, which provides, "that bankers and banking companies doing business under this Act, shall be taxed upon their capital stock at the same rate as other personal property under the laws of this State," is applicable only to the capital stock, and not to the calling or business of those institutions. VOORHIES, J., (with whom concurred BUCHANAN, J.,) dissenting.

C. C. 418, 424, 429.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Hiestand & Levy, for plaintiff. *Eustis*, for defendant and appellant.

MERRICK, C. J. The general banking law, approved April 30th, 1853, in regard to the privileges and immunities granted under it, is as much a contract with the individual corporations formed under the Act, as would be a special Act of incorporation containing the like provisions.

So long as nothing is said in the Act of incorporation on the subject of taxation, that power must be considered as reserved to the Legislature, it being one of the most important rights of sovereignty.

It must follow that the thirty-fifth section of the Act under consideration, was a useless provision if it were intended to secure to the State the right of taxation, for it was not necessary for the State to stipulate for this right with any of her citizens.

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We must therefore conclude, that this section was intended for the security of the capitalist, and an assurance to him that if he invested his money in the banks, under this general banking law, that his stock should be taxed at the same rate as other personal property. It was an assurance that it should not be taxed in any other manner. So far then, this section possesses the force of an obligation, binding alike upon the State and all municipal and other corporations deriving their authority from the State.

A majority of the court, therefore, is of opinion that the banks organized under the above mentioned Free Banking Law, are not subject to taxation in the form attempted.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and there be judgment against the plaintiff and in favor of the defendant, and that the plaintiff pay the costs of both courts.

VOORHIES, J., (BUCHANAN, J., concurring,) dissenting. This is an action for the recovery of the sum of $500, alleged to be due by the defendant for a tax or license. The ordinance of the Common Council of New Orleans, under which it is claimed, declares:

"From and after the 1st day of January, 1854, the taxes and licenses for professions, callings and other business throughout the city and parish of Orleans, &c., &c., shall be fixed, assessed and collected at the rates and sums specially set forth in the following sections:

"Art. 2. A tax of five hundred dollars shall be levied annually on the following, viz: Every bank organized and doing business under the Free Banking Law of this State; approved April 30th, 1853."

The power of the Common Council to impose this tax or license, is derived from the 1st section of the Act of 1842, which provides:

"That the powers heretofore conferred on the General Council of New Orleans, shall be so construed as to authorize them to fix the rate that shall be levied, as an annual or other tax, or license, on and to be paid by all brokers, merchants, traders, wholesale or retail dealers, hotels, boarding-houses, theatres, theatrical and other performances, grogshops, bar-rooms, cabarets, and *all other callings, professions or business*, to be collected under the authority of the Councils of the different municipalities, on such persons vending within their respective limits and exercising said callings, professions or business, and whether said persons be permanent or transient residents in the said city of New Orleans. (Session Acts of 1842, p. 17.) Under the Consolidation Act, all the powers conferred on the First, Second and Third Municipalities and General Council of the city of New Orleans, were vested in the present Common Council of said city. (Session Acts of 1852, p. 48.) The Common Council then was invested with the authority to fix the rate of taxes or licenses as prescribed by the Act of 1842. But it is contended by the defendant's counsel, that the banks incorporated under the Free Banking Law do not come within the operation of that statute; that the authority thus conferred, is only applicable to natural persons exercising such of the trades or callings as are therein specified. I do not think so. A corporation, for certain purposes, is considered as a natural person. C. C., 418, 424, 429; 5 L., 461. Being viewed as such, I think the words "and all other callings, professions or business," used in the statute are broad enough to include the defendant.

It is also contended that the defendant can be taxed in no other manner than as provided for in the 35th section of the Free Banking Law, which is as follows: "That bankers and banking companies, doing business under this Act, shall be taxed upon their capital stock at the same rate as other personal property under the laws of this State." I think it is clear that this section is applicable only to the capital stock—"fonds capital"—and not to the calling or business of those institutions. The distinction existing between the capital stock and calling or business of a bank, appears to me manifest, a distinction too which seems to be generally observed in another statute in relation to the same subject-matter, in which merchants are not only taxed on their calling or business, but upon the capital employed in such calling or business. (Session Acts of 1853, p. 285, sec. 1, 3.) Hence I consider the tax in question not as a tax upon the capital stock of the bank, but as a tax upon its calling or business. The statute authorizing its levy, is clearly not in contravention of the 35th section of the Free Banking Law; and being in force at the time, it must be presumed that the Southern Bank was incorporated with reference to its provisions. Besides, it is difficult to perceive any good reason why bankers and banking companies should stand upon a more favorable footing than merchants in regard to the contribution to the public burthens. The law authorizing the municipal corporation of the city of New Orleans to levy taxes on capital, was abrogated by the statute of 1852. It follows, therefore, that the defendant's stock is exempted from municipal taxation. Whether the State would have the right, by subsequent legislation, to tax the calling or business of the banks thus incorporated, is a question which is unnecessary to be decided in the present case.

As to the constitutionality of the tax, the question may be considered as well settled under the repeated decisions of this court. See 9th An., 305.

I am therefore of opinion, that the judgment of the court below ought to be affirmed with costs.

JOHN WATTS & Co., for the use of, etc., *v.* STEAMBOAT SAXON, CAPTAIN and OWNERS.—WATERMAN & Co. *v.* THE SAME.

Action for non-performance of contract to deliver molasses "at the port of Louisville," etc. The molasses was landed at Portland, whence it was to be carried to Louisville under a contract made by defendants with steamboat Envoy. The molasses remained at Portland some time, and was there much damaged. *By the Court:* As Portland is shown not to be the port of Louisville, we think the obligation of common carriers rested upon the defendants until the goods were delivered at Louisville, and if the Envoy, or any other boat, neglected to take the molasses on board, it was the neglect of their own agents, for so much of the voyage as remained unaccomplished between New Orleans and Louisville. Neither could the plaintiffs be charged with the transportation of their freight through the locks to Louisville,

The common carrier is bound to the most exact diligence as much to avoid danger, which may be reasonably apprehended, as to rescue the property from present and imminent peril.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Spring, for *Watts & Co. Hunton & Bradford*, for *J. Waterman & Co. Wolfe & Singleton*, for defendants and appellant.

MERRICK, C. J.* The bills of lading on which these consolidated cases are

*BROSSOARD, J., not having been present at the argument, took no part in the decision of this case.

brought are precisely similar to the one executed in favor of *James Dalzel*, which was recently before this court in the case of *Dalzel* against the same defendants. In that case the judgment of the court was in favor of the defendants. If we are led to a different conclusion in this, it is because the facts proven are different, and we are obliged to decide cases upon the pleadings and facts of each case as the parties present them to us.

The bills of lading in this case contain an agreement on the part of the steamboat and owners to deliver the molasses (two hundred and fifty barrels in the one case, and two hundred and sixty in the other) at the port of Louisville, and "to reship (to the consignees) at Pittsburg, on the best terms she (the boat) can, without extra charge for re-shipping."

The Saxon proceeded with the freight to Portland, and being too large to pass the locks, the boat deposited the freight on the landing at Portland. It is probable that the captain of the Saxon engaged the Envoy or Convoy, a boat in the Pittsburg trade, to proceed to Portland and take the molasses aboard for Pittsburg, but the Envoy did not keep its engagement. The captain of the Saxon, without waiting to see whether the Envoy actually took the freight or not, departed for New Orleans, leaving the molasses on the bank of the river. The Ohio, sometime after the departure of the Saxon, (how long is not shown,) rose somewhat suddenly, from a storm, eight or ten feet, and notwithstanding the strenuous exertions of the agent of the Saxon, *after*, as he says in his examination, "the danger was discovered, and as soon as it was thought necessary," a large portion of the molasses was lost.

It has been shown by evidence that the Ohio river, below Louisville, is subject to sudden rises, but according to defendants' witness, the one by which the molasses was lost was unprecedented.

It has been further shown, that although Portland is within the corporate limits of Louisville, that it is two and a half or three miles distant from Louisville proper; that freight is five cents per 100 pounds more to Louisville than Portland; that the larger amount of merchandize from New Orleans, intended for Louisville, is shipped by the Louisville boats to Portland, on account of the difficulty in passing the locks; that where freight is shipped to Louisville, it is incumbent upon the boat landing at Portland, to transport it, either by a smaller boat, which can pass the locks, or by drays, to Louisville, at its own cost.

The defendants, in their answer, after admitting the execution of the bill of lading, aver that "they carried the molasses to Louisville, and delivered the same in good order, pursuant to the bill of lading; that they have faithfully performed all the obligations of their contract, and are in no wise indebted to the plaintiffs."

In one of the answers, the defendants further allege that the obligation to reship to Pittsburg was entirely gratuitous, and that they did all they could to re-ship.

It is clear, under the answer, that the burden of proof rests upon the defendants to show that they have complied with their contract to deliver the molasses at the port of Louisville, and that they have re-shipped it to Pittsburg.

As Portland is shown not to be the port of Louisville, we think the obligation of common carriers rested upon the defendants until the goods were delivered at Louisville, and if the Envoy, or any other boat, neglected to take the molasses on board, it was the neglect of their own agent, for so much of the voyage as

remained unaccomplished between New Orleans and Louisville. Neither could the plaintiffs be charged with the cost of the transportation of their freight through the locks to Louisville. They were entitled to have it delivered at Louisville, where, it is evident from the testimony, it would have cost them five cents less per hundred for freight to Pittsburg.

As the molasses was not delivered at Louisville, and as the obligation of defendants, as common carriers, never ceased in relation to the goods, it is unnecessary to determine whether their obligation to re-ship was that of a gratuitous bailee.

The remaining question, therefore, to be considered is, have the defendants shown that *vis major*, uncoupled with any act on their part by which the property was exposed to increased danger, which relieves the common carrier from the obligation to deliver?

The defendants have entirely failed to make this proof. The failure of the Envoy to take the molasses is defendants' fault, for the boat would have been their boat for the transportation of the freight to Louisville. The defendants were bound to know that the Ohio was subject to sudden rises, and yet the molasses was suffered to lie upon the bank of the river for days, and without a watch, so far as the testimony discloses in this case, and to be rescued, in case of danger, by an agent living in Louisville, two miles and a half from where the molasses was deposited.

This unnecessary exposure, for the length of time, upon the bank of the river, was a risk for which defendants were bound, and the most extraordinary diligence of their agent, after he had discovered the danger, or had concluded it was necessary to act, will not relieve the defendants. The common carrier is bound to the most exact diligence as much to avoid danger, which may be reasonably apprehended in the future, as to rescue the property from present and imminent peril.

On this point, we cannot do better than to quote the forcible language of our learned brother of the lower court. He says:

"The spot on which they (the goods) were landed was a proper one if it had been intended to remove them thence in a short time, but the evidence does not show that it was a proper place of deposit for any indefinite period of time. There would have been no rise in the river without the storm, and the sum and substance of the defence is, *that the defendants did not expect a storm.* In trusting to the weather, they trusted to a notorious uncertainty, which they had not a right to do at the risk of anybody but themselves. I am therefore of the opinion that if the defendants had a right to re-ship at Portland, and to detain the molasses there for that purpose for an indefinite period, the bank of the river was not a proper place of deposit."

The judgments, therefore, in these consolidated cases, are affirmed.

Alfred Bodin *v.* H. McCloskey.

An adjudication made by an auctioneer not in accordance with the instructions of the owner is null and void, both as to the owner and purchaser, the latter, however, being entitled to his recourse against the auctioneer.
C. C., 2415, 2966, 2964, 2979, 2982.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Price & Denegre*, for plaintiff. *H. H. Strawbridge*, for defendant and appellant.

Voorhies, J. This is a suit to set aside an adjudication, on the ground that it was not made by the auctioneer in accordance with the written instructions of the plaintiff, as follows, to wit:

"A certain property situated on St. John street, between Perdido and Poydras, having (French measure) 30 feet front on St. John street, by 120 in depth, with all the improvements thereon, consisting in a wooden house, kitchen, etc. This property is rented at $14 per month. The only incumbrance existing thereon is the enjoyment and occupation for life of a room in said house in favor of an old woman 78 years of age. Terms: the purchaser to assume payment of a note of $700, due 15th–18th May, 1852, bearing mortgage on said property; balance cash. (Signed,) Alfred Bodin."

The advertisement for the sale of the property by the auctioneer is silent as to the existence of this right of use and habitation in favor of the old woman. The certificate of the auctioneer shows that the omission to make mention of it in the advertisement was in consequence of the inadvertance of his clerk.

The defendant, it would seem, rests his defence chiefly on the ground that the plaintiff was bound, under the advertisement and adjudication to convey the property to him. We are unable to give our assent to this proposition. We do not consider the adjudication as binding on the plaintiff in the absence of the reservation contained in his instructions to the auctioneer.

It was evidently the duty of the auctioneer to have given notice of the incumbrance, and make the adjudication of the property with reference to it. Every transfer of immovable property or slaves must be in writing. In cases of mandate, as in the present case, the power must be express to alienate immovable property, and must besides be in writing. Therefore it is clear that the only power conferred on the auctioneer to sell the property in this case, must be sought in the plaintiff's written instructions to him; and it is equally clear that the adjudication, unless made in accordance with those instructions, must be considered as null and void, not only as to the plaintiff, but as to the defendant, the latter being entitled to his recourse against the auctioneer. C. C., 2415, 2966, 2964, 2979, 2982.

It is, therefore, decreed, that the judgment of the court below he affirmed, with costs.

JOHN S. DAVID et al. *v.* MUNICIPALITY No. Two.

A reservation in a judgment in a petitory action, by which the right of defendant, or others, to demand that the property recovered should be used as a market, etc., will not restrain the plaintiffs from executing their writ of possession. The effect of the reservation is to allow to the parties in interest a right of action to compel the plaintiffs to use the property in a particular way, should the plaintiffs' title contain any such limitation.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Eustis, Jr., and *Pitot*, for plaintiff. *Livingston*, City Attorney, for defendant and appellant.

BUCHANAN, J. This was a petitory action, and judgment having been rendered for plaintiffs, a writ of possession was the regular mode of execution.

The judgment recognizes the plaintiffs as owners of the property claimed in the petition, without prejudice of the rights of the defendants, or of any parties interested, if any they have, to demand (after their rights thereto shall have been judicially ascertained) that the said property shall be occupied as a market, in such manner and subject to such restrictions as may be thereafter determined.

The reservation contained in this decree by no means restrained the plaintiffs from executing their judgment. Its plain and obvious import was to allow the defendants, or any other party interested, a right of action to compel the plaintiffs to make use of the property in a particular mode, in case it should be determined that plaintiffs' title contained a destination of the property to the particular use specified, which included a renunciation to the enjoyment of it in any other mode. The question of destination seems, indeed, to have been made by defendant in this very suit as a defence to the action. But the judgment rendered is a final one, and leaves nothing to be adjudged in this suit. If the defendants have any rights in the subject matter, their only remedy is by a separate action.

The judgment of the District Court upon the rule of defendants is, therefore, affirmed, with costs.

R. H. FRASER & Co. *v.* JAMES THORPE.—A. W. POREE, Administrator.

A judgment had been obtained by plaintiff against J. T., with privilege on the interest of J. T. in certain goods belonging to the firm of J. T. & Co., which had been attached, and were bonded by J. T. & Co., who had intervened and claimed the goods. J. T. & Co. obtained a judgment recognising their right to the goods, "subject to the payment of such sum of money as may be shown to be the value of the interest of defendant (J. T.) therein." In an action against the surety, on the bond of J. T. & Co., *Held:* that no judgment could be rendered until the amount of the interest of defendant, J. T., in the property attached was shown.

APPEAL from the First District Court of New Orleans, *Robertson*, J.

Mott & Frazer, for plaintiffs. *Hammer & Hays*, for administrator and appellant

LEA, J. (MERRICK, C. J., absent.) The plaintiffs obtained a judgment against *James Thorpe*, with privilege for the payment of the same, upon the

interest of the defendant in certain goods belonging to the commercial firm of *James Thorpe & Co.*, which goods had been seized under attachment, and were released upon a bond furnished by *James Thorpe & Co.*, who claimed the goods as intervenors, and to whom they were delivered. Judgment was rendered in favor of the intervenors, recognizing their right to the property claimed, and decreeing that they recover the same, subject to the payment to the plaintiffs "of such sum of money as may be shown to be the value of the interest of the defendant therein." The effect of this decree, as it is interpreted in the opinion of SLIDELL, C. J., affirming the judgment of the District Court, was to make the firm a trustee of the plaintiffs for any residuary interest in the goods the defendant might have after the liquidation of the partnership affairs. As the intervenors to whom the property was delivered are domiciled in Mississippi, the plaintiffs resorted to their remedy upon the bond given for the release of the property by a rule taken upon the representatives of the surety upon the bond.

It does not appear what was the interest of the defendant, *Thorpe*, in the property attached, and we think that, under such a judgment as that above described, in the absence of any affirmative showing of the extent of *Thorpe's* residuary interest in the property attached, or of any steps taken to liquidate or ascertain the same, no judgment can be rendered against the surety upon the bond given by the intervenors upon a mere return of "*nulla bona*" on a writ of execution against the original defendant. It would in effect convert a contingent into an absolute liability.

The case of *Alley* v. *Hawthorn* is not applicable to that under consideration. In that case the liability of the principal debtor was fixed and liquidated by a judgment; in this case by the very terms of the judgment the liability of the principal upon the bond is dependent upon the liquidation of the affairs of *J. Thorpe & Co.*

Whether, under the circumstances of the case, the intervenors could not, upon proceedings had against them, be compelled either to pay the debt or to establish, contradictorily with the plaintiffs, in the courts of this State, the non-existence of a residuary interest in *Thorpe*, is a question we do not feel called upon to determine; but until some fixed liability in a determinate sum can be shown to be due by the principal in the bond, no judgment can be rendered against the surety.

It is ordered, that the judgment appealed from be reversed, and that the rule taken herein upon the administrator of the succession of *P. A. Owen* be dismissed, without prejudice to the plaintiffs' right to proceed hereafter against said succession for the recovery of any amount for which the said *Owen*, or his legal representatives, would have been, or may be, liable, on his contract of suretyship on the bond referred to in the rule, when such liability shall have been established according to law.

It is further ordered, that the costs of this appeal be paid by the appellee.

The State v. H. Wedemeyer.

All that a prisoner says on the subject matter at the time of making a confession is admissable; but the jury is at liberty to believe one part of the confession and disbelieve another.

In a prosecution for selling or giving spirituous liquor to a slave, the onus is upon the accused to show that such liquor was sold or given with the consent of the owner or person having charge of such slave.

APPEAL from the First District Court of New Orleans, *Robertson*, J.

Tuppan, District Attorney, for the State. *Collins*, for defendant and appellant.

Voorhies, J. (Merrick, C. J., absent.) The defendant is appellant from a sentence pronounced against him on a conviction for the offence of selling spirituous and intoxicating liquor to a slave, without the consent or authorization of the owner, or other person having lawful charge of said slave.

The grounds of defence relied upon for the reversal of the sentence are set forth in the following bill of exceptions:

"Be it remembered, that on the trial of this case, the accused, by his counsel, moved the court to charge the jury:

"That in a case where the only evidence against the accused is his confession, the confession cannot be divided against him by the jury, as in cases where other proof of other facts has been heard.

"That, if in this case the only proof be that the accused, in a *first* interview, stated to the witness, Recorder *Vaught*, out of his office, that the accused had a right to give liquor to the slave, because he had the permission of the master, and that in a second interview, the accused having produced the written consent of the master, was asked by the same witness whether the consent was written before giving the liquor, he did not answer, and evaded the question, these admissions could not be divided by the jury.

"Which charge the court refused to give, but instructed the jury that though the whole admission could not be divided *in the hearing of the testimony*, yet the jury might, *in considering their verdict*, believe a part and disbelieve the rest, or disbelieve the whole.

"And the court also charged the jury, that in conformity with the act of 1852, the onus was on the accused, to show that the consent of the master was given previous to the act confessed, or previous to the act of giving or selling liquor to the slave.

"*By the court:*

"The Court explained that the confessions of the accused could not be divided so as to allow one portion of it to go to the jury, and the other part to be excluded; but that the jury had *absolute control* over the admissions after they were allowed to go to the jury."

The judge, in our opinion, did not err. The consideration of the effect or sufficiency of the confession of the defendant belonged exclusively to the jury. In the proof of confessions the rule, as we understand it, and as it is also in civil cases in regard to admissions, is, that the whole of what the prisoner said on the subject, at the time of making the confession, should be taken together; as, where one part of a conversation is relied on as proof of a confession of the

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crime, the prisoner has a right to lay before the court the whole of what was said in that conversation. In the present case it appears that the whole of what the defendant said on the subject, at the time he made his confession, was laid before the jury. Under the rule, this was all that he could require. "But if, after the whole statement of the prisoner is given in evidence, the prosecutor, (says Greenleaf,) can contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases, where one part of the evidence is contradictory to another. For it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing. If what he said in his favor is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are *not bound* to give weight to it on that account, but *are at liberty* to judge of it like other evidence, by all the circumstances of the case." 1 Greenleaf on Evidence, § 218. Such appears to be the well-settled doctrine. Applied to the case at bar, it is evident that the jury believed that part of the defendant's confession which charged him with having sold, given and delivered intoxicating liquor to a slave, and rejected that which was in his favor—*i. e.*, that it was with the consent of the master. For it is clear, in a prosecution for this offence, where the proof of the selling or the giving of the intoxicating liquor to a slave is complete, the onus is upon the accused to show that such liquor was sold or given with the consent of the owner or person having charge of said slave.

It is therefore ordered and decreed that the judgment of the District Court be affirmed, with costs.

THE STATE, ON THE RELATION OF P. S. WILTZ, *v.* ALEXANDER DERBES.

The clerks of the several courts do not continue to hold their offices after a general election until the new Governor enters upon the discharge of his duties. Article 149 of the Constitution only provides the day of their election, and does not fix the period when they shall cease to perform their duties.

APPEAL from the Second District Court of New Orleans, *Morgan*, J. *Dufour*, for plaintiff. *Preaux*, for defendant and appellant.

STOFFORD, J. (MERRICK, C. J., absent.) The relator was elected Clerk of the Second District Court of New Orleans on the first Monday in November, 1855, and, having been duly commissioned and qualified, demanded a delivery of the books, papers, &c., belonging to the office. The incumbent, Alexander Derbes, conceiving that he was entitled under the law to retain possession of the office until the fourth Monday in January, 1856, declined to surrender the archives to his successor, whereupon the latter sued out a mandamus from the Judge of the Second District Court, which, upon a hearing, was made peremptory.

By an amicable understanding between the parties, all delays have been waived, and the case has been submitted to us on appeal, for the purpose of settling the construction of the Constitution and laws upon the point in controversy.

The general rule prescribed by law is, that the old incumbent shall continue to discharge the duties of his office until his successor is elected, commissioned and qualified, and no longer.

"All State and parish officers shall, after the expiration of their term of service, continue to perform the duties of their offices until their successors or themselves, in case of appointment or election, shall be inducted into office by performing the formalities required by existing laws; so that no interruption may occur in the discharge of any public duty required by said offices, under the same penalties, bonds, obligations and securities as were given and entered into by them at the time they were elected to said office." Act March 15th, 1855, § 2. (Session Acts, p. 350.)

But the appellant maintains that the Constitution of 1852, by a special provision, extended his term to the fourth Monday of January, 1855, and that the Legislature, in the Act of April 28th, 1853, (Session Acts, p. 158,) adopted that construction.

A comparison of the articles of the Constitution of 1852 has brought us to the conclusion that this interpretation is erroneous. The article mainly relied upon by the appellant is as follows:

"ART. 149. The first term of service of the District Attorneys and the clerks of the inferior courts to be ordered and established under this Constitution, shall be regulated by the term of service of the first Governor, so that a new election for these officers shall be held on the first Monday of November, 1855."

As the Governor cannot enter upon the discharge of his duties until the fourth Monday of January next, (Art. 37,) the inference is drawn that the newly-elected clerk cannot.

But the framers of the Constitution only had in contemplation the fixing of the day for the election of clerks in Article 149, and not the period when they should cease to perform their duties. It is only as to the day of their election that the term is to be regulated by that of the Governor; "the first term of service of these clerks shall be regulated by the term of service of the first Governor, *so that* a new election for these officers shall be held on the first Monday of November, 1855." If the intention had been such as the appellant contends for, the article should have gone on to add: "and they shall be inducted into office on the fourth Monday of the following January."

We cannot add such a clause to the article, as we do not conceive that it is fairly to be implied from all the provisions of the Constitution taken together.

Article 79 declares that "clerks of the inferior courts in this State shall be elected for the term of four years; and should a vacancy occur subsequent to an election, it shall be filled by the Judge of the court in which such vacancy exists, and the person so appointed shall hold his office *until the next general election.*"

By Article 125, "the Legislature may provide by law in what case officers shall continue to perform the duties of their offices until their successors shall have been inducted into office."

It is in pursuance of this constitutional provision that the Act of March 15th, 1855, already cited, has been passed.

There existed a reason for postponing the installation of the Governor, which has no application to clerks of courts.

The votes for Governor have to be counted by the General Assembly, and the General Assembly does not meet until the third Monday in January. Constitution, Articles 35, 5, 152, 153.

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No such delay is necessary as was contemplated in counting the votes and officially declaring the result of the election for clerks of courts; on the contrary, special provision has been made for clothing them with their commissions at an earlier period.

The Act of April 28th, 1853, (Session Acts, p. 158,) upon which the appellant also relies, follows the language of the Article 149 of the Constitution, which we have already construed.

It is therefore unnecessary to comment upon this statute, as it adds nothing to the strength of the appellant's case.

If a legislative interpretation of Article 149 is to be regarded, it would seem to be in favor of the appellee. See Act April 28th, 1853, § 19, (Session Acts, p. 192,) and an Act approved same date, §§ 2 and 3, (Session Acts, p. 152.)

It is therefore decreed that the judgment of the District Court be affirmed, with costs.

R. A. VAN HORN *v.* W. C. TEMPLETON and C. VANDERBILT—McCROSKY *v.* THE SAME—NEAL *v.* THE SAME.

Action of damages for non-performance of contract. Defendants agreed to convey plaintiffs from San Francisco to New Orleans, in about twenty-four days, connecting at San Juan, whence they were to be taken by the steamer Daniel Webster to New Orleans. The D. W. did not appear at San Juan for ten days after the arrival of plaintiffs. A violent storm at sea prevented the defendants from having a steamship at San Juan in time. *Held:* This was an inevitable accident and overpowering force, which exempted defendants from responsibility.

Any other steamship, equally fitted to transport passengers with comfort and safety as the D. W., would have been a compliance with the contract.

Defendants contracted that the only extra expense of passengers would be for their board in crossing the Isthmus; and that on their arrival at San Juan they should immediately go on board the steamer. After their arrival at San Juan they were not permitted to go on board the D. W. for about ten days. *Held:* That plaintiffs were entitled to recover their expenses for that length of time.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Rand & Bartlett, for plaintiffs. *Clack*, for defendants and appellants.

SPOFFORD, J. These consolidated suits were brought against the owners of the Vanderbilt line of steamers by three passengers, who bought tickets of the defendants in San Francisco, for the purpose of being conveyed thence by the Nicaragua route to New Orleans.

They allege that they have suffered damages to the extent of $1000 each, through the fraud and negligence of the defendants, who failed and refused to comply with their contract in the following particulars—viz.: that they promised to transport the plaintiffs without delay to New Orleans, in the space of about twenty-four days, by means of a connection with their steamship the Daniel Webster, to be formed at San Juan del Norte, on the Atlantic side of the Isthmus of Nicaragua; whereas, on arriving at San Juan del Norte no steamer was there to make the connection, nor did any appear at that point until some ten days after the arrival of the plaintiffs, when the Daniel Webster made her appearance; but that her officers, the defendants' agents, refused to let the plaintiffs go on board until some thirteen days more had expired, when they were suffered to go on board, and were brought to New Orleans; that they were thus

delayed about three weeks upon the Isthmus of Nicaragua, at their own expense, in an unwholesome climate and at a sickly season, whereby they have suffered loss and damage, through the fault of the defendants, to the amounts claimed in their respective petitions.

The plaintiffs obtained a verdict from a jury for $350 each, and the defendants have appealed from judgments rendered in pursuance of the verdict.

Upon the pleadings and evidence, the case naturally gives rise to two distinct inquiries:

1. Are the defendants liable in damages for the failure to connect punctually at San Juan del Norte?

2. Are they liable for refusing to allow the plaintiffs to go on board the Daniel Webster when she did arrive, and to remain on board until she sailed?

The first question we are compelled to answer in the negative.

The tickets purchased by the plaintiffs, as well as the law of the contract, exempted the defendants from responsibility for inevitable accident and overpowering force. A violent storm at sea prevented the defendants from having a steamship at the port of San Juan del Norte in season to take those passengers for New Orleans, who, like the plaintiffs, had left San Francisco upon the steamer Brother Jonathan, with through tickets by the Nicaragua route. But the plaintiffs contend that although this is true, yet the defendants had first violated their contract by dispatching the steamship Pampero from New Orleans, instead of the Daniel Webster, to make the connection at the time referred to. In proof of this position, they cite the advertisements published by the defendants in San Francisco just before the sailing of the Brother Jonathan for San Juan del Sud, by which it appears that the Daniel Webster was named as the connecting ship for that voyage.

We do not think this constituted an essential or material part of the contract. Any other steamship equally fitted to transport passengers with comfort and safety would answer as well. The Pampero belonged to the same company, and was a staunch A No. 1 ship. *Non constat* but that, had the Daniel Webster encountered the same gale she too would have been obliged to put back and have equally disappointed the plaintiffs. The tickets bought by plaintiffs did not specify any particular ship as the promised conveyance from San Juan del Norte to New Orleans, but merely promised them a passage upon the steamer to connect with the one on which they left San Francisco. Nor does it appear that there was any bad faith on the part of the defendants' agents in San Francisco in advertising the Daniel Webster as the connecting steamer. They believed the representation to be true, and it was a mistake of a character not to affect the contract materially. The Pampero is shown to have been equally seaworthy, if her reputation was not quite so high as that of the Daniel Webster. And it does not appear that the defendants could have sent a steamship sooner to replace the Pampero, after the accident.

But upon the other branch of the case, we are of opinion that the strong representations made by the defendants that the only extra expense of the plaintiffs would be for their board whilst crossing the Isthmus of Nicaragua in the conveyances of the Accessory Transit Company, which connected the defendants' lines of steamers, and that they should immediately go on board the steamer at San Juan del Norte, make out a case of liability on the part of the defendants for refusing to take the plaintiffs on board the Daniel Webster after her arrival at the last-named port. There is no such evidence of a well-under-

stood usage, or of notice to the plaintiffs of what would be done in such a contingency as will counteract the presumption that arises from the actual representations made to the plaintiffs when they bought their tickets.

The evidence shows that after the arrival of the Daniel Webster the plaintiffs were kept on shore at San Juan del Norte for about ten days, at an expense of $1 50 per day.

They are accordingly entitled to recover each the sum of $15 and costs.

It is therefore ordered that the judgment of the District Court be reversed, and proceeding to render such judgment as should have been rendered, it is ordered, adjudged and decreed, that each of the plaintiffs in these consolidated suits recover of the defendants, *in solido*, the sum of $15 and the costs of suit in the District Court; the costs of appeal to be paid by the plaintiffs and appellees respectively.

J. B. G. ARNOULT *v.* CITY OF NEW ORLEANS.

After the annexation of Lafayette to New Orleans the Legislature required the Parish Recorder of Jefferson to make copies of acts relating to property in Lafayette, for registry in New Orleans. The costs of these copies were fixed by law, and were to be paid by the city of New Orleans. *Held:* There is nothing in such legislation which either violates or impairs the obligation of a contract, or destroys a vested right.

To the city of New Orleans, as a civil corporation, has been delegated a portion of the powers of the government; it was established, as are other city corporations, for the public convenience, and it is certainly competent for the Legislature, from time to time, as the public convenience or necessity may require, to add to or abridge the powers and duties of the corporation, to restrict or enlarge the boundaries of this delegated authority, except so far as they are recognized and guaranteed by the Constitution itself.

The Act of 1853 is entitled "An Act to provide for the removal of certain public records from the Fourth District of New Orleans to the Parish of Jefferson," and the Act of 1854 is entitled an Act amendatory thereof. Each section in both of these Acts has direct reference to the subject-matter of its legislation, or its necessary incidents. It certainly was not necessary to meet the requirements of the Constitution, for the Legislature to pass two separate acts for the purpose of accomplishing one object—the first in order that a thing should be done, and the second to indicate the manner in which the expense should be defrayed.

The title of the amendatory Act not only refers to but includes the title of the first Act. The Constitution does not prohibit any designation of an amendatory Act by a reference to the title of the Act amended.

The object of the Constitution was to prevent the amendment or revival of laws *merely* by reference to their title. It was intended that each amendment and each revival should speak for itself and stand independent and apart from the Act revived, or section amended.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Roselius* and *Filleul*, for plaintiff. *Livingston*, City Attorney, for defendant.

LEA, J. The plaintiff seeks to recover from the city of New Orleans compensation for certain transcripts of conveyances made by him in accordance with the provisions of an Act of the Legislature, approved 30th April, 1853, and an Act amending the same, approved 15th March, 1854.

These statutes were enacted for the purpose of preventing the difficulty and confusion in tracing the registry of conveyances of, and incumbrances upon real estate, which it was apprehended might result from the separation of the city of Lafayette from the parish of Jefferson and its annexation to the city of New Orleans.

These statutes, so far as they are applicable to the present controversy, provide, substantially, that the Recorder of the parish of Jefferson should make and cause to be made a full and complete synopsis of the records of the sales of all real estate and slaves situated in the city of Lafayette, to be delivered "to the Recorder of Conveyances of the city of New Orleans," for which he was authorized to charge and receive the sum of one dollar for each and every transcript of conveyance, as aforesaid, "the expenses to be paid by the city of New Orleans." A similar provision was made for the transfer of the registry of all liens, privileges, judgments, &c.

The plaintiff, who is the Recorder of the parish of Jefferson, it is admitted has, in accordance with the provisions of the Acts above referred to, furnished the transcripts of 10,503 conveyances, which have been duly delivered to the Recorder of Conveyances of the parish of Orleans.

It appears that after 3,000 transcripts of conveyances had been furnished, the plaintiff was paid the sum of $3,000—that being the rate of compensation provided by the statute; but when his claim of remuneration for the remainder of the transcripts was presented, (after some hesitation and discussion,) payment was refused, on the ground, as appears from the admissions on file, "that the plaintiff had instituted a suit against the city for the recovery of the amount." Without examining into the validity of such a reason for a refusal, the question to be determined is, whether the city is or is not legally bound to pay the plaintiff's claim.

It is urged in the pleadings and in the brief of the counsel for defendant, that the Act of the Legislature, under which the plaintiff claims, is illegal and void, on the ground, 1st, that the Legislature cannot compel the defendant to pay for the value of work executed for the benefit, advantage and convenience of others, the defendant being only bound upon the contracts made in accordance with the laws regulating their powers and duties; and 2d, that the Acts of 1853 and 1854 are both unconstitutional, the object of the Act of 1853 not being expressed in its title; and that the Act of 1854 was passed in violation of Articles 115 and 116 of the Constitution of the State. Wherefore the defendant claims a judgment against the plaintiff on his principal demand, and demands in reconvention the reimbursement of the $3,000 paid to plaintiff under a mistaken view of the legal liability therefor.

To the city of New Orleans as a civil corporation has been delegated a portion of the powers of the government; it was established as are other city corporations for the public convenience; and it is certainly competent for the Legislature from time to time, as the public convenience or necessity may require, to add to or abridge the powers and duties of the corporation; to restrict or enlarge the boundaries of this delegated authority, except so far as they are recognized and guaranteed by the Constitution itself. Now, in the exercise of this discretion, and considering that it was for the public benefit, the Legislature have indicated the manner in which all existing acts affecting real estate and slaves in the city of Lafayette, at the time of its consolidation with the city of New Orleans, should be registered in the parish to which it was transferred, and of which it became a component part. At the same time a proper compensation was provided for the necessary labor in effecting the registry, as required by law.

If the obligation of executing the act at the expense of the city had been imposed upon the Mayor or some other city functionary, it would have been, in substance, what it is now. The charge of carrying out an Act rendered necessary

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by the alteration in the boundaries of the city is imposed upon the corporation. It formed a part of the legislation incident to the consolidation of the two cities into one, and the expense incident to the change is as properly chargeable upon the city as any other expense incident to its organization. There is nothing in such legislation which either violates or impairs the obligation of a contract or destroys a vested right. Nor is the defence, in our opinion, tenable on the ground that the Acts referred to are in violation of Articles 115 and 116 of the Constitution. The Act of 1853 is entitled "An Act to provide for the removal of certain public records from the Fourth District of New Orleans to the parish of Jefferson," and the Act of 1854 is entitled "An Act amendatory thereof."

Each section in both of the Acts has direct reference to the subject-matter of its legislation or its necessary incidents. It certainly was not necessary to meet the requirements of the Constitution for the Legislature to pass two separate acts for the purpose of accomplishing one object—the first to order that a thing should be done, and the second to indicate the manner in which the expense of its execution should be defrayed. "It is sufficient that the object of the law be stated in its title according to the understanding of reasonable men." See 6th An., 605, *Municipality No.* 3 v. *Antoine Michoud.*

We think, therefore, that these Acts embrace but one subject of legislation, which subject is clearly designated in their titles. The next objection which is urged is, that the Act of 1854 is unconstitutional, because it purports to be an amendment of the Act of 1853: that this amendment is effected by a reference to the title of the first Act, and because the whole of the amended Act is not reënacted and published at length.

The title of the amendatory Act not only refers to but includes the title of the first Act. The Constitution does not prohibit any designation of an amendatory Act by a reference to the title of the Act amended: if it did, it would deprive the Legislature of most direct and accurate means of designating all amendatory legislation.

The Article of the Constitution is as follows:

"No law shall be revived or amended by reference to its title, but *in such case* the Act revived or section amended shall be reënacted and published at length." Constitution, Art. 116.

This was intended to prevent the amendment or revival of laws *merely* by a reference to their titles. It was intended that each amendment and each revival should speak for itself; should stand independent and apart from the act revived or the section amended. It was therefore provided that "*in such cases*," if the object was to revive an act, it should be "*reënacted*" throughout; if the object was to *amend* an act then the "*section amended*" should be "*reënacted and published at length.*" In the case under consideration the object was to amend an act, and accordingly all the "*sections amended*" have been reënacted and published at length. It is urged, however, that the fifth section of the Act 1853 has been left out in the amendatory Act, and two new sections, upon a subject not embraced in the first Act, are added. As it was not the intention of the Legislature to amend this section, it was probably not thought necessary to reënact it; but even upon the hypothesis that each amendatory Act should embrace the whole of the legislation contained in the Act of which it is an amendment—(a conclusion not warranted, as we think, by a fair and reasonable interpretation of the article referred to)—still it is evident that the section in question was at best mere surplusage. It was a mere saving clause that nothing in the

Act should be so construed as to impair or invalidate any mortgage or conveyance of property made prior to the promulgation of the Act, although no transcript should *thereafter* be made as provided by the Act. The law would have been precisely the same without such a clause as with it, and its addition to the Act of 1854 would neither add to nor in any manner alter or affect its scope, meaning or application as a statute.

The Act of 1854 has therefore every element of separate and detached legislation, which it is contended that the Constitution requires. The law means all that it would mean if the section were annexed. And its provisions, and all its provisions are fully operative without a reference to the Act of 1853. Under such circumstances we do not feel called upon by any rule of interpretation which might be adopted to set aside as unconstitutional and void a statute which was considered to be one of public utility, which was intended to guard against the confusion and uncertainty in the registry of public acts incident to the annexation of the city of Lafayette to the parish of Orleans. It is perhaps needless to add that we do not consider that the last two sections of the Act of 1854 which provides the means of defraying the expense incident to its execution, as being legislation upon a subject different from that embraced in the first Act.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

THOMAS HUBNALL *v.* WATT & DE SAULLES and ROBERT Y. JONES.

An Act under private signature has no date against third persons; but a date may be given to such an instrument by evidence *dehors* the instrument itself.

There is nothing in the Registry Laws which precludes a title not registered from being the basis of the prescription mentioned in Article 3444 of the Code, when it is accompanied by actual possession and the incidents prescribed in Article 3458.

APPEAL from the Fifth District Court of New Orleans. *Augustin*, J.

Henderson, Jr., for plaintiff. *Benjamin, Micou & Finney*, for *Jones*. *Taylor*, for warrantor.

BUCHANAN, J. (MERRICK, C. J., absent.) Plaintiff has judgment against the defendant, *Robert Y. Jones*, for the possession of a slave named *Henry*, and in default of said slave being delivered up, then for $1,000 as his value, and for $25 per month from the date of judgment, as his hire. There is also judgment in favor of *Jones* against his warrantors, *George A. Botts* and *George M. Bayley*. *Jones* and *Bayley* have appealed.

In this court the appellant *Jones* contends that the suit is barred by the prescription of five years, under Article 3444 of the Code, and should the plea of prescription not prevail, that the slave *Henry* is valued too high by the judgment.

The plaintiff has answered the appeal, and prayed for an amendment of the judgment in his favor, by allowing him hire for the slave *Henry* from the institution of the suit, instead of from the judgment.

Defendant holds by a conveyance *sous seing privé* from *Botts*, not recorded. *Botts*'s title was by notarial act of sale from *Bayley*, of date September 3d, 1845, not registered in the office of the Register of Conveyances. *Bayley* bought the slave from *J. A. Brown* by act under private signature, not recorded, on the 20th April, 1844.

HUBBARD v. WATT.

The three sales in question were made in New Orleans, and the District Judge was of opinion that their want of registry prevented them from constituting a foundation for the prescription of five and ten years—the short prescription by which the title of slaves is acquired to one who possesses with a title translative of property. We have come to a different conclusion. It is very true that an act under private signature has no date against third persons, and that two of the conveyances in defendants' chain of title are of that description. But a date may be given to such an instrument by evidence *dehors* the instrument itself; and in the present case the date of the conveyance from *Brown* to *G. W. Bayley*, (April, 1844,) is fixed by the testimony of two witnesses, *R. H. Bayley* and *Richard Beck*, who also prove the open and uninterrupted possession of *Bayley* under that title. In relation to the conveyance from *Botts* to *Jones*, there is the following admission in the record, made on the trial of this cause in the court below, 1st February, 1854: "It is admitted that *Jones* would prove a private title from *Botts* to him of the slave *Henry*, of date about September, 1845, the production of which paper is dispensed with; the said title being the title upon which *Jones* relies for his title to the property, and under which he holds possession to the present time."

We are of opinion, after a careful examination of the law and of the authorities cited in argument, that there is nothing in the Registry Laws which precludes a title, not registered, from being the basis of the prescription mentioned in Article 3444 of the Code, when it is accompanied by actual possession, with the incidents prescribed in Article 3453. This suit was instituted the 14th November, 1850; and actual and uninterrupted possession is shown in the defendant and warrantors from April, 1844, to that time, being six years and seven months. The defendants have therefore acquired title by prescription to the slave, unless the plaintiff has shown himself to have had a residence out of this State. In his petition he styles himself a resident of New Orleans; but his counsel relies upon the evidence of plaintiff's brother-in-law, *Simons*, who proves that in 1837 and 1838 plaintiff resided in Tennessee, and that in 1838 or 1839 he removed to Missouri. He has also offered two witnesses named *Waters*, one of whom, *Thomas Waters*, swears that in December, 1844, the plaintiff resided in St. Louis, Missouri, and that in March, 1845, he was keeping store in St. Louis. This witness also declares that at this last date the slave *Henry* was hired out in Boonsville, Missouri. *Charles Waters* swears positively that plaintiff resided *in Boonsville* in December, 1844. Apart from the discrepancy in the testimony of these witnesses as to plaintiff's residence in December, 1844, which creates a doubt of the correctness of their recollection of dates, we find it proved beyond question that the slave was in New Orleans in April, 1844—a fact that corroborates the evidence of a witness, *Henry E. Moore*, who swears that he came down the river in company with plaintiff and the slave *Henry*, in the spring of 1843, or it might have been the following year, 1844. It is also proved that plaintiff resided in New Orleans in 1845 and in 1846, and that in 1847 he went to the Mexican war, whence he returned in the latter part of that year or early in 1848.

On the whole, the plaintiff has failed to prove satisfactorily a residence anywhere out of Louisiana within the five years next preceding the institution of this suit. The nearest approach to it is in the testimony of *Thomas Waters*, who says: "He (the plaintiff) came here a short time in 1845, but returned to St. Louis."

The plaintiff has been afforded the opportunity of two trials, and ought to have produced something more satisfactory than such loose and vague testimony, if in truth he had a residence elsewhere than in this State, within five years previous to the institution of the suit. The burden of proof is upon the plaintiff to show an exemption from the prescription applicable to residents; and in this case the propriety of such a rule is peculiarly manifest.

Judgment of the District Court reversed, and judgment for defendants, with costs in both courts.

SUCCESSION OF HENRY FLETCHER, f. m. c., CELESTE BAHAM et al. v. JOSEPH DECOUDREAU, Administrator.

The children and grandchildren of a natural aunt of the deceased are not entitled to the estate—there being no statute authorizing them to set up such an illegitimate relationship as a basis for the right of inheritance, which is the creature of positive law. Code 911, 915, 917, 928.

In an act of manumission before a notary and two witnesses, the deceased described M. L. as his "natural daughter slave." This is a sufficient acknowledgment of paternity, although the object of the act was to enfranchise the slave.

No form is prescribed for such an acknowledgment, except that the declaration be made in the presence of a notary and two witnesses. (Code 221.) If the declaration be thus made, it seems immaterial whether it be the main object of the act or not.

Natural children are not like legitimate heirs seised of the succession at the instant the ancestor dies. They have only a right of action to cause themselves to be put in possession upon a proper showing. Code 919, 943.

The State claimed the succession, charging that M. L. was an adulterous bastard; to the evidence of which she objected, under Article 968 of the Code, which provides that "the exclusion [from the inheritance], either for cause of incapacity or unworthiness, shall not be sued for by others than the relations who are called to the succession of the unworthy heir," &c. *Held:* The State is not suing to exclude M. L. under any of the pretences contemplated in Article 968. She is an actor seeking by proof to have herself recognized as heir. She must, therefore, make out her case like other plaintiffs, and, when apparently made out, it is open to be rebutted.

If the act upon which she bases her claim to the heirship be a nullity, she cannot be put in possession of the estate; and the act is a nullity if made in contravention of Article 222 of the Code, which prohibits the acknowledgment of children the offspring of an adulterous or incestuous intercourse.

This prohibition would be futile if the State could not insist on the inquiry whether the acknowledged child was an incestuous or adulterous bastard—for such a bastard can only exclude the State. C. C. 177, 1184, 1185, 1186, 1202, 1203.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Collins, for plaintiffs. *Culbertson*, for defendant. *A. Hennen*, for testamentary executor. *Morse*, Attorney General, and *Miller*, for the State. *Filleul* and *Tissot*, for intervenor.

SPOFFORD, J. (MERRICK, C. J., absent.) *Henry Fletcher*, f. m. c., died in New Orleans, leaving a succession inventoried at about $10,000.

One *Joseph Découdreau* was appointed administrator, and took possession of the effects in that capacity. After a time an olographic testament was discovered, in which *Fletcher* had appointed one *Jean Louis Dolliole* his executor. The will being probated, *Dolliole* was confirmed as testamentary executor, and now represents the succession.

The death of the legatees prior to that of the testator involved the caducity of the main dispositions of the will. So the property must follow the general law of successions *ab intestato*.

SUCCESSION OF FLETCHER.

Three parties claim the inheritance:

I. The *Bahams*, and others styling themselves the cousins of the deceased.

II. *Marie Louise*, f. w. c., styling herself the duly acknowledged natural child of the deceased.

III. The State.

The prayer of the first claimants must be rejected, because they are the children and grandchildren of a natural aunt of the deceased, and there is no statutory provision authorizing them to set up such an illegitimate relationship as a basis for the right of inheritance, which is the creature of positive law. C. C. 911, 915, 917, 920; *Sayre* v. *Pasco*, 5 R. 9; *Bevens* v. *Dupré*, 6 An. 494.

The only remaining question is whether *Marie Louise* shall take in preference to the State.

Henry Fletcher, in an act of manumission passed before a notary and two witnesses, described *Marie Louise*, whom he enfranchised by the act, as his "natural daughter slave." It is contended that this is an insufficient compliance with Article 221 of the Civil Code, which declares that "the acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public in presence of two witnesses, whenever it shall not have been made in the registering of the birth or baptism of such child."

It is said that the words "*natural daughter* slave" were terms of description foreign to the purpose of the act which was to manumit a slave, and not to acknowledge her paternity.

But no form is prescribed for such an acknowledgment, save only that the declaration be made before a notary public, in presence of two witnesses. If the declaration be thus made, it seems to be immaterial whether it be the main object of the act or not. "La seule condition requise c'est qu'elle soit constatée dans un acte authentique. Ainsi, peu importe par quel officier cet acte est dressé, et peu importe aussi que la reconnaissance, au lieu d'être l'objet direct de l'acte, ne s'y trouve que par énonciation incidente." 2 *Marcadé*, p. 91.

Marie Louise having exhibited the act in which she was described by *Henry Fletcher* as his natural daughter, maintains that her heirship is thereby established conclusively as against the State, and that neither the State nor the executor in possession of the property can be heard to show by any extraneous evidence the existence of facts which would cut her off from the inheritance.

On the other hand, both the executor and the State offered and were permitted to show that, if *Marie Louise* was the daughter of *Fletcher*, she must have been the offspring of an adulterous connection. C. C., 201.

Upon this fact the proof is conclusive.

So the only question is, was the evidence admissible?

Marie Louise, the appellant, relies upon the Article 968 of the Civil Code as implying a *fin de non recevoir*, which bars the State and the executor from entering into any such investigation as was permitted in the court below.

"The exclusion, either for cause of incapacity or unworthiness, shall not be sued for by others than the relations who are called to the succession of the unworthy heir, or in concurrence with him; and this kind of suit shall be determined in the same manner as other civil actions."

This article must be construed not alone, but in connection with the subject-matter of the chapter in which it is found, and with reference to various other provisions in different parts of the Code.

Natural children are not, like legitimate heirs, seized of the succession at the instant the ancestor dies. They have only a right of action to cause themselves to be put in possession upon a proper showing. "Children called to the succession of their natural father or mother, in the case mentioned in the preceding articles, are permitted to take possession of the succession which has fallen to them only by the order of the judge of the parish in which the succession is opened." C. C., 919.

Natural children, and the surviving husband or wife, before being put into possession of the estate left to them, are not considered as having succeeded to the deceased from the instant of his death; but they do not the less transmit their rights to their heirs, if they die before having made their demand to be put in possession. The reason is, that this sort of heirs, having only a right of action to cause themselves to be put into possession of successions thus falling to them, this right and this action form a part of the succession which they transmit to their heirs." C. C., 943.

Marie Louise is not, then, in the posture of a defendant with a legal possession which is attacked by the State; but she is an actor seeking by proof to get herself recognized as an heir to an inheritance which cannot be given her without establishing her heirship. The State is not suing to exclude her under any of the pretences contemplated in Article 968 of the Code.

She must, therefore, make out her case, like other plaintiffs, and when apparently made out it is open to be rebutted. She cannot hold up the act which merely describes her as the "natural daughter" of *Henry Fletcher*, and then say to the other parties, "you shall not look beyond this paper, to see whether I am such a natural daughter as the law permits to inherit from her natural father."

If the act upon which alone she bases her claim is itself a nullity, it would be absurd to say that she should be put in possession of the estate she sues for. That it is a nullity the evidence objected to abundantly shows. It was made in contravention of a prohibitory law established in the interest of public morals. "Such acknowledgment shall not be made in favor of the children produced by an incestuous or adulterous connection." C. C., 222.

To say that evidence cannot be brought *aliunde* to show facts which would establish the adulterous connection of which the child was the fruit, would be to nullify the article of the Code altogether. For it is not to be expected that the father, in acknowledging a natural daughter, would go so far as to thwart his own design by proclaiming his infamy before the notary and witnesses.

The appellant invokes the Article 913 of the Code: "Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State. In all other cases they can only bring an action against their natural father, or his heirs, for alimony, the amount of which shall be determined as is directed in the title of father and child."

But the next article provides that "bastard, adulterous or incestuous children shall not enjoy the right of inheriting the estates of their natural father or mother, in any of the cases above mentioned—the law allowing them nothing more than mere alimony."

A futile prohibition, if the fact of their being bastard, adulterous or incestuous children cannot be inquired into on the suggestion of the State. For they

could exclude no one but the State, and it is not to be presumed that they will themselves disclose the fact of their infamous origin, to defeat their own pretensions.

But we are not left to inference upon this subject. For the sake of enforcing the penalties it imposes upon immorality, the Code has declared, in Article 235, that "every claim set up by natural children may be contested by those who have any interest therein."

That the State has an interest in defeating the unlawful pretensions of *Marie Louise* in this case is obvious, under the testimony which shows that there are no legitimate heirs or surviving wife.

We therefore think the evidence was rightly admitted, and that upon the record, as it stands, the succession will belong to the State. C. C. 477, 923.

The decree, so far as it rejects the demands of the *Bahams* and of *Marie Louise*, is correct.

But there was error in decreeing the property to be forthwith delivered to the Attorney General. There appear to be unpaid debts, and, in a succession of this kind, the Code seems to contemplate that all the movable and immovable property should be sold, the latter after appraisement and on prescribed terms of credit, that the balance, on the homologation of a final account, may be paid over in money to the State Treasurer, who is authorized to receipt therefor. C. C. 1202-3, 1184-5-6.

The answer of the executor to the appeal prays for an amendment accordingly.

It is therefore ordered that the judgment rejecting the claims of *Baham et als.*, and of *Marie Louise*, intervenor, to inherit from *Henry Fletcher*, be affirmed. It is further ordered that the judgment in other respects be reversed, and that the administration of the succession of *Henry Fletcher* be continued, according to law, until the succession is finally wound up; and it is further ordered that the costs of this appeal be paid by *Marie Louise*, the appellant.

WILLIAM W. PEYTON *v.* NEWTON RICHARDS.

Action for the value of a slave killed by the unskilfulness and fault of persons who were in the employment of defendant. The evidence showed that the defendant had contracted with the undertaker to put up the iron front on a building, and that afterwards defendant made a special contract with T. for T. to do the same work, with assistants and laborers employed and paid exclusively by T. The work fell to the ground and killed the slave. *Held:* That T. was not the servant or overseer of defendant, and consequently defendant was not liable.

C. C. 2299, 2789.

APPEAL from the Second District Court of New Orleans. *Lea*, J.

J. R. & J. D. Jones, for plaintiff and appellant. *Durant & Hornor*, for defendant.

BUCHANAN, J. The plaintiff's slave, while walking along the sidewalk of Camp street, in front of a building which was in process of erection, was killed by the falling of cast iron columns and entablatures, which formed the front of said building. Plaintiff claims the value of said slave from defendant, on the

allegation that the accident was caused by the unskilfulness and fault of persons who were in the employment of defendant, and who were at the time in the exercise of the functions in which they were employed by defendant.

The action is based upon the 2299th Article of the Civil Code, and, as the defendant has denied his liability, we are first to inquire whether the workmen who put up the iron front were persons for whom the defendant was legally responsible in damages, at the suit of those who might have been injured by their fault, unskilfulness or negligence in the performance of that work.

The evidence shows that the building belonged to *Dr. Farrell*, and that *John McVittie* was the undertaker of the building. *McVittie* made a special contract with defendant, *Newton Richards*, to put up the iron front in question, of which *McVittie* furnished the materials; and *Richards* made another special contract with *William Thompson* to do the same work. *William Thompson* himself performed the work, with the assistance of laborers, hired and paid by himself. Just as the work was completed, the iron columns and plates, or entablatures, fell to the ground, in consequence, as the witnesses think, of not being sufficiently propped with pieces of wood under the horizontal pieces, as is usual and necessary. *Thompson* himself and another workman fell to the ground with the work. After this accident, which caused the death of plaintiff's slave, *Thompson* erected the work anew, and only received the stipulated compensation from defendant, $15, after the work was properly done and finished. We are of opinion that *Thompson*, by whose fault, negligence or unskilfulness this accident happened, was not the "servant or overseer" of defendant, in the performance of this work. He engaged to do a certain job for defendant, for which defendant engaged to pay him when completed. But in doing the job, the defendant had no control or superintendence over *Thompson*. The laborers who assisted *Thompson* had no right to look to *Richards* for their payment, except, under a particular statute and upon the observance of certain formalities, to the extent that *Richards* might become indebted to *Thompson* for the work; and no indebtedness could arise on the part of *Richards* towards *Thompson* except upon the delivery of the work completed.

In all the cases of damages awarded under the 2299th Article of the Code, the party who caused the damage was one, under wages to the party defendant, and engaged in work of which the actual superintendence and control belonged to the defendant. 18th L. R., 492; 1 Rob., 178; 2 An., 654; 5 An., 704; 7 An., 321.

In the case of *Camp* v. *Kirwan and the Wardens of the Church of St. Louis*, where the proprietors of the building, as well as the contractor who executed the work, were held liable *in solido* for damage caused by an accident similar in its character to this one, there existed the peculiar feature, that the proprietor had reserved to himself, by contract, the controling superintendence of the execution of the work, through an architect employed by himself. Judge SLIDELL, delivering the opinion which was the basis of the decree in that case, uses the following language: "It seems to me that whatever responsibility there may be for such accident is thrown upon the undertaker, by the Article 2739 of our Civil Code. But the church wardens took their case out of the ordinary category, by retaining a continuous and active direction and control over the construction of the work. By reason of the exercise of this direction and control, they, in my opinion, are answerable to *Camp* for the consequences of the defectiveness of the work." 7 An., 326.

Judgment affirmed, with costs.

J. BERMUDEZ, for the use of P. C. WRIGHT, *v.* THE UNION BANK.

Sale of mortgage stock of the bank, bought by the bank. Sale sought to be set aside on the ground that the stock could not be sold apart from the real estate upon which it was secured. *By the Court:* We can see no good reason why the bank might not seize and sell any property of their debtor for the satisfaction of their debt. Certainly the objection is one which cannot be raised by the debtors, whose acts in the premises gave a sanction to the proceedings, and who are without interest in the enforcement of the supposed prohibition which they invoke.

The bank had a right to make purchases of this character under the provisions of the Act of 1843.

The objection that no legal notice of seizure was given cannot be urged by a party who appointed an appraiser, and was present at the sale.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Durel, for plaintiff and appellant. *Denis*, for defendant.

LEA, J. (MERRICK, C. J., absent.) This suit is brought for the purpose of cancelling a judicial sale of 284 shares of the capital stock of the Union Bank, made under an execution issued at the suit of the bank, and at which the bank became the purchaser of its own stock.

The plaintiff, *Bermudez*, was the owner of the stock which was secured by mortgage upon certain real estate and slaves, which were his property; the stock was also pledged to the bank for the reimbursement of loans which he obtained upon it. As owner of the stock, the plaintiff borrowed, in accordance with the terms of the charter, certain other sums of money which were secured by mortgage upon the real estate and slaves above referred to. The property and stock thus encumbered was transferred successively to *Mrs. Emma Bermudez*, and from her to *P. C. Wright, Esq.*, for whose use this suit is apparently brought. This being the case, the bank, in virtue of a writ of *fieri facias*, issued against *J. Bermudez* after the sale to *Wright*, caused the stock to be seized and sold, and at the sale became the purchaser at $5 50 premium per share.

This sale is attacked as illegal, on the following grounds:

1st. That the stock could not, under the charter of the corporation, be sold separate and apart from the real estate upon which it was secured.

2d. That the bank could not become the purchaser of its own stock, thereby extinguishing the same, and diminishing the security for the payment of the State bonds issued to that institution.

3d. Because the writ did not authorize the seizure of the stock.

4th. That no notice of seizure was given, as required by law.

In the absence of any law to the contrary, we can see no good reason why the bank might not seize and sell any property of their debtor for the satisfaction of their debt; certainly the objection is one which cannot be raised by the debtors, whose acts in the premises gave a sanction to the proceeding, and who are without interest in the enforcement of the supposed prohibition which they invoke. Equally untenable is the objection that the bank could not purchase her own stock, and extinguish the same; such a sale could not be attacked upon such a ground by a party having no interest in the question; moreover, the provisions of the Act of 1843 expressly authorizes purchases of this character.

The objection that no notice of seizure was given, as required by law, cannot be urged with consistency by a party on whose behalf an appraiser was appointed, and who was himself present at the sale; moreover, the evidence shows conclusively that the plaintiff had knowledge of the seizure.

Under the circumstances, all informalities in the proceedings, if any such existed, must be considered as waived by the acts of the parties themselves.

It is ordered, that the judgment appealed from be affirmed, with costs.

SUCCESSION OF BETSY YOUNG.

A nuncupative will by public act declared explicitly that the three attesting witnesses were present when the will was dictated to the Recorder. The three witnesses, seven months after the execution of the will, testified that they were present at the time of the execution, but did not recollect hearing the testatrix dictate the dispositions, but believed they heard her, because they attested the will at the time. *By the Court:* This evidence is insufficient to rebut the presumption which exists in favor of the truth of an authentic act executed by a Parish Recorder in solemn form.

APPEAL from the District Court, parish of Plaquemines, *Rousseau*, J. *Grandmont*, for appellant. *Foulhouze* and *Collins*, for appellees.

SPOFFORD, J. (MERRICK, C. J., absent.) *Betsy Young* died in 1854, leaving two nuncupative wills by public act, one executed on the 17th of August, 1850, the other on the 12th August, 1854. This controversy concerns the validity of the latter testament.

It was decreed to be null by the District Judge, because he was satisfied that two of the attesting witnesses were not present when the will was dictated to the Recorder by the testatrix.

The instrument itself, which appears to be in due form, declares in the most explicit manner that they were present.

But these witnesses have been called to testify on this point, and they were the three attesting witnesses to the will.

Not one of them declared that all were not present during the dictation.

The testimony is entirely consistent with the hypothesis that they were present during that period.

The only thing calculated to raise a doubt in the mind is, that after a lapse of seven months, they did not recollect hearing the testatrix dictate the dispositions, but believed they heard her, because they attested the will at the time.

Upon the authority of the case of *Macarty*, 7 An., 485, this evidence is insufficient to rebut the presumption which exists in favor of the truth of an authentic act executed by a Parish Recorder in solemn form.

As it is intimated on both sides that all the available testimony was not adduced, we will remand the case out of deference to the opinion of the District Judge upon a question of fact.

It is, therefore, ordered that the judgment appealed from be avoided and reversed, and the cause remanded for a new trial, the appellants to pay the costs of this appeal.

THE STATE *v.* THE JUDGE OF THE SEVENTH JUDICIAL DISTRICT.—W. F. KERNAN, District Attorney, praying for a Writ of Prohibition.

The Act of March 15th, 1855, creating an interchange between the Judges of the Fourth, Seventh and Eighth Judicial Districts, contemplates nothing but a provision for the regular jury terms, as fixed by law, and does not annul the power conferred on every District Judge to call special jury terms, when the public necessity requires them, provided they do not interfere with the discharge of his duties, as imposed by law.

ON an application for a writ of *prohibition.*
Kernan, for the relator

SPOFFORD, J. The Judge of the Seventh Judicial District has called a special session of his court for the parish of West Feliciana, and had a jury summoned, in pursuance of sections 26 and 28 of the Act relative to District Courts, approved March 15th, 1855, (Session Acts, pages 495-6.) It does not appear that this called term clashed, or will clash, with the regular term of court for that parish, which was to commence on the first Monday of December, nor within the term commencing on the third Monday in October in East Feliciana.

A writ of prohibition is prayed for, on the ground alone that the Judge has been inhibited from holding such a special jury term in West Feliciana at the present time by the Act of March 15th, 1855, creating an interchange between the Judges of the Fourth, Seventh and Eighth Judicial Districts. (Session Acts, pages 246-7.)

The latter Act, by its terms, evidently contemplated nothing but a provision for the regular jury terms as fixed by law. It says that "the interchange shall only apply to *the* jury term," and "to make effective its provisions," it is declared that *the* jury term for the parish of East Feliciana shall commence, for *that* term only, on the second Monday in April next, and thereafter as provided by law," that is, on the first Monday in April. (Session Acts, sec. 14, page 493.)

The provision in the interchange Act, that neither of the said Judges can lawfully hold a second jury term in any parish until he shall have held a term in every other parish of the district, cannot fairly be construed to annul the power conferred on every Judge to call a special jury term in any parish of his own district, when the public necessity requires, provided that such called term does not interfere with the performance of his judicial duties elsewhere, as imposed upon him by law, or with the discharge of the duties imposed by law upon the Judges with whom he is bound to interchange.

It is, therefore, ordered that the application for a writ of prohibition be dismissed, and that the relator, *W. F. Kernan*, pay costs.

Widow Duchamp v. J. P. Butterly.—Same v. Same.—Alphonse Garrus v. J. P. Butterly.—Widow Butterly, Opponent.

Statutes in derogation of common right should not be enlarged by construction.

Mrs. B. claimed a thousand dollars out of her deceased husband's estate, under the "Act to provide a homestead for the widow and children of deceased persons"—against *bona fide* mortgagees. In answer to interrogatories, the widow said that she owned a house worth seven hundred dollars, and added a vague statement that she was in debt. *By the Court:* The statute does not say that the amount of property owned by her must be estimated over and above her indebtedness, whatever it may be and whenever due, and we cannot add such a provision to it. Three hundred dollars allowed.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *J. & E. Bermudez* and *Pedesclaux*, for plaintiffs and appellant. *Biron*, for *Mrs. Butterly*.

Spofford, J. (Merrick, C. J., absent.) The widow of *J. P. Butterly* claims the $1000 awarded to indigent widows by the Act of March 17th, 1852. (Session Acts, page 171.)

The only valuable property belonging to the succession of her deceased husband has been sold, under three orders of seizure and sale, issued at the instance of the *Widow Duchamp* and *Alphonse Garrus*, who were mortgage creditors of the deceased.

The *Widow Butterly* claims a superior privilege on the proceeds of these three sales, by virtue of the Act aforesaid.

Statutes in derogation of common right should not be enlarged by construction.

The statute in question, which gives a bounty to the widow at the expense of *bona fide* mortgage creditors, is entitled "an Act to provide a homestead for the widow and children of deceased persons." It declares "that whenever the widow or minor children of a deceased person shall be left in necessitous circumstances, and not possess in their own right (*en leur nom*) property to the amount of $1000, the widow, or the legal representative of the children, shall be entitled to demand and receive from the succession of their deceased father or husband, a sum which, added to the amount of property owned by them, or either of them, in their own right, will make up the sum of $1000, and which said amount shall be paid in preference to all other debts, except those for the vendor's privilege and expenses incurred in selling the property."

The only evidence which tends in any way to show that the widow in this case is in necessitous circumstances shows also that she is owner in her own right of a house and lot, or homestead, in the town of Donaldson. In answer to interrogatories, she says this property is estimated at $700. It is true she adds the vague statement that she is indebted to the amount of $700 or $800, without giving any explanation of the terms of this indebtedness. But the statute does not say that the amount of property owned by her must be estimated over and above all her indebtedness, whatever it may be and whenever due, and we cannot add such a provision to the statute.

It may be that the creditors, out of whose pockets the bounty for the widow is to be taken, loaned their money to the husband upon the belief that, as the wife was already in the possession of a homestead, the death of the husband would not evict them of their mortgage rights.

DUCHAMP v. BUTTERLY.

Under her indefinite and somewhat evasive answers to interrogatories, the widow is is only entitled to $300, the difference between the value of the property she owns and possesses and $1000.

It is, therefore, ordered that the judgment appealed from be avoided and reversed, and proceeding to render such judgment as should have been rendered, it is ordered, adjudged and decreed, that the third opponent, *Azelie Landry*, widow of *J. P. Butterly*, and natural tutrix of the minor child *Aimée Butterly*, be paid the sum of three hundred dollars by privilege and in preference to the seizing creditors, *Widow Duchamp* and *Alphonse Garrus*, out of the proceeds of the property seized and sold in these suits, the sum taken from the proceeds of each of the three lots sold to bear the same ratio to the total sum of $300 as the net proceeds of the sale of each of the three lots to the net proceeds of all the lots; it is further ordered and decreed, that the costs of the intervention in the District Court be borne by the appellants, and the costs of this appeal by the *Widow Butterly*, appellee.

CITY OF NEW ORLEANS v. JOHN A. STAIGER.

The license tax imposed on keepers of coffee-houses is imposed upon all persons of the same class, and is therefore constitutional.

The third paragraph of the twentieth section of the Act of 8th March, 1836, supposing it to be in force, is not violated by the City Ordinance of 21st December, 1854.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Labatt & Eustis* and *Hiestand*, for plaintiff. *Collins* and *Black*, for defendant and appellant.

BUCHANAN, J. (MERRICK, C. J., absent.) The defendant appeals from a judgment rendered against him for a license as coffee-house keeper in the city of New Orleans for the year 1855. The defence set up is, that the ordinance under which this claim is made is unconstitutional and illegal. Unconstitutional because the Art. 123 of the State Constitution requires taxation to be "equal and uniform;" illegal, because the Act of 1836 (page 127, Bullard & Curry,) requires the Council to fix uniform prices for all licenses, and because the Act of 1847, (page 140, section 1,) requires taxation to be "equal and uniform."

Upon the question of constitutionality, it is only necessary to repeat what was said in the case of the *State* v. *Rebassa*, 9 An., 305: that the license tax in question operates uniformly upon all persons of the same class, to wit: all keepers of coffee-houses. It is therefore constitutional.

The third paragraph of the 20th section of the Act of 8th March, 1836, (Bullard & Curry, 127,) required the City Council to fix an "uniform rate" of all licenses to pedlars, hawkers, grog-shop keepers, taverns, and others, which now or hereafter may be provided by law. Supposing this law to be still in force, and to be applicable to the present case, it does not seem to be violated by the City Ordinance of 21st December, 1854.

The Act of 1847, (page 140,) which is an Act to provide for the payment of the debts of the Municipalities of New Orleans, commences by the enunciation of the rule that taxation within each Municipality shall be equal and uniform. It is not seen what application this rule has to the present case.

The judgment of the District Court is affirmed, with costs.

Leland & Co. and John Simmons & Co. v. A. Rose.

Under proceedings had for a forced surrender, in which there was no prayer for imprisonment, the jury found a verdict of guilty, but the court refused to sentence the defendant to imprisonment. *Held:* that the Court did not err; the prayer for general relief, while it entitles the party to all the ordinary decrees or orders which the pleadings may justify, will not authorise the imprisonment of a debtor under a highly penal statute.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Smiley & Perrin, for plaintiffs and appellants. *T. G. Semmes* and *Schmidt*, for defendants.

Lea, J., (Merrick, C. J., absent.) This case is presented on an appeal from the refusal of the District Judge to pass sentence of imprisonment upon the defendant, who was found guilty of fraud by a verdict of a Jury, under proceedings had for a forced surrender. The District Judge refused to pass sentence upon the defendant for the reason (with others) that the plaintiffs had in no part of their pleadings asked for the extraordinary remedy of imprisonment against their debtor, and that the defence could not have been conducted with reference to such a demand.

We think this view of the case is correct. It was not the duty of the Judge to enforce the penalty of the law in a case where the penalty was not invoked. The case is not analogous to that of a public prosecution by indictment or information. The plaintiffs are seeking to enforce their private rights in a civil proceeding, and they ask in their petition that the defendant, in default of the payment of their judgments, be compelled to make a surrender of his property to his creditors.

Upon the filing of the defendant's schedule under the orders of the court, they filed charges of fraud, and close their opposition, asking that the prayer of the defendant for exemption under the insolvent laws be rejected. It is true there is also a prayer for general relief, and in such cases we hold that the party making it are entitled to any and all ordinary decrees or orders which the pleadings and evidence under the pleadings may justify; but this relief does not extend to the extraordinary remedy of the imprisonment of a debtor under a highly penal statute. The presumption is, when a party fails to invoke such a remedy, that he waives it, and the defence is conducted accordingly.

It is ordered that the judgment be affirmed, with costs.

City of New Orleans v. Charles Gottschalk.

Judgment for municipal taxes by default and confirmed, without proof that the property assessed in the name of the defendant belonged to him; *Held:* a legal presumption necessarily arises from the provisions of the assessment law in favor of the correctness of the assessment roll, and it was the business of defendant to show the error in the roll, if error there was.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Hiestand & Levy, for plaintiff. *Laville*, for defendant and appellant.

Voorhies, J. (Merrick, C. J., absent.) The defendant is appellant from a definitive judgment by default against him for municipal taxes.

The defence urged by him is, that, under the tacit issue, which is tantamount to a general denial, the plaintiff was bound to show that he was the owner of the property assessed in his name for the year 1854; that the court below erred in assuming the proof of the existence of the title to the property in him from the fact of its description in the tax receipt and assessment roll. This defence is clearly inadmissible. In the assessment of property subject to taxation, the law imposes certain duties upon the assessors, among others, that of calling upon each tax payer for a list of his property under oath. Certain notices are required to be given in cases of absence. After the completion of the assessment roll, it must be deposited with the proper officer, giving notice thereof, in order to rectify any errors which may exist therein to the prejudice of any person, within a certain delay. Hence it is obvious that a legal presumption must necessarily arise in favor of the correctness of such assessment roll. If any error existed to the prejudice of the defendant in the assessment of property in his name, he should therefore have alleged and proved such error.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

THERESA HERMAN *v.* GASPARD THEURER.

Where the community is dissolved by the death of the husband, the surviving wife is presumed to have the intention to accept the community, and her right to renounce is subject to the same rules as govern the beneficiary heir.

But a different rule prevails where a divorce has been pronounced. Unless the wife accepts the community within the delay allowed by law, and obtains from the Judge a prolongation of that delay, she is supposed to have renounced the community. Code 2389.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Tissot* and *Duvigneaud*, for plaintiff. *Dufour* and *Roselius*, for defendant and appellant.

MERRICK, C. J. In August, 1843, the defendant, *Gaspard Theurer*, instituted an action against the plaintiff, his then wife, for a divorce, on account of adultery committed with one *Jacob Euper*, and also to obtain possession of a child of their marriage, to set aside certain donations, and to liquidate and settle the community.

No personal service of the petition appears to have been made upon the plaintiff; but a curator *ad hoc* was appointed to represent her in that suit, and service of the citation was made on him. The curator answered by a general denial. The proof of the facts seems to have been conclusive. The court decreed the divorce prayed for, gave the care and keeping of his minor son to *Theurer*, annulled the donations and ordered that the parties, "plaintiff and defendant, be referred to *Louis T. Caire, Esq.*, a notary public, for the settlement of the community of acquets and gains which existed between them." This decree was signed May 10th, 1844. It will be observed that up to this date, there is nothing in the record which shows that *Theresa Herman* ever accepted the community or desired that the same should be partitioned between her and *Gaspard Theurer*.

In August, 1843, an inventory was made, and at the making of the same, *Theurer*, the defendant, was present in person and signed it, and *John L. Thielen* signed the same, purporting to act as attorney for plaintiff. This inventory was filed in court on the 16th of September, 1844, and showing the debts of the community to be equal to the assets. Nothing further was done in the case until the present suit was instituted.

It appears from the allegations in plaintiff's petition, that she has married *Jacob Euper*, the person with whom the decree of divorce convicts her with having committed adultery.

The present action was commenced by service of citation on the 11th day of June, 1852. Plaintiff prays in her petition for a renewal of the order given in the judgment of May 6th, 1844, (referring the parties to a notary to take an inventory,) in order to proceed to a partition, and that the former inventory be declared null and void, and that a partition of the community take place between the parties.

The defendant resists plaintiff's demand on the following, among other grounds, viz:

That the plaintiff, not having accepted the community within the delay allowed by Article No. 2389 of the Civil Code, must be considered as having renounced the same.

We find that the plaintiff in her petition expressly denies that she was ever notified to attend the taking of the inventory, or represented at the taking of it according to law. There is nothing in the record which shows that *Mr. Thielen* was authorized to represent her, and she could not now be heard to contradict the allegations of her petition. So far, therefore, as the taking of the inventory is concerned, it proves no acceptance of the community on the part of the plaintiff.

But it is contended that the acquiescence in the portion of the decree quoted in this opinion, had the effect of an acceptance of the community, and a decision from Sirey, A. D., 1830, Tit. Communauté, Partie 2d, p. 97, in these words, is quoted as an authority, viz:

Attendu que lorsque le jugement qui prononce le divorce renvoie les parties, sur leurs conclusions, devant un notaire pour y régler leurs droits, et que les parties ont acquiescé audit jugement, il est manifeste que cela est une acceptation suffisante de la communauté.

The difference between the case cited (were we to view it as an authority) and the one at bar, consists in this: the decree in the one case was formed upon the "*conclusions*" of the parties, in the other, without any prayer to that effect on the part of the defendant, and on a mere general denial of the curator *ad hoc* appointed to defend her.

As the curator *ad hoc* had no power to accept the community for the plaintiff, we must construe the judgment rendered upon the pleadings in this case as simply recognizing the defendant's right to accept or renounce the community, as she should deem most to her interest. Had she been sued immediately afterwards for the one-half of any of the large debts of the community, unquestionably she could have set up her refusal to accept as a bar to such action. *Hyde* v. *Creddic*, 10 R. R., 393-4; *Clacor* v. *Lane*, 5 A. R., 499.

In order, therefore, to render the plaintiff, under the judgment, responsible for one-half of the debts of the community, it was necessary that she should, by some act of her own, evince her determination to accept the same. Where

HERMAN v. THEURER.

the community is dissolved by the death of the husband, the surviving wife is presumed to have the intention to accept, and her right to renounce is subject to the same rules as govern the beneficiary heir. But a different rule prevails where a divorce has been pronounced. Unless she accepts the community within the delay allowed by law, or obtains from the Judge a prolongation of that delay, she is supposed to have renounced the community. C. C., 2389.

The reason of the rule is doubtless this: the husband is the head and master of the community, and at once responsible for its debts, and being seized of it, he ought not to be compelled to demand a partition of the wife of the effects in his hands, and thus lessen his means to meet the debts, particularly as he is responsible for the whole, whilst his wife, by acceptance, would only be responsible for one-half of the same. The interest of the creditors and the public requires that the delay allowed the divorced wife to accept, should be, as provided by the Civil Code, a short one.

The plaintiff having suffered eight years to elapse after the rendition of the judgment in action for a divorce, without doing any act by which her acceptance of the community can be clearly inferred, her action is barred, unless the conduct of the defendant has been such as to prevent her from ascertaining her rights in regard to the community.

We do not think the testimony makes out a case of that kind. The absence of the plaintiff with her paramour, at the time the decree was pronounced, is not a circumstance calculated to make a very favorable excuse for not looking into her rights at the time the judgment was rendered. The demand of the notary, whether certain property did not belong to the community, and the answer that it did not, were on file, and if the answer was not true, (relating as it did to a grocery store,) she must have known the fact at the time, and it was for her to controvert that part of the inventory. But she did not then see fit to do so. The testimony which she has introduced, after this lapse of time, conflicting as it is, does not possess that clear and consistent character, and show that want of knowledge on her part, and that deception on the part of the husband, which would entitle her to a restitution against her tacit renunciation of the community.

The judgment of the lower court is therefore reversed, and ours is in favor of the defendant, with the costs of both courts.

NICHOLAS MURRAY v. JOHN WALKER.

A record was offered in evidence, but not filed, and therefore not copied by the Clerk in making up the transcript for the Supreme Court The transcript was brought up by the appellee, who moved to dismiss the appeal. *By the court:* It was the duty of the appellant to present her case in such a shape that this court could pass upon the correctness of the judgment appealed from. It is true the appellee has brought up the appeal, on the failure of the appellant to do so. But the deficiency of the record is plainly the fault of the appellant, which should not prejudice appellee. Appeal dismissed.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J. *Durant & Hornor*, for plaintiff. *Dunlap*, for defendant and appellant.

BUCHANAN, J. (MERRICK, C. J., absent.) This is a proceeding by third opposition on the part of defendant's wife, claiming to be paid, by preference over plaintiff, out of the proceeds of property sold in execution, the amount of

an alleged judgment obtained by her against her husband. She is appellant from a decision of the District Court adverse to her claim.

In support of her third opposition, the appellant offered in evidence "the whole of the record of the suit No. 7773 in the First District Court, entitled *Caroline L. Campbell, wife of John Walker*, v. *Her Husband*." But the certificate of the Clerk of the court to the transcript, declares, that the record in question, though offered in evidence, was not filed; and consequently that it is not copied. It was the duty of appellant to present her case in such a shape that this court could pass upon the correctness of the judgment appealed from. It is true the appellee has brought up the appeal, on the failure of the appellant to do so. But the deficiency in the record above mentioned, is plainly the fault of the appellant, which should not prejudice the appellee. The appeal is dismissed, with costs.

BOGERT, WILLIAMS & CO. *v.* JOHN EGERTON.

Defendant held a sum of money belonging to W., and refused to pay it over, under wholly unfounded pretences, for three years, when he acquired a protested note on which W. was endorser—which he pleaded in compensation of the debt due to W. *By the court:* The allowance of the plea, under all the facts of the case, would be subversive of that good faith upon which the doctrine of compensation reposes.

APPEAL from the Sixth District Court of New Orleans, *Cotton* J.

Durant & Hornor, for plaintiffs. *Benjamin, Bradford & Finney*, for defendant and appellant.

SPOFFORD, J. (MERRICK, C. J., absent.) The evidence satisfies us that the defendant received and disbursed and collected money for *Wilkinson* in a highly confidential capacity. He styled himself "Treasurer" of a company to which *Wilkinson* belonged, and whose members were interested in a single joint adventure.

On the 22d October, 1850, he stated the balance due by him in this fiduciary capacity, to *Wilkinson*, as the final result of the adventure, at the sum of $685, for which amount, with interest, the District Judge gave judgment in favor of the plaintiffs, who are assignees of *Wilkinson*.

But, instead of paying the money over then to the party for whom he held it, as he should have done, the defendant kept it, under pretence of a set-off, which was a legal impossibility, according to his own statement of the facts; an off-set which he has not attempted to insist upon in this suit.

But it served as an excuse for keeping the money three years, when he acquired a protested note, long past due, on which *Wilkinson* was endorser, by which he now pretends his debt to *Wilkinson* has been extinguished through the operation of law.

We concur with the District Judge, in thinking that the allowance of the plea, under all the facts of the case, would be subversive of that good faith upon which the doctrine of compensation reposes.

The authorities cited sustain the judgment.

Bloodworth v. *Jacobs*, 2 An., 25; *Nolan* v. *Shaw*, 6 An., 46; *Breed* v. *Purvis, Wood & Co.*, 7 An., 35; 2 Pardessus, Droit Com., § 325.

The judgment is therefore affirmed, with costs.

JOHN C. BEATTY et al., Executors, *v.* JOHN L. DUFIEF et al.

It is well settled that payments by an executor without an order of court are irregular, and not binding, unless it be shown that they liberate the estate from a legal obligation.

APPEAL from the District Court, Fifth District, Parish of Lafourche, *Cole, J.*

J. C. & A. Beatty, for plaintiffs and appellants. *Race & Foster*, for defendants.

VOORHIES, J. On the 10th of July, 1840, *Abner Robinson* mortgaged his sugar plantation and slaves to *Joseph Fowler, Jr.*, to secure the payment of six promissory notes given by him to the latter for a loan of $59,254 15. Subsequently, on the 10th of April, 1841, he also mortgaged the same property to *W. Bogart & Co.*, to secure the payment of six promissory notes given by him to the latter for a loan of $30,000, stipulating in both mortgages to pay 10 per cent. interest on each of the notes from maturity.

Joseph Fowler, Jr., died in August, 1850, and *W. Bogart*, a member of the firm of *W. Bogart & Co.*, was appointed curator of his estate.

The mortgage notes in favor of *W. Bogart & Co.*, endorsed in blank by them, were inventoried as the property of *Fowler's* succession. The judicial partition between the heirs of *Fowler*, made on the 4th of April, 1851, is silent as to any other claim against *Abner Robinson.*

The heirs to whom the mortgage notes were allotted in the partition, obtained an order of seizure and sale on them, for the sum of $136,911 16, alleged to be the principal and interest due on the 10th of February, 1854, after allowing various credits to the estate of *Abner Robinson.*

The plaintiffs, as testamentary executors of the late *Joseph W. Tucker's* last will and testament, allege that the testator was, during his lifetime, executor of *Abner Robinson's* last will and testament; that as such, he paid to the heirs of *Joseph Fowler, Jr.*, or their assigns, on the 24th of April, 1851, the sum of $12,701 03, which has never been allowed as a credit on the mortgage notes of *Abner Robinson;* that when this payment was made, neither *Joseph Fowler, Jr.*, nor his heirs, held any other claim against *Abner Robinson* than said mortgage notes, and that they are interested and bound to require said payment to be allowed as a credit, otherwise *Tucker's* estate will lose the benefit of it on the settlement with the estate of *Robinson.* Their petition concludes with a prayer for an injunction, and that the plaintiffs in the executory process be required to show whether *Abner Robinson* ever owed any other debt to *Joseph Fowler, Jr.*, than said mortgage notes, in order that said *Tucker's* estate may be protected thereby from loss; and in default of showing any other indebtedness, that said payment may be imputed as a credit on said mortgage notes.

The receipt in question is in the following words, viz.:

"Received, New Orleans, April 24th, 1851, from *J. W. Tucker, Esq.*, executor of the estate of *Abner Robinson*, deceased, late of Lafourche Parish, La., twelve thousand seven hundred and one dollars three cents ($12,701 03), in full for all accounts due by said estate to the late *Joseph Fowler, Jr.*, of New Orleans, La., and whose succession has been opened in the Second District Court of New Orleans, except twelve (12) certain promissory notes and interest thereon, drawn by said *Robinson* to the order of , which said

notes are still due and have been divided among the heirs of the said *Joseph Fowler's* estate as the property thereof. For their amounts, dates, and descriptions, reference is made to the act of partition of the property of said *Fowler's* estate, made before *Theodore Guyol*, Notary Public of this city. (Signed,) *John H. Skinner*, attorney in fact for *Margaret Swain* and others; *Race & Foster*, attorneys for *J. A. Dolman; John L. Dufief*, attorney for various heirs; *James J. Fowler*, for self and others; *John D. Fowler; John Greeves*, attorney for various heirs."

In February, 1847, *Joseph Fowler, Jr.*, brought a suit against *Joseph W. Tucker*, testamentary executor, for the recovery of $100,970 56, alleged to be the amount of the principal and interest then due him by *Abner Robinson* on the mortgage notes, after allowing as credits partial payments which had been made by said executor, as shown by a statement annexed to his petition. After the joinder of issue in July, 1850, no other steps appear to have been taken in that suit. Thus it would seem that *Fowler* himself, during his lifetime, had never asserted any other claim against *Robinson's* estate than that which was evidenced by said mortgage notes.

Under this state of facts, we think it was incumbent upon the heirs of *Fowler* to have shown the existence of other claims, if any they had, against the estate of *Robinson*. It is perfectly clear that *Tucker*, as executor, could pay only such debts against *Robinson's* estate as were legally exigible; and it appears to us to be equally clear that the executor, in a payment made by him in error, and without the authority of the court, is entitled to the reimbursement of such payment. It is well settled that payments by an executor, without any order from the court, are irregular and not binding, unless it be shown that they liberate the estate from a legal charge. Hence it follows that *Tucker's* estate is entitled to claim the imputation of the payment in question as a credit on the notes sued upon. We do not think there is any force in the defendant's objection, that the question is not now before us as to whether *Tucker's* estate would be allowed such payment as a credit, or not, by the estate of *Robinson*. It is enough to say that *Tucker* could only pay what *Robinson* owed, and the heirs of *Fowler* have not attempted to set up any other claim than that on which we think the imputation should have been made.

It is therefore ordered and decreed that the judgment of the court below be avoided and reversed, and that said sum of $12,701 03 be allowed as a credit to the estate of *Abner Robinson*, deceased, on the defendant's claim, to be imputed on the 24th of April, 1851, that the injunction herein sued out for said amount be made perpetual, and that the defendants and appellees pay the costs of both courts.

MERRICK, C. J. Although I have doubts whether sufficient facts have been established to throw the burden of proof upon the heirs of *Fowler* to show that the intestate held other claims against the estate of *Robinson*, still I am not prepared formally to dissent.

Rehearing refused.

JOHN C. BEATTY, for the use, &c., *v.* MILES A. McCLEOD, Tutor.

The maxim that money has no identity, when applied to agents, is true in this sense: if it is deposited in bank in the name of the agent, with his own funds, or kept with his own money, it cannot be identified, and must necessarily be held to belong to the agent, in any contest between the principal and third persons claiming the same.

So also if the agent pays out the money to one who receives it in good faith, it cannot be recovered back—it has no identity.

But this doctrine has never been held to extend to cases where the money has become capable of a complete identification from the manner in which it has been kept—as in packages, labeled in the name of the principal, or deposited by the agent in bank in the name of the principal.

When the agent makes the deposit in the name of the principal, it is to be presumed that the money he so deposited is the identical money which he received from or on account of his principal.

A tutor, who was insolvent, believed himself about to die, deposited a sum of money with M., stating it to be the property of his ward. It was shown that the tutor was in possession of no means but those belonging to his ward, and that he had recently obtained certain notes of his ward to be discounted, amounting to a larger sum than that deposited with M. *By the court:* As by law the tutor ought not to use the funds of his ward, and as he has the right to deposit such funds in bank in his name as tutor, or to keep them distinct from his own by proper labels, there is no good reason why, on an occasion like the present, he might not deposit the money with some trusty person for safe keeping.

APPEAL from the District Court, Fifth District, Parish of Lafourche, *Cole*, J.

J. C. & A. Beatty, for plaintiff and appellant. *Belcher*, for defendant.

MERRICK, C. J. *W. R. Jordan*, of the parish of Lafourche, was taken sick and died at Tuscumbia, in the State of Alabama.

He had been insolvent for many years. His wife died some time previously, leaving an estate, the most of which was sold, and brought $21,545 55. Although the sale was on terms of credit in part, *Jordan* discounted the principal notes and reduced them to cash. He had at the decease of his wife been confirmed as natural tutor to his minor daughter, issue of their marriage.

While he was sick at Tuscumbia, a few days before his death, under apprehension that his sickness would terminate fatally, he sent for a gentleman of that place, *Judge Nooé*, and deposited with him the sum of $6565, informing him that the money was not his, but belonged to a daughter for whom he was tutor, and exacted a promise from *Judge Nooé* that he would write to the defendant, informing him that he had this money, and request that he should become tutor to his daughter, and deliver the money to the defendant, when he should come after it.

The letter to the defendant was written in the presence of the sick man, read to him, and deposited by one of the servants he had with him in the post-office.

The money was sealed up in packages, and kept until the arrival of the defendant—who, in accordance with a request contained in the letter, had caused himself to be appointed tutor—and delivered to him. The defendant returned with the money to Louisiana, and has the same under administration as tutor to the minor.

The testimony shows that the intestate was in possession of no other means except those entrusted to his management as tutor, and that he ought to have had in his hands, after the discount of the notes not matured, a larger sum in cash than that left with *Judge Nooé*.

The present action is brought by certain of the creditors of *Jordan*, who contend that as money cannot be identified, the fund received by the defendant must be considered as belonging to *Jordan*, and distributed among his creditors.

It is also intimated that if the money is shown to have arisen from the discount of notes received at the probate sale before their maturity, it was a conversion of the notes to his use, and therefore made the money his own.

The maxim that money has no identity, when applied to agents, is true in this sense: if it is deposited in bank in the name of the agent, with his own funds, or kept with his own money, it cannot be identified, and must necessarily be held to belong to the agent in any contest between the principal and third parties claiming the same.

So also if the agent pays out the money to one who receives it in good faith; it cannot be recovered back; it has no identity. But this doctrine has never been held to extend to cases where the money has become capable of a complete identification from the manner in which it has been kept, as in packages labeled, in the name of the principal, or deposited by the agent in bank, in the name of his principal. *McDonogh* v. *Delarsen*, 10 Rob., 481.

As money, however, can have no identity in the sense above indicated, when the agent does make the deposit in the name of the principal, it is to be presumed that the money he so deposits is the identical money which he received from or on account of his principal.

As by law the tutor ought not to use the funds of his ward, and as he has the right to deposit such funds in bank in his name as tutor, or to keep them distinct from his own by proper labels, we can see no good reason why, on an occasion like the present, he might not deposit the money with some trusty person for safe keeping.

We do not see any force in the argument that the tutor has converted the notes into cash, and therefore made the proceeds his money. If the tutor has wronged the minor by discounting the paper belonging to her, it is no reason why she should be further wronged by giving the proceeds to the creditors of her father.

Believing the case to be clearly with the defendant on the merits, we have not deemed it important to consider the objections to the form of the action.

Some comments have been made in argument in respect to the large amount of property which the deceased, *Mrs. Jordan*, managed to acquire under her judgment against her husband for the separation of property. As the judgment of separation has been admitted to have been obtained in good faith for a sum really due, and as this action has not been brought to set aside the purchases made by the mother of the minor, under her judgment and with her paraphernal funds, it is evident that this argument is foreign to the issue before us.

Judgment affirmed.

Susan Bourgeat, Administratrix, *v.* Elijah Adams.

Where an administrator obtains a judgment against a former administrator, whose estate, as shown by the tableau, is utterly insolvent, no further proceedings need be had by him against the estate of the former administrator, to entitle him to judgment against the surety of the former administrator.

APPEAL from the District Court, Ninth District, Parish of Point Coupée, *Robertson*, J., presiding. *Cooly*, for plaintiff and appellant. *U. B. & R. Phillips*, for defendant.

Lea, J. The administratrix of the succession of *Augustin Bourgeat* claims from the surety of the former administrator of the succession of said *Augustin* the amount of a judgment obtained against the estate of the former administrator for an amount due said estate for moneys received by him as administrator, and not accounted for.

To this petition the defendant excepted, on the ground that the administratrix had not taken the necessary steps to make the money out of the estate of his principal. It is shown that the plaintiff prosecuted her demand against the estate of the former administrator to a final judgment, and that his estate, as appears by the tableau, is utterly insolvent.

We think no further steps were necessary, if, indeed, they were possible.

The ruling of this court in *Alley* v. *Hawthorne* is fully applicable to this case: "The law will not turn a judgment creditor over to a labyrinth of creditors to await the tardy liquidation of a litigated or insolvent succession."

See also *Wells* v. *Roach & Watson*, 10th An., 543.

It is ordered that the judgment appealed from be reversed, that the exception filed by the defendant be overruled and dismissed, that the case be remanded for further proceedings to be had therein according to law, and that the defendant pay the costs of this appeal.

Widow Pierre Gautreau *v.* Auguste H. Verret.

The court will not presume that a note not dated, and bearing 10 per cent. interest on its face, was executed on or before the day when the rate of interest was limited by law to 8 per cent.

APPEAL from the District Court, Fifth District, Parish of Terrebonne, *Cole*, J. *Goode*, for plaintiff. *J. C. & A. Beatty*, for defendant and appellant.

Merrick, C. J. The note sued on in this case is in these words, viz.:

"A un an de date, je promets de payer à l'ordre de veuve *Pierre Gatreau* la somme de trois cent soixante-trois piastres et 99-100, pour valeur reçue et les intérêts à dix du cent de cette date.

"Terrebonne, 27 avril, 184–.

(Signed) "A. H. Verret."

The note is in the handwriting of defendant, and the plaintiff, it appears, does not know how to write.

The plea of prescription is interposed.

It appears now to be well established that the defendant, who pleads prescription, must show the facts from which it results—that the burden of proof is upon the defendant to establish the plea.

The defendant contends that there are two circumstances from which the date of the note may be inferred to be more than five years previous to the institution of the suit.

The one is, that the note bears 10 per cent. interest, and it must be presumed to have been given prior to the statute of 1844 reducing the rate of interest to 8 per cent.

The other, that the defendant for several years has not been in good credit.

In regard to the last fact proven, it may be remarked that no presumption can arise from this circumstance, as the plaintiff is not shown to have had knowledge of the same.

The other ground seems to be covered by the case of *Andrews* v. *Rhodes*, 10 Rob., 52, where it was held that the court would not presume that a note not dated was executed at or before the day when interest commenced to run according to the face of the note. The statement of the interest at 10 per cent. may have been by error, or as the judge of the lower court remarks, the note may have been given in renewal of an old one. The defendant has failed to make his plea certain, and the judgment of the lower court, which correctly rejects the interest, must be affirmed.

Judgment affirmed.

THE STATE v. THE JUDGE OF THE NINTH JUDICIAL DISTRICT COURT OF POINTE COUPEE.

The fact that the Sheriff's wife has a law suit (to which he is a necessary party) pending before the court for which a jury is to be drawn, does not disqualify or exempt the Sheriff from performing the ministerial duties imposed upon him by the Act "relative to juries," approved March 14, 1855; nor does the fact that he has performed those duties furnish good cause for a challenge to the array by the party opposed to his wife, when a jury thus drawn is called to try her case.

Malpractice should be suggested and made probable before the array willbe set aside, unless there is some apparent legal defect.

The Sheriff was not disqualified to summon the jurors for the term, after they were drawn according to law; nor does the fact that he summoned them furnish ground for challenge to the array.

The Code of Practice, Articles 496-7, made it the duty of the Clerk to draw the names of the jurors from the box, for the trial of a particular cause, and although, by the Act of 27th April, 1826, this is no longer necessary, it may furnish a guide for the present case.

It would not be becoming in this case for the Sheriff to attend personally upon the jury during their deliberations.

Where there is no qualified Coroner, the Act of 9th March, 1855, section 1st, furnishes a mode by which the vacancy may be speedily filled.

By the Court: We would not be supposed to intimate that a cause must be utterly suspended when the Sheriff and Coroner are both disqualified to perform ministerial duties in a particular case.

APPEAL from the District Court, Ninth District, Parish of Pointe Coupée, *Cooley*, J. *U. B. & E. Phillips* and *Haralson*, for petitioner.

SPOFFORD, J. The fact that the Sheriff's wife has a law-suit (to which he is a necessary party) pending before the court for which a jury is to be drawn, does

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not, in our opinion, disqualify or exempt the Sheriff from performing the ministerial duties imposed upon him by the Act "relative to juries," approved 14th March, 1855, (Session Acts, page 297,) nor does the fact that he has performed those duties furnish a good cause for a challenge to the array by the party opposed to his wife, when a jury thus drawn is called to try her case.

We have not been referred to any express law which declares such a disqualification.

There seems to be no good reason for establishing a rule which would produce so many inconveniences and hardships.

The law directs, in the most explicit terms, how the jury shall be composed. A list of all the qualified jurors in the parish is to be made out from the tableau of assessment, not by the Sheriff alone, but by the Sheriff, Clerk, Recorder, and three freeholders together; these names being well mixed in a box, one of the said officers, under the direction of the others and of the freeholders present, is to draw therefrom not less than forty-eight ballots, etc.

The law defines who shall compose the total list from which the jury for a given term is to be drawn, and chance determines who are drawn.

Six men are to preside over the work; so that there must not only be a most flagrant and easily proven breach of the law, in order to draw a jury who will be partial in a given case, but to accomplish such a result there must be a conspiracy between the Sheriff, Clerk, Recorder, and three freeholders.

Such a state of things is not to be presumed from the bare fact that one of the six persons, or a wife or kinsman of one of them, has a law suit which may be tried before a jury to be selected by the parties out of the array drawn for the term.

Malpractice should be suggested and made probable to the court before the array is set aside, unless there is some apparent legal defect.

The Sheriff was not, in our opinion, disqualified to summon the jurors for the term after they were drawn according to law; nor does the fact that he summoned them furnish ground for a challenge to the array.

The District Judge, in his answer to the mandamus, has intimated that it would be desirable for us to express an opinion as to the fitness of the Sheriff to call the jurors to the jury-box, and attend to them during the trial of the suit, in case we should find the array a competent one.

The Code of Practice, in Articles 496-7, made it the duty of the Clerk to draw the names of the jurors from the box for the trial of a particular cause, and although, by the Act of 27th February, 1826, this is no longer necessary, it may furnish a guide for the present case.

We would not deem it becoming in this case for the Sheriff to attend personally upon the jury during their deliberations.

The District Judge states that there has been no qualified acting Coroner for some time past in that parish. The law provides a mode by which the vacancy may be speedily filled. Act of 12th March, 1855, § 1. (Session Act, page 83.)

We would not be understood to intimate, however, that a cause must be utterly suspended when the Sheriff and Coroner are both disqualified to perform ministerial duties in a particular case.

It is, therefore, ordered that a peremptory mandamus issue to the Judge of the Ninth Judicial District Court in and for the parish of Pointe Coupée, commanding him to proceed at the proper time to the trial of the cause pending in the said court, wherein *John S. Scott* is plaintiff in injunction, and the relator,

Judith Ann Morgan, wife of *James A. Morgan*, and her said husband are defendants in injunction, and to allow said cause to be tried before a jury formed, drawn and summoned as prescribed by the Act of March 14th, 1855, and further to proceed according to law and to the views expressed in this opinion.

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THE STATE *v.* GUILLERMO BALLERIO.

Where a bill of exceptions, taken to the refusal of a judge to grant a continuance in a criminal case, shows that there were matters of fact known to the judge, which, though they do not appear, may have had an important bearing on the decision of the question of continuance, the Supreme Court will not interfere.

The accidental omission of some names from the jury-list will not furnish a sufficient ground for challenging the array; to make a perfect list would be impracticable, and to construe the law so as to require it, would operate an indefinite suspension of the trial by jury.

A party under indictment has not the right to move for attachments against absent persons, whose names are found on the jury-list, in order to bring into court a greater number of jurors, when there are enough in attendance to complete the panel.

It is good cause of challenge in capital cases that a juror has conscientious scruples against finding an unqualified verdict of "guilty."

In determining the guilt or innocence of a party indicted, the jury are the judges of the law as well as of the facts; but not in exactly the same sense. Under our statute, they are the exclusive judges of the facts; they are, subordinately, judges of the law, because the statute proceeds upon the assumption that they are not familiarly conversant with it, and therefore requires the presiding judge to "give them a knowledge of the law applicable to the case." They have power to decide against the judge's opinion of the law—nay, they have power to pervert or ignore the law itself by their decision, and no penalty awaits them. But, as they cannot trample on the law without spurning the obligation of their oaths, so they cannot in general overrule the authoritative exposition of the law given by the judge, without endangering the cause of justice, and forgetting the theory upon which its administration is based. That theory is, that the complicated duties of a criminal trial should be so parcelled out amongst various officers as to give to no one man or set of men unqualified and arbitrary control over the life and liberty of the citizen and the welfare of the State. After hearing the arguments of both sides, the judge, unbiassed by interest or passion, is expected to declare the law; the jury to apply it to the facts which they find. They may safely take the law from the judge, for, if he misstates it to the prejudice of the prisoner, the latter is not without remedy: his exceptions may be heard in another tribunal, after the excitement of the hour is past. But the error of the jury is subject to no such revision.

The following charge to the jury was asked and refused:

"In all criminal cases the jury are the judges of the law as well as the facts. The province of the judge is to explain the law, and they are bound to listen to and weigh such explanation with due care and attention, although not bound to admit it as conclusive of the law, should they differ in opinion from the judge." *By* MERRICK, C. J., *dissenting:* I think the instructions should have been given the jury as prayed for.

APPEAL from the Fifth District Court of New Orleans, *Robertson*, J.

Morse, Attorney General, for the State. *G. & C. E. Smidt*, for appellant.

STOFFORD, J. *Guillermo Ballerio* has appealed from a judgment of the First District Court of New Orleans, by which he was sentenced to seven years' imprisonment in the Penitentiary, for the crime of manslaughter.

I. If we concede that there may be cases where this court has power to review the exercise of the discretion vested in the District Judges upon the subject of continuances in criminal cases, still the appellant has not presented a fit case for relief.

The bill of exceptions and the affidavit do not disclose the exercise of any diligence on the part of the prisoner. It is not shown that the absent witness was ever recognized to appear or even summoned, although he had been present on other occasions. But the bill of exceptions does show that there were

matters of fact known to the District Judge, which do not fully appear before us, and into the truth or falsity of which we could not enquire, if they did, but which may have had an important bearing upon the decision of the question of continuance. It is therefore unnecessary for us to express an opinion whether the doctrine in the case of *The State* v. *Hunt*, 4 An., 438, was laid down too broadly or not.

II. The second bill of exceptions is also untenable. It was taken to the opinion of the Judge overruling a challenge to the array. It does not show affirmatively that the Sheriff failed to make out, in December, 1854, a list of all persons, in the parish of Orleans, subject to jury duty, and if it did, the accidental omission of some names would not furnish a sufficient ground for challenging the array. To make a perfect list would be impracticable, and to construe the law so as to require it, would operate an indefinite suspension of the trial by jury.

III. We have not been referred to any law authorizing a party under indictment, to move for attachments against absent persons whose names are found upon the jury list, in order to bring into court a greater number of jurors when there are enough in attendance to complete the panel.

In the absence of a legislative enactment upon the subject, we think this matter is left exclusively to the discretion of the District Judges, and with the exercise of that discretion, we will not interfere upon grounds like those suggested in the third bill of exceptions.

IV. The next bill of exception was taken to the ruling of the Judge, who held it to be good cause for challenge to a juror by the State, that he had conscientious scruples against finding an unqualified verdict of "guilty" in capital cases. In the recent case of *The State* v. *Melvin*, we expressed our unanimous concurrence in the correctness of a similar ruling, and we see no reason to change our opinion.

V. Lastly, the prisoner's counsel excepted to the refusal of the Judge to give the jury the following instructions: "That in all criminal cases the jury are the judges of the law as well as the facts. The province of the Judge is to explain the law, and they are bound to listen to and weigh such explanation with due care and attention, although not bound to admit it as conclusive of the law should they differ in opinion from the Judge."

As the prisoner took no exception to any portion of the Judge's charge, we are bound to presume that it embodied a correct exposition of the law applicable to the case. So the question is, whether, after a sound and strictly legal charge, the court so far erred in refusing to add the above instructions as to authorize us to set aside the verdict. We think not.

There is undoubtedly an admixture of truth in the instructions asked and refused. But they were so framed that, without further qualification, they would have been likely to leave an erroneous impression upon the minds of jurors.

In determining the guilt or innocence of a party indicted, the jury are the judges of the law as well as of the facts; but not in exactly the same sense. Under our statute, they are the exclusive judges of the facts; they are, subordinately, judges of the law, because the statute proceeds upon the assumption that they are not familiarly conversant with it, and therefore requires the presiding Judge to "give them a knowledge of the law applicable to the case." They have power to decide against the Judge's opinion of the law; nay, they

have power to pervert or ignore the law itself by their decision, and no penalty awaits them. But, as they cannot trample on the law without spurning the obligation of their oaths, so they cannot in general overrule the authoritative exposition of the law given by the Judge without endangering the cause of justice and forgetting the theory upon which its administration is based. That theory is, that the complicated duties of a criminal trial should be so parcelled out amongst various officers as to give to no one man or set of men unqualified and arbitrary control over the life and liberty of the citizens, and the welfare of the State.

After hearing the argument of both sides, the Judge, unbiassed by interest or passion, is expected to declare the law; the jury to apply it to the facts which they find. They may safely take the law from the Judge, for if he misstates it, to the prejudice of the prisoner, the latter is not without remedy; his exceptions may be heard in another tribunal, after the excitement of the hour is past. But the error of the jury is subject to no such revision.

The reason why we set aside verdicts for an erroneous charge of the Judge is, that the law presumes the charge to have exercised a controlling influence upon the minds of jurors.

It is ordered that the judgment appealed from be affirmed, with costs.

MERRICK, C. J., dissenting. I think the instructions should have been given the jury, as prayed for. It is in accordance with the common law, as I think it has been understood in this State, and also in harmony with the practice in civil cases. C. P., 520; 12 R. R., 165.

Experienced counsel are often unwilling to prejudice their cause in the minds of the jury by a seeming admission that the charge of the Judge is against the accused, even where they think he is in some respects in error. I think, therefore, the accused is entitled to the instructions asked, without excepting to the charge in other particulars, and that the case ought to be remanded for a new trial.

SUCCESSION OF JOSEPH JEWELL.

Where the purchaser of land failed to give his notes according to the terms of sale, he cannot set up the prescription of five years.

A debtor said he would "settle provided his claims were allowed." *Held:* insufficient to interrupt prescription.

APPEAL from the District Court, Ninth District, Parish of Pointe Coupée, *Cooley*, J. *W. H. Cooley*, for appellant. *Provosty*, for appellee.

VOORHIES, J. The opponent is appellant from a judgment rejecting her claim against the succession of the late *Joseph Jewell*.

The appellee has filed a motion to dismiss the appeal on grounds which we consider untenable. The addition of the word "administratrix" to the appellant's name by the Clerk may be treated as mere surplusage. Her motion for the appeal, and the bond executed by her, sufficiently indicate the capacity in which she has taken this appeal.

The facts disclosed by the record are in substance these: At a judicial sale of the estate of the late *William R. Faulkner*, of which the appellant, his widow, was the administratrix, made on the 1st of July, 1843, a tract of land was ad-

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judicated to *Joseph Jewell* for the price of $768, payable, according to the terms of sale, at one, two and three years from the date thereof; the purchaser to give his notes, with good security, and to bear ten per cent. interest from maturity until paid.

Jewell signed the proces verbal of adjudication, but did not comply with the terms of sale by giving his notes. No steps appear to have been taken by the appellant, during her administration, to compel him either to do so, or to pay the price of adjudication. In the final settlement of the estate of her deceased husband, she was charged with the amount of this adjudication, which she now claims as a *subrogee* of his estate.

The appellee relies on the prescription of five and ten years as a bar to the action.

The purchaser having failed to comply with the terms of his contract, by giving his promissory notes, we are of opinion that the only prescription applicable is the prescription of ten years. See the case of *Burton* v. *Chaney*, 6 An., 338. The *Widow Faulkner* filed her opposition to the tableau in September, 1855. It is, therefore, clear that the third instalment of the price of the adjudication cannot be extinguished by prescription. But in regard to the others it is different, unless an interruption has taken place, as contended for by the appellant.

According to the ruling of this court in the case of *Lackey* v. *Macmurdo*, 9 An., 15, we think the acknowledgment of *Joseph Jewell*, during his lifetime, as shown by the testimony, is insufficient to bind his estate. The substance of that acknowledgment appears to be, that he would "settle, provided his claims were allowed." What those claims were, it is true, does not appear. But it is evident that his acknowledgment, qualified as it is, amounts at most to this, that he was willing to settle the price of adjudication on condition that his claims against the estate of *Faulkner*, would be allowed in compensation; in other words, he did not acknowledge his indebtedness to the appellant for the amount of her claims.

It is, therefore, ordered and decreed, the judgment of the court below be avoided and reversed, that the plea of prescription be maintained as to the first two instalments of the price of the adjudication, and overruled in the last instalment of the price, viz: the sum of $256, with ten per cent. interest from the 1st July, 1846, and that the case be remanded for further proceeding to be had herein according to law.

MARTHA WEBB v. WILLIAM DEESON.

A written admission made by plaintiff, that a certain slave is the property of F. D., and that "he can do as he pleases with her," estops her from claiming the slave from one to whom F. D. had made title.

APPEAL from the District Court, Tenth District, Parish of Carrol, *Farrar*, J. *Dubose*, for plaintiff and appellant. *Caldwell*, for defendant.

LEA, J. The plaintiff claims from the defendant a female slave, of whom she alleges that she is the owner and proprietor, and also claims damages for

her detention. The defendant sets up title under an act of sale from one *Fenton H. Davis*, the son of the petitioner, who, as defendant alleges, is estopped from questioning the title made by *Davis*, by her written recognition thereof made expressly for the purpose of enabling *Davis* to give a satisfactory title to a purchaser. The written admission referred to in the defendant's answer, signed by the plaintiff, expressly recognizes that the woman *Clarissa* is the property of *Fenton Davis*, and that "he can do as he pleases with her." It is unnecessary to enquire whether in point of fact the slave *Clarissa* really belonged to *Davis* or not, the plaintiff is estopped from questioning his title by her own act. "Admissions which have been *acted upon by others*, are conclusive against the parties making them, in all cases between them and the persons whose conduct they have thus influenced." 1st Greenleaf, on Evidence, § 207.

In such cases, considerations of good faith and public policy alike preclude parties from repudiating their own representations, and "it makes no difference in the operation of this rule whether the thing admitted was true or false, it being the fact that it has been acted upon that renders it conclusive." 1st Greenleaf, on Evidence, § 208. There was no error in the ruling of the court in admitting the testimony referred to in the bills of exceptions taken by plaintiff's counsel.

Judgment affirmed.

Succession of Cleopas Landry.

It is impossible to lay down any definite rules limiting the discretion of a court in ordering or maintaining such steps as may be necessary for the protection of the persons, or property of minors. Cases may arise for which the law has made no specific provision, and in such cases, it is the duty of the court, in its discretion, to order such steps as may afford effectual protection; but for all the ordinary purposes of administration, the interests of minors are placed under the control of tutors and under-tutors, acting under the supervision of the court.

A mere informality in the organisation of a family meeting, does not involve a nullity of its proceedings, and they will not be set aside in the absence of proof of injury to the minors.

Where a family meeting assented to the second marriage of the tutrix, on condition of her giving bond to secure the minors, it will be time enough to consider the effect of this condition after the second marriage is contracted.

APPEAL from the District Court, Fifth District, Parish of Assumption, *Cole*, J. *Maurin & Gentile*, for appellants. *Mailhot & Mills*, for appellees.

Lea, J. It is not absolutely certain, from the manner in which the various matters displayed in the record have been referred to in the briefs of counsel, whether the appellants considered that one or both of the judgments which we find in the record were appealed from. As the under-tutor, however, has not been made a party to the appeal, and as but one judgment has been appealed from, we shall consider the appeal as applicable to the judgment dismissing the opposition of the appellants to the homologation of the proceedings of the family meeting held to deliberate upon the propriety of allowing the natural tutrix of the minors *Landry* to retain the tutorship notwithstanding her contemplated marriage. Various matters are set forth in the opposition, having

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relation to the organization of the family meeting, and to the order of the Clerk thereon; to which opposition the tutrix filed a peremptory exception, that the opponents are without interest to enquire into the validity of the proceedings, or otherwise to disturb them. It is impossible to lay down any definite rules limiting the discretion of a court in ordering or maintaining such steps as may be necessary to the protection of the persons or property of minors. Cases may arise for which the law has made no specific provision, and in such case it is the duty of the court, in its discretion, to order such steps as may afford effectual protection; but for all the ordinary purposes of administration, the interests of minors are placed under the control of tutors and under-tutors, acting under the supervision of the court.

In the case at bar, no sufficient cause is set forth to justify the extraordinary interference of the relatives of the minors. A mere informality in the organization of a family meeting, does not involve a nullity of its proceedings, and though proceedings may be instituted for their annulment upon sufficient cause, they will not be entertained in the absence of any proof of injury to the minors. The rule governing such cases is laid down with clearness and precision in Marcadé, 2d vol., p. 207, sec. 4.

"La loi ne prononçant nullité ni pour l'inobservation de l'ensemble des règles ci-dessus tracées, ni pour aucune d'elles en particulier (ce qui donnerait un point de comparaison pour les autres); il s'ensuit que les tribunaux ne seront *jamais forcés* d'admettre cette nullité; mais, d'un autre côté, le législateur n'ayant certainement pas eu la pensée de laisser ces règles sans sanction aucune, il s'ensuit que les tribunaux auront *toujours la faculté* d'annuller en se décidant par les circonstances. Ils devront le faire, 1o. quand la violation portera sur une règle tellement grave, qu'il serait vrai de dire qu'il n'y a point de conseil de famille; 2o. quand la violation, quelle qu'elle soit en elle-même, aura causé un grave préjudice au mineur."

The District Judge did not consider that a case was presented which justified him in sanctioning the interference of the relatives of the minors, in the proceedings had with reference to their interests, and we are not prepared to say that he erred.

The homologation of the proceedings of the family meeting carries with it, at most nothing more than an obligation of the tutrix to furnish bond "pursuant thereto," in case she enters into a second marriage; or at least it is a condition annexed to the consent of the family meeting without which it probably would not have been given. Should the tutrix therefore marry without giving bond, it will be proper to consider the effect of the condition annexed to their assent, but not till then.

See *Smith, under-tutor*, v. *Dickerson*, 2d An., 401.

Judgment affirmed.

MARTIAL DODEMAN et al. *v.* R. R. BARROW.

The laws requiring transfers of immovables to be in writing, would be vain and illusory, if the thing sold were not required to be described in writing. In forced sales, especially, it is necessary for the description to be such as to warn the public what is intended to be sold; that the purchaser may be able to identify the object of his purchase, and that the property of the original owner may not be sacrificed by a sale in the dark.

The adjudication by the State Treasurer of "six arpents, more or less, in the parish of Assumption," unaccompanied by a delivery of possession, did not convey a legal title to the specific land claimed in this action.

The monition law cannot cure such a substantial defect as this.

The only *indicia* of taking possession by defendant—to make a basis for prescription—before 1844, were that in 1840, he sent hands to aid in stopping a crevasse in front of the tract in question, and that the next year, some of his negroes worked on a road and levee running over a part of it. *By the court:* It would be contrary to the text and meaning of the Code to declare these *indicia* sufficient to establish such an unequivocal corporal possession—*animo domini*—as is required to mark the commencement of the prescription of ten years. Defendant had other lands in the vicinage. He had an obvious interest in stopping the crevasse and assisting to keep the road and levee in repair, and his doing so did not clearly indicate an intention to take possession of this piece of land as owner.

The land in dispute was abandoned by plaintiffs in 1827 or 1828. It is not shown that they exercised any act of ownership over the land from that period until the institution of this suit,—a period of twenty-two or three years,—and under Article 3467 C. C., it would seem that the plaintiffs have lost their civil possession, because they did not pay taxes, keep up the roads and levees, or do other similar acts. (MERRICK, C. J., dissenting.)

While on the one hand, the positive acts of defendant show possession before 1844, much can be inferred, on the other, from the passive conduct of plaintiffs, which seems to have amounted to an intention of ridding themselves of the burden of taxes and keeping up levees, by abandoning the property to the purchaser at the tax sale and his vendees. (MERRICK, C. J., dissenting.)

Three-fourths of the territory of the State, consisting of forests, prairies, swamps and wood lands, for the present at least, admit of scarcely any other possession than that shown by the defendant in this case. To require this sort of real estate to be enclosed, in order to prescribe, would be the virtual abrogation of the provisions of the Code as to a large part of the wealth of the State.—(MERRICK, C. J., dissenting.)

Code, 3453, 3466, 3467, 3389, 3399, 3400.

APPEAL from the District Court, Fifth District, Parish of Assumption, *Cole*, J. *Bonford & Gentile*, for plaintiffs. *Illsley*, for defendant and appellant.

STOFFORD, J. (MERRICK, C. J., dissenting.) This cause has formerly been before this court, upon a peremptory plea of *res judicata* interposed by the defendant and sustained by the District Court. We reversed the judgment, overruled the plea, and remanded the cause for a trial upon the merits. See 10th An., p. 193.

There has been a judgment against the defendant, and he, in his turn, has appealed.

The action is petitory; its object is to recover a certain tract of land containing 240 arpents on the bayou Lafourche, in the parish of Assumption.

The defendant holds (through mesne conveyances) under a tax sale made by the State Treasurer in 1828, for taxes alleged to have been due by the plaintiff *Dodeman*. The land was described in the adjudication merely as "a certain tract or parcel of land situated in the parish of Assumption, measuring six arpents, more or less."

In forced alienations of real property, it is essential that there should be a

reasonably certain description of the property seized and sold. The laws requiring transfers of immovables to be in writing, would be vain and illusory if the thing sold were not required to be described in writing. In forced sales, especially, it is necessary for the description to be such as to warn the public what is intended to be sold; that the purchaser may be able to identify the object of his purchase, and that the property of the original owner may not be sacrificed by a sale in the dark. *Wilson* v. *Marshall*, 10th An., p. 327.

We are of the opinion that the State Treasurer's adjudication to *Mooney* (under whom the defendant claims) of "six arpents, more or less, in the parish of Assumption," unaccompanied as it was by a delivery of possession, did not convey to *Mooney* a legal title to the specific 240 arpents claimed in this action.

And we have heretofore decided that the monition law was not intended to cure such a substantial defect in the sale as this.

As the only title set up by the defendant is traced from *Dodeman* through the tax sale to *Mooney*, *Dodeman* must recover unless his title has been lawfully divested, or unless the defendant's plea of the prescription of ten years is valid.

Upon the former point we have said enough. The latter requires a brief notice.

It does not appear that *Mooney*, who, it is pretended, bought this land at the tax sale aforesaid, ever went into possession of it.

In 1838, *Mooney* sold the tract now sued for to one *High*, reciting the sale for *Dodeman's* taxes as the origin of his own title. But it is not shown that *High* ever took possession.

About a month after his purchase, *High* sold the tract to the defendant *Barrow*; but having no possession, either actual or civil, himself, he could transfer none to his vendee.

Barrow then was bound to prove a corporeal possession in himself as the starting point of his title by prescription.

The incidents of the possession under title, which will enable one to acquire an immovable by the prescription of ten years, are explicitly laid down in Article 3453 of the Louisiana Code; it must be a possession in fact and right as owner; it must be continuous and uninterrupted, peaceable, public and unequivocal. The incidents of possession to support the prescription of thirty years without title, are the same: the possession on which this long prescription is based, "ought to have the other qualities which are necessary to the prescription of ten and twenty years, i. e. it must be continuous and uninterrupted during all that time; it must be public and unequivocal and under the title of owner." C. C., 3466. And it is only when it has been "commenced by the corporeal possession of the thing," that the possession "may be preserved by external and public signs announcing the possessor's intention to preserve the possession of the thing, *as the keeping up of roads and levees*, the payment of taxes, and other similar acts." C. C., 3467.

The only *indicia* of a taking of possession by *Barrow* previous to 1844, which we find to be satisfactorily established by the evidence, are the two facts that in 1840 he sent hands to aid in stopping a crevasse in front of the tract in question, and that the next year, some of his negroes worked on a road and levee running over a part of it.

We think it would be contrary to the text and meaning of the Code, to declare these *indicia* sufficient to establish such an unequivocal corporeal posses-

sion, *animo domini*, as is required to mark the commencement of the prescription of ten years.

The defendant had other lands in the vicinage. He had then an obvious interest in stopping the crevasse and assisting to keep the road and levee in repair, and his doing so did not clearly indicate an intention to take possession of this piece of land as owner.

In 1844 or 1845, he did take unequivocal possession. The witnesses, without dissent, speak of that as the marked epoch when he began to use and cultivate the land. But prior to that time, we do not find that he cut a tree or dug a ditch, or built any kind of structure, or planted upon this land, although from one fourth to one third of it had been cleared many years anterior to his purchase.

The plea of prescription does not appear to us to be tenable, as citation was served upon the defendant in August, 1851.

We find no sufficient evidence to prove that *Barrow* was in bad faith whilst reaping fruits and making improvements, before this suit was instituted, and he has a legal presumption in his favor.

Upon the subject of rent and improvements, there is the usual discrepancy in the evidence.

The District Judge, who saw and knew the witnesses, had a better opportunity to graduate the amounts which should be allowed to either party, and although both complain of his estimates, we are not prepared to say that they were erroneous or unjust.

The judgment is therefore affirmed, with costs.

MERRICK, C. J., dissenting. I have not been able to concur in the view taken of this cause by the majority of the court.

The principal defence to the action, is the plea of prescription of ten years.

The Judge of the lower court was of the opinion that the defendant was a possessor of the land in question in good faith, but that the proof did not show a possession extending back a sufficient period to enable him to prescribe against the plaintiff's title. The tract of land seems to have been cultivated many years ago, and being covered with coco, was abandoned by the plaintiffs about the year 1827 or 1828. It is not shown that they exercised any act of ownership over the land, from that period until the institution of the suit, a period of twenty-two or twenty-three years, and under Article 3467 C. C., it would seem that the plaintiffs have lost their civil possession because they did not pay taxes, keep up the roads and levees, or do other similar acts.

The Judge of the lower court seems to have believed the witnesses who testified as to defendant's acts of ownership, but he did not think they proved enough to establish the plea of prescription.

It appears that the defendant *Barrow* caused his title to be recorded.

He published a monition in the parish where a part of the plaintiffs reside, describing the tract of land in controversy, and obtained a judgment homologating the tax title.

R. C. Davis, a witness, says: "At *Barrow's* request, I worked on the road with the slaves of *Barrow*, in the early part of 1838, and afterwards repaired the roads and levees and ditches on the land. *Barrow* had then and still has the actual and exclusive possession of said land as owner and proprietor thereof. I had for many years, and since 1838, brought a number of negroes every year, working on the land, repairing the roads, levees, etc., cutting ditches on

the whole front of the land, and also towards the rear, I cannot say how far back. The land was certainly in possession of *R. R. Barrow* in the spring of 1838. I heard him say he purchased it on or about May, and it is now in his possession and has been since he purchased it, in 1838."

A. V. Rogers says: "In the early part of the year 1838, I met with said *Barrow* on the land, working the road with negroes, and ditching."

In another place, he says: "I saw *Barrow* working on the land, that is on the road, with his negroes, in the early part of the year 1838."

Dr. T. A. Dozier testifies that he resided with *R. R. Barrow* prior to 26th of November, 1838; that some time previous to this date, "whilst riding along the bayou, he saw ten or fifteen negroes working with different implements, such as hoes, spades and axes, as it appears to him, but does not recollect exactly; working in different directions on the plantation and on the road." He ascertained at the time that the negroes belonged to *Barrow;* thinks there were one or two white men there; he stopped a few minutes and talked with them. After this, he saw them again at work there.

Harrison Benton says, that in 1838 or 1839, he saw 12 or 15 negroes of *Barrow* working on the ditches and road in front of the land.

It is also established by abundant testimony, that in May or June, 1840, there was a crevasse upon this land. That to prevent it, *Barrow* had sent for some negroes owned by him in partnership with another; that he employed and paid the white laborers upon the crevasse, and that the overseer and slaves remained in an old store-house (magasin) whilst they were there at work. The proof shows that *Barrow* continued to keep up the roads and levees, and that in 1844 or 1845, he enclosed the land and cultivated it as a part of his sugar plantation.

If this testimony is to be believed, and it is opposed by negative testimony only, I think that the plea of prescription is sustained by it. As already observed, not the slightest act of ownership had been exercised over the place by *Dodeman* or his children, after its sale for taxes.

Barrow gave notice to all the world, in 1838, by his monition published in French and English, that he claimed the land, and it was adjudged to him by the court; hence his acts had unusual publicity.

The testimony shows that the land was probably of no value for cultivation to the plaintiffs. One of the witnesses says it was nothing but a "coco patch."

I think, therefore, the acts of *Barrow* were all that were needed to vest the possession in him. He had paid a full price for the land. He had done every act indicating ownership which the nature of the land admitted. It was probably useless for all purposes of cultivation, except for sugar, and it did not become valuable for that purpose until he bought the adjoining lands which then gave sufficient size for a plantation.

The Civil Code defines possession to be the detention or enjoyment of a thing which we hold or exercise by ourselves or another who keeps or exercises it in our name. C. C., 3389.

Detention consists in keeping a thing under our power. 1 Zacharie, section No. 184.

To be able to acquire possession of property, two distinct things are required:

1st. The intention of possessing as owner;

2d. The corporeal possession of the thing. C. C., 3399.

The Civil Code gives examples of this corporeal possession in Article 3391,

but it leaves it to the discretion of the court to judge what act constitutes possession. It is expressly provided by the Code that "It is not necessary however that a person wishing to take possession of an estate, should pass over every part of it. It is sufficient if he enters on and occupies a part of the land, provided it be with the intention of possessing all that is included in the boundaries. C. C., 3400.

That able jurist, Judge Bullard, in the case *Lecomte* v. *Smart*, 19 L. R., 489, says: "If the defendant had taken possession of the land under an apparent title, we should regard slight acts as evidence of an intention to take possession; but when a man, without any *pretence of title*, goes upon land which he is informed is claimed by another, he must show unequivocal and continued acts of possession for more than a year, to maintain the plea of prescription." While the positive acts of the defendant are shown on the one hand, much can be inferred on the other, from the passive conduct of the plaintiffs, which seems to amount to an intention to rid themselves of the burden of taxes and keeping up levees, abandoning the property to *Mooney* and his vendees. Quem ad modum nulla possessio, adquiri nisi animo et corpore potest: ita nulla amittitur, nisi in qua utrumique in contrarium actum est. ff. Lib. 41; T. D. L. 8; C. C., 3467.

Three fourths of the territory of the State, consisting of forests, prairies, swamps and woodlands, for the present at least, admit of scarcely any other possession than that shown by the defendant in this case. To require this sort of real estate to be enclosed, in order to prescribe, would be the virtual abrogation of the provisions of the Code on the subject of prescription as to a large part of the wealth of the State.

I think that prescription should protect the defendant against the claim of all of the plaintiffs, except perhaps the minor *Angelique Dodeman*.

DAVID WISE v. MARTIN GUTHRIE et al.

In a sale it is essential that the price should be certain, that is to say, fixed and determined between the parties, either by themselves, or by the intervention of a third person; otherwise there exists no sale.
C. C., 2439.

APPEAL from the District Court, Tenth District, Parish of Tensas, *Snyder*, J. *Farrar*, for plaintiff. *Reeves* and *Stacy & Sparrow*, for defendants and appellants.

VOORHIES, J. The plaintiff claims to be the owner of twenty-four bales of cotton, seized under a writ of *fieri facias*, issued on a judgment in favor of the defendant against *James N. Cole*, as the property of the latter. He alleges that the cotton was sold and delivered to him, and was in the possession of his agent, *George R. Snodgrass*, when it was levied upon him.

The plaintiff pretends to derive his title from *James Cole*, the seized debtor. On the trial below, he introduced in evidence the following instrument, viz:

"We, the undersigned, promise and oblige ourselves to deliver over unto *David Wise* the present crop of cotton we are about to make, in consideration of all necessaries furnished and to be furnished, to carry on the business of the place, by said *D. Wise*.

JOEL CHANDLER,
JAS. N. COLE."

"Waterproof, February 23d, 1853.

The interest of *Joel Chandler* in the crop appears to have been set apart to him and conveyed to the plaintiff. The plaintiff next offered his account in evidence for various goods and merchandize sold and delivered to *James N. Cole*, the items of which, proved by the testimony of his clerk, amounted to the sum of $588 28, exclusive of $67 80, amount of note for balance due in 1852; and also introduced in evidence an order drawn by *James N. Cole* on him in favor of *Reuben Chadwick*, dated the 10th of January, 1854, for the sum of $311 75, purporting to be for the price of three work-horses purchased of the latter.

The cotton, it is shown, was hauled to the gin-house of *George R. Snodgrass*, where it was ginned, baled and marked J. C., and where it was seized as the property of *James N. Cole*. *Dixon*, the overseer of *Snodgrass*, testifies that he marked the cotton in dispute with the letters J. C. without any instructions from any person; that immediately on discovering it, *Cole* told him that it was wrong, as the cotton belonged to *Mr. Wise*. *Chandler* testifies that *Cole* sold the whole of the crop to *Wise;* that "*Cole* was very much embarrassed, and could not have gotten supplies and other necessaries without making the written agreement he did with *Mr. Wise*." *James N. Cole*, also examined as a witness by the plaintiff, testified that he had sold his crop of cotton to *Mr. Wise* early in 1853, on condition that *Mr. Wise* would afford him supplies for carrying on the crop, and take up certain debts for him. That the cotton was taken by him to the gin of *Mr. Snodgrass* at the instance of *Mr. Wise*.

It is not shown whether the cotton was sold to the plaintiff, as pretended, in a lump, by weight, or by the bale; neither is it shown what was the specific price stipulated to be paid by the plaintiff. In a sale, it is essential that the price should be certain, that is to say, fixed and determined between the parties, either by themselves or by the intervention of a third person, otherwise, in the words of the law, there exists no sale. C. C., 2439.

The defendant claims damages from the plaintiff and his sureties on the bond resulting from the injunction. We are of opinion that this is not a case in which damages should be allowed. See the case *Borie* v. *Borie*, 5 L. R., 89. But the judgment injoined bearing interest, eight per cent. must be allowed, to be calculated from the date of the injunction to its dissolution. *Barrow* v. *Bank of Louisiana*, 2 Ann., 456.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed; and it is further decreed, that the injunction in this case be dissolved, and that the Sheriff proceed to make the sale of the property seized according to law; it is further adjudged and decreed, that the defendant, *Guthrie*, recover of plaintiff in injunction, and his sureties *in solido*, interest at the rate of eight per cent. per annum upon the amount of the judgment enjoined, to be calculated from the date of said injunction to the present date; it is further ordered, that the plaintiff and appellee pay costs in both courts.

GEORGE JACKSON *v.* JOSEPH WILLIAMS and JOHN M. WILLIAMS.

The delegation by which a debtor gives to the creditor another debtor, who obliges himself toward such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation. Code, 2188.

Suit brought by the creditor against the delegated debtor is not evidence of intention to discharge the original debtor.

Wallon v. Beauregard, 1 Rob., 301, is of doubtful authority.

APPEAL from the District Court, Fifth District, Parish of Lafourche, *Cole*, J. *C. A. Johnson*, for plaintiff. *J. C. & A. Beatty*, for defendant and appellant.

BUCHANAN, J. The plaintiff furnished and put up for the defendants a sugar mill and steam engine, in the year 1845, for a price payable in several instalments, running from January, 1846, to January, 1848. This suit was brought in June, 1853, for a balance due of about two thousand dollars, with interest. The defendants plead that they had delegated one *Holcombe* to pay in their place the debt due plaintiff under their said contract; that *Holcombe* assumed and promised to pay for said engine, and the plaintiff agreed to accept him as his debtor in the stead and place of defendants; that *Holcombe* subsequently paid to plaintiff a large part of the price of said engine, and for the balance due on the same, the said *Holcombe* gave, and plaintiff accepted in payment, certain mortgage notes of *Alexander H. Tyson*, drawn in favor of *Holcombe*, and by him endorsed in blank. By means whereof, defendants plead, the debt has been novated, and defendants discharged from all liability to plaintiff.

All these allegations of the answer are proved, except that the plaintiff accepted *Holcombe* as his debtor in the place and stead of defendants, and received *Tyson's* notes, endorsed by *Holcombe*, in payment of the balance due him on defendants' contract. To prove these facts, the defendants have interrogated plaintiff, who answers that "*J. M. Williams* told him, in the spring of 1849, that it was agreed between the defendants and *Holcombe* that *Holcombe* was to pay plaintiff for the machinery. Plaintiff told *Williams* that he had never accepted *Holcombe* as paymaster; that he had never been asked to do so; that the contract was in the name of defendants, and plaintiff would hold them responsible for it."

To another interrogatory, plaintiff answers: "I received from *J. C. Holcombe*, as collateral security for my claim on the machinery, two notes drawn by *A. H. Tyson*, payable to *Holcombe*, and due in March, 1849, and March, 1850, bearing interest from date. The two notes amounted to six or seven hundred dollars above my claim. *J. C. Holcombe* proposed to give me those notes for my claim. I refused to take them. He then took them to New Orleans to get them discounted. Failing to do so, he then offered them to me as collateral security. I took them as such, and stated in my receipt that upon their being paid they would be good against my claim on the machinery. I also gave *J. C. Holcombe* my obligation for the difference, payable when the last note of *Tyson* was paid to me."

This evidence does not make out the novation alleged by defendants. The delegation by which a debtor gives to the creditor another debtor, who obliges

himself towards such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation. C. C., 2188.

The case of *Walton* v. *Beauregard*, 1 Rob., 301, relied on by defendants, is of doubtful authority. We do not regard the suing of the delegated debtor as an evidence of intention by the creditor to discharge the original debtor. The words of the law are that the intention must be expressly declared. At all events the two cases differ in some essential particulars.

Judgment affirmed, with costs.

POLICE JURY OF WEST BATON ROUGE *v.* WILLIAM G. BOZMAN.

Action to recover cost of a side levee, which had become necessary in consequence of the removal back of the levee above by the parish of Pointe Coupée. *By the Court:* It is to be presumed that the change in the levee would not have been made by the authorities of Pointe Coupée unless the public safety had required it. It was the duty of the proprietor of the tract below, and of the parish of West Baton Rouge, to accommodate themselves to this change, as much so as if such change had been occasioned by a sudden caving of the banks of the river above.

The discretion in regard to the plan and size of the levees is reposed by law and the regulations of the Police Jury in certain persons, who, in this respect, act in an official capacity. If, in the exercise of their functions, they should err in regard to the size of the work to be constructed, an application to the Police Jury should be made to correct the error. But, as a general rule, after the work is done, and the expense incurred, the Supreme Court will not interfere with the discretion of officers who appear to have acted in good faith.

The reasons for the judgment rendered by the District Court were: "This case having been regularly taken up according to assignment, and after the testimony adduced, and argument of counsel, it is ordered," etc. *By the Court:* This, it is apparent, is as much a reason for rendering a judgment in favor of the defendant as plaintiff, and does not meet the requirements of the Constitution. Article 72, Constitution.

APPEAL from the District Court, Sixth District, Parish of West Baton Rouge, *Robertson*, J. *Favrot*, for plaintiff. *Elmore & King*, for defendant and appellant.

MERRICK, C. J. This is an action to recover of the defendant the sum of $960 66, the cost of a side levee built by plaintiff upon the land of *Stephen Van Winkle*, of whom defendant is a vendee.

A careful examination of the testimony satisfies us that the District Judge had sufficient proof before him to infer a substantial compliance with the law in the notices, advertisement, estimation of the work and adjudication of the contract.

The levee in question is a side levee, on the lower side of Fausse Riviere, which had become necessary in consequence of the levee above having been removed back some distance by the authorities of the parish of Pointe Coupée.

It is contended in this court that the defendant cannot be made responsible for the damage required by this act of the Police Jury of the parish of Pointe Coupée. It is intimated that this last mentioned parish ought to bear this expense, and the thirty-seventh article of the police regulations of West Baton Rouge is cited in support of this position. It is to be presumed that the change in the levee would not have been made by the authorities of Pointe Coupée unless the public safety had required it.

It was the duty of the proprietor of the tract below, and of the parish of West Baton Rouge, to accommodate themselves to the change, as much so as

if such change had been occasioned by the sudden caving of the banks of the river above. This side levee, as it was made, was after all but to unite the front levees, and therefore subject to the same rules as to the charge of the person upon whom it must fall in the first instance. Revised Statutes, 1852, p. 463, sec. 21, p. 508, sec. 5 and 6.

Several witnesses were examined for defendant, who appear to reside in Pointe Coupée, who give it as their opinion that the levee was much larger and stronger, and therefore more expensive than was needed. The discretion in regard to the plan and size of the levees is reposed by law and the regulation of the Police Jury in certain persons who, in this respect act in an official capacity. If, in the exercise of those functions, they should err in regard to the size of the work to be constructed, an application should be made to the Police Jury to correct such error. But as a general rule, after the work is done and the expense is incurred, this court will not interfere with the discretion of officers, who appear to have acted in good faith.

It is further contended, that the judgment of the lower court must be reversed, because given without reasons. The reasons stated are: "This case having been regularly taken up according to assignment, and after the testimony adduced and argument of counsel," it is ordered, etc.

This, it is apparent, is as much a reason for rendering a judgment in favor of the defendant as plaintiff, and does not meet the requirement of the Constitution. Art. 72 of Constitution.

For the reasons here given, it is ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and proceeding to pronounce such judgment as should have been pronounced by the lower court for the reasons aforesaid, it is ordered, adjudged and decreed by the court, that the privilege of the Police Jury of the parish of West Baton Rouge, for the sum of nine hundred and sixty dollars and sixty-six cents, with legal interest thereon from the 11th day of December, 1852, until paid, upon the said tract of land of the said *William G. Bozman, jr.*, in said parish of West Baton Rouge, measuring nine and one-half arpents front on the Mississippi river by the depth thereto belonging, between parallel lines, bounded above by Fausse Riviere, and below by lands known as the Withersby tract, be recognized; and it is further ordered, that said tract of land be seized and sold to pay and satisfy said sum of money, and interest and costs of copies and costs of the lower court; and it is further ordered, that the plaintiff pay the costs of the appeal.

Rodney C. King *v.* Z. Preston and Wm. Hall.

Where property insured by the vendor was sold, and the policy not assigned to the vendee, the latter cannot, after a loss, recover from the vendor the amount of insurance collected by him.

A cotton plantation was sold, subject to an unexpired lease. Before the lease expired, the cotton gin was burnt. *Held:* that the vendor was not liable for the deterioration in the value of the plantation caused by the fire, which was the result of the carelessness and negligence of the lessee. The lessee was not the mandatary of the vendor. He was a third person, who had rights which neither the vendor nor vendee could disturb. Code, 2704.

APPEAL from the District Court, Tenth District, Parish of Tensas, *Snyder*, J. *Farrar*, for plaintiff and appellant. *Stacy & Sparrow*, for defendant.

Lea, J. The litigation in this case is based upon the following state of facts:

On the 27th day of October, 1851, the plaintiff entered into a written agreement with the defendants to purchase for them "a tract of land known as the Isthmus Plantation," for which he was to give them certain endorsed notes upon the execution of a good and valid title by the vendors, who were also to assign to the purchaser, as it is expressed in the Act, "the article of lease to *R. W. McRae*, which expired on the 1st of January, 1852."

On the 11th November a formal act of sale was passed before a notary, in pursuance of the foregoing agreement, by which the defendants conveyed the tract in question to the plaintiff; no mention was made in the act of the assignment of the lease, but, taking the two documents together, (and this view is fully borne out by the evidence) we consider that it was understood to be a sale of a plantation subject to a lease, the termination of which was well known to both parties.

On the 4th of November, 1851, the defendants effected an insurance upon the gin and on the plantation for the sum of $5000. At the time of the sale this policy was not transferred to the purchasers, nor was there any agreement to transfer it. On the 30th December the cotton-gin on the place was destroyed by fire. The defendants claimed the insurance money, and after some difficulty with the company, they effected a compromise, in pursuance of which they were paid the sum of $3440.

The plaintiff in this suit rests his claim upon two apparently distinct causes of action. First, he alleges that as the purchaser of the property insured, he was entitled to receive the insurance money which the defendants received and converted to their own use, and secondly, that in consequence of the defendants' failure and refusal to deliver the premises to him, which, as vendors, they were bound to do, they became liable for the deterioration in the value of the plantation caused by the burning of the gin house, which was owing to the carelessness and negligence of the lessee.

We will consider first the nature and extent of the liability of the defendants incident to receipt of the insurance money. There was no contract for an assignment of the policy, nor did a sale of the property operate as an assignment. "The contract of insurance is strictly personal, it is not an incident to the subject insured. It is an obligation to make good to the party really insured any loss that he may sustain from the perils insured against, according to the nature and terms of the insurance, not an obligation to make good any damage that, from the same causes, the property insured may sustain without regard to its ownership." See 2d Duer on Insurance, page 53; also 1st Phillips on Insurance, § 86, 87.

It is needless, therefore, to determine whether the defendants were or were not entitled to recover from the insurance company. Unless the defendants received money which the plaintiff was entitled to recover, the latter has no ground of complaint. It matters not how much money the defendants may have received improperly from the insurers, the plaintiff could not be injured by such payment. We must consider the case, therefore, precisely as if no insurance whatever had been effected. The relation of the plaintiff towards the defendants was that of a purchaser of property subject to an unexpired lease, of which he had full cognizance, and to which he assented. The plaintiff had received such possession as was contemplated by the parties.

It is true no written transfer of the lease was made, but had such been necessary, it does not appear that the defendants were called upon to execute an

assignment. It is urged in argument, however, that the plaintiff had the right to disregard the lease, and to demand delivery and possession according to the terms of the act of sale. Assuming even this view of the case to be correct, it does not appear that the defendants were called upon to make such delivery. But this is not the true view of the case; the lessee was not the mandatary of the defendants. He was a third person who had rights, which neither the vendor nor vendee could disturb. C. C., 2704.

Under the circumstances, we think that such delivery was made as was in contemplation of the parties. Considering the nature of the contract, with the full knowledge of the lease on the part of the purchaser, it cannot be said that there was any delay in the fulfilment of the contract on the part of the vendors, or that the property sold sustained any injury through gross neglect on their part.

We think there is no error in the judgment appealed from.

Judgment affirmed.

RICHARD PETERS v. TOBIAS GIBSON.

Article 351 of the Code of Practice was intended to compel the oral answer of the party in the presence of the court and opposite party, and to compel him to answer from his recollection and knowledge of the facts in his own words, and in such language as occurs to him when thus interrogated. He cannot be permitted to prepare his answers beforehand and read them in court.

A party interrogated may refer to memoranda to assist his recollection, as other witnesses may.

APPEAL from the District Court, Fifth District, Parish of Terrebonne, *Cole*, J.

J. C. & A. Beatty, for plaintiff. *Goode*, for defendant and appellant.

MERRICK, C. J. A careful examination of the record and testimony in this case has brought us to the conclusion that the cause must be remanded for a new trial.

In the lower court, while the case was on trial before the jury, the defendant, in order to establish certain of the credits claimed by him, propounded interrogatories to be answered by the plaintiff. The interrogatories were propounded just as the court was adjourning for dinner. When the plaintiff came to answer the interrogatories in the afternoon, instead of giving the answer to each question, as read to him by the Clerk, *viva voce*, he handed to the Clerk a slip of paper in the handwriting of his attorney, and signed by himself, which the Clerk recorded and read to the jury as his answer, the party interrogated not uttering a word. The defendant objected to each answer, and insisted that the party should answer orally, but the court overruled the objection, and defendant excepted.

The defendant insists in this court that the interrogatories shall be taken as confessed, or that the case be remanded to the lower court for a new trial.

Article 351 of the Code of Practice gives the party propounding the interrogatories the right to require the opposite party to answer, in open court, and in his presence, on a day to be fixed by the Judge, provided the party interrogated resides in the parish where the court is held.

The right to interrogate a witness in the presence of the parties, the jury and the court, has been deemed of great importance, and guarded with jealous care; so much so that it is guaranteed to the accused in criminal cases by the Constitution.

We doubt not the Article of the Code of Practice cited was intended to compel the oral answer of the party in the presence of the court and opposite party, and to compel him to answer from his recollection and knowledge of the facts in his own words, and such language as occurs to him when thus interrogated. If it is legal to prepare his answers beforehand, and deliver them to the Clerk, or even read them himself, no useful purpose is attained by bringing the party into court. His answers might as well be prepared and sworn to in the presence of a Justice of the Peace.

We think the party interrogated in open court, in regard to the testimony he is about to give, is so far a witness upon the stand; and that the party interrogating has a right to a reply to each interrogatory in the words of the witness. The party interrogated may refer to memoranda to assist his recollection only in such cases as are allowed to witnesses examined orally upon the stand.

The court having sustained the party interrogated in the manner in which he proposed to answer, the penalty for neglecting to answer cannot be invoked against him, and the cause must be remanded to give the plaintiff an opportunity to make legal answers to the interrogatories on facts and articles before they can be taken as confessed.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and the cause be remanded for a new trial, with directions to the plaintiff to answer orally in open court, and the presence of the opposite party, the interrogatories propounded to him, otherwise to take the same as confessed. And it is further ordered, that the plaintiff pay the costs of this appeal.

MRS. IRA SMITH, Testamentary Executrix, *v.* JOHN BUHLER.

A right of way for a railroad was granted by the owner of land on the Mississippi to a proprietor in the rear, and an acre of ground leased for a depot, etc. Subsequently, by order of the proper parochial authorities, a new levee was constructed, and the greater portion of the land for the depot was thrown outside of the levee, and consequently the public road, and so rendered useless for the purposes for which it was leased. Suit was brought to compel a surrender of an additional piece of land, to be used for a depot in lieu of that rendered useless. *By the Court:* The contract in question is not so much a lease as the creation of a servitude, or right of way from plaintiff's plantation to the river's bank for a term of years—a predial servitude in favor of plaintiff's estate, and due by defendant's estate. This right of way is of a particular character—a railroad, an indispensable part of which is a depot at the landing. The dimensions of the depot are precisely defined by the contract, and the lessee has the right to a depot of that size to the expiration of the term, fronting on the public road, and running back from that road for quantity.

The caving of the bank of the river, and hence the necessity for a new levee, etc., might have been foreseen (as shown by the evidence) and the parties must be supposed to have contracted with reference to such a contingency.

C. C., 1950, 1952.

APPEAL from the District Court, Sixth District, Parish of West Baton Rouge, *Robertson*, J. *Edwards & Barrow*, for plaintiff. *T. G. & P. H. Morgan*, for defendant and appellant.

BUCHANAN, J.* The plaintiff's testator and the defendant owned adjoining plantations: that of defendant fronting on the Mississippi river, and that of

* LEA, J., took no part in this decision.

plaintiff's testator in the rear of defendant's. Under these circumstances, the parties made a contract on the 10th May, 1850, of the following tenor:

"Be it remembered, that on the day and date hereof, *John Buhler*, of the State and parish aforesaid, has given and granted, and by these presents doth give and grant, unto *Dr. Ira Smith*, of the parish of West Feliciana, his heirs and assigns, a right of way for a railroad, to be made from the land of said *Smith*, in the rear of the plantation of said *Buhler*, to the Mississippi river. Said road to be made entirely on the land of said *Buhler*, and as near the line of *Conrad* and *Chinn*, etc.

"And be it further remembered, that the said *John Buhler* has this day leased unto the said *Smith*, his heirs and assigns, for the term of twenty years, one superficial acre of land, fronting half an acre on the public road, and running back two acres in depth on the line of the railroad, on the terms and conditions following, viz: The said lot of ground shall not be used by said *Smith*, his heirs and assigns, for any other purpose than as a depot for the storage and sale of wood and lumber; that the said *Smith*, his heirs and assigns, shall establish thereon no nuisance to the detriment of said *Buhler*, his heirs and assigns, and that in consideration of said lease, the said *Smith*, his heirs and assigns, shall pay to *John Buhler*, his heirs and assigns, the sum of fifty dollars, annually, so long as said lot of ground shall be used for such purpose by said *Smith*. It is also understood, that said *Buhler* shall have the use of said lot of ground for the facilities of transportation, provided that said use shall not cause any inconvenience to said *Smith*."

The railroad was made, and the depot inclosed and used by the lessee, in accordance with this contract, until January, 1854, when the Inspector of Roads and Levees for that district of the parish of West Baton Rouge, assisted by three inhabitants and landholders, after a survey, as required by law, ordered a new levee to be made on defendant's land, adjoining that of *Conrad* and *Chinn*, considerably inside of the levee existing in 1850, by means whereof the greater portion of the land leased, as aforesaid, to plaintiff's testator for a depot was thrown outside of the levee, and consequently outside of the public road, which, according to law and usage, runs alopg the front of riparian estates on the Mississippi river, inside of and adjacent to the levee.

The object of the present action is to compel the defendant to set off to plaintiff, for a depot, an equal extent of ground to that originally set off under the lease, (and which has been curtailed by the making of the new levee,) by enclosing a portion of ground, one-half acre in width, on the line of the railroad to the depth of two acres from the new road, and fronting upon the same. The defendant pleads, in substance, that he leased to plaintiff's testator a specific portion of ground, and is not bound to make good any deficiency that may have been subsequently caused in the quantity of the same by the caving in of the river bank in front.

To this it is replied in argument, and we think correctly, that the contract in question is not so much a lease as the creation of a servitude, or right of way from plaintiff's plantation to the river bank for a term of years—a predial servitude in favor of plaintiff's estate, and due by defendant's estate. This right of way is of a particular character—a railroad, an indispensable part of which is a depot at the landing. The dimensions of the depot are precisely defined by the contract, and the lessee has the right to a depot of that size to the expiration of the term, fronting on the public road, and running back from

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that road for quantity. The change of the bank by caving in was a thing which might have been foreseen, according to the evidence, and the parties must be supposed to have contracted with reference to such a contingency. C. C., 1950, 1952.

We have not found any error to the prejudice of the appellant in the bills of exception to the evidence and to the charge of the court.

The defendant objects that he has not been put in default. But this point is immaterial, inasmuch as the jury have not awarded any damages, and the appellee does not ask that the judgment be amended in this respect.

Judgment affirmed, with costs.

MARGARET BRACY *v.* W. O. BUCK.

A title not registered may be the basis of prescription.

APPEAL from the District Court, Ninth District, Parish of Pointe Coupée, *Cooley*, J. *U. B. & E. Phillips*, for plaintiff and appellant. *Farrar* and *W. Beatty*, for defendant.

MERRICK, C. J. This is a petitory action. The defence, which was sustained by the judgment of the lower court, is the prescription of five years, with possession in good faith and a title translative of property.

Plaintiff bases her hopes of reversal of the judgment on the ground that the note of evidence does not show that the certificate of the Parish Recorder, endorsed on the act of sale *sous seing privé*, was offered in evidence with the act itself.

She contends that the act, without being registered in the office of a notary, cannot prejudice third persons even as the basis of prescription.

It is not necessary to consider whether the certificate formed a part of the act and was therefore under a reasonable intendment in evidence or not.

The case, under the authority of *Hudnall* v. *Watt & Desaulles*, is with the defendant without the certificate of the registry of the act.

Judgment affirmed.

HEWITT, HERAN & CO. *v.* NOLAN STEWART'S EXECUTOR and D. P. CAIN.

A judicial mortgage results from a *bona fide* judgment, though rendered on the confession of defendant.

A judgment by confession is a "final judgment," for no appeal lies from it.

Code, 3289, 3295; C. P., 567.

APPEAL from the District Court, Sixth District, Parish of West Baton Rouge, *Robertson*, J. *Greves*, for plaintiffs. *R. & H. Marr*, for defendants and appellants.

SPOFFORD, J. Upon the allegation that they had a judicial mortgage against certain slaves now in the possession of *D. P. Cain*, (their judgment debtor,)

but claimed by *Nolan Stewart*, who had purchased them at a Sheriff's sale under execution at the suit of the Clinton and Port Hudson Railroad Company against *Cain*, the plaintiffs brought this hypothecary action to enforce their judgment upon the slaves.

The defendant, *Stewart's executor*, has appealed from a decree ordering these slaves to be sold to satisfy the plaintiffs' judicial mortgage.

It is urged in this court, although the point does not seem to have been made below, that the plaintiffs have no mortgage, because the judgment from which it is supposed to spring, was not rendered in a contested case, or by default, but upon the confession of the defendant.

The answers of both defendants, filed in the inferior court, would seem to admit the existence of the plaintiffs' mortgage, for, without denying it, they aver the existence of a superior mortgage in favor of the minor children of *Cain*.

And we are of opinion that a judicial mortgage results from a *bona fide* judgment, though rendered upon the confession of the defendant.

The construction of Article 3289, upon which the opposite theory is based, would be too narrow and literal. "The judicial mortgage is that resulting from judgments, whether these be rendered on contested cases, or by default, whether they be final or provisional, in favor of the person obtaining them." Perhaps it would have been better to stop where the Code of 1808 did, in book III, tit. XIX, ch. I, art. 8, p. 452: "The judicial mortgage is that which proceeds from every judgment." But those who suggested the amendments which resulted in the Code of 1825, did not intend to restrict the judicial mortgage to a particular class of judgments; their object seems to have been rather to call attention to the fact that the mortgage was not so restricted, but flowed alike from the various sorts of judgments. A judgment by confession is certainly a "final" judgment, for no appeal lies from it; C. P., 567; it comes therefore within one of the categories which seem to have been named in Article 3289, rather as antithetical specimens of some of the opposite kinds of judgments from which a mortgage may result, than as exclusive of other classes not specially enumerated.

The Article 9 of the old Code, next succeeding the one just quoted, contained a similar antithesis: "The judicial mortgage takes place from the day when the judgment, either on a hearing of the parties or by default, final or subject to an appeal, has been rendered in favor of him who obtained said judgment."

But the framers of the Code of 1825, have given unmistakable proof that they intended mortgages to spring from confessed judgments procured at a time and in a manner not suspicious. Article 3225 declares that "the inscription of a judgment, obtained against a debtor within ten days preceding his failure, shall have no effect against the other creditors of the debtor, if it appears, from the time at which the suit was commenced, and the manner in which it was conducted, that the debtor intended to favor the plaintiff, either by consenting that judgment should be rendered against him without the usual delays, or by not making a defence, or by confessing judgment when the cause admitted of contest."

We see no reason, therefore, for introducing, at this late day, a novel interpretation of an Article of the Code, which, if adopted, would lead to so much confusion.

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The only other point made by the appellant, is that the slaves in question were adjudicated to him at a sale made under the anterior mortgage in favor of the Clinton and Port Hudson Railroad Company; that they were included in that mortgage, and that, consequently, he took them free from the subsequent judicial mortgage of the plaintiffs.

This matter is brought before us in disregard of rules of practice, which are important to the certainty of legal proceedings, and to the correct administration of justice. Neither of the defendants pleaded any such defence, but, on the contrary, their answers appear to be inconsistent with it. Instead of objecting, however, to the point being opened in argument here, the counsel for the appellees has proceeded to answer it by a counter argument which raises the plea of *res adjudicata*.

Overlooking these irregularities, we are of opinion that the defence, if it had been pleaded, would have been successfully met by the plea of the thing adjudged. In the suit of *Nolan Stewart* v. *J. R. Allain et al.*, for the erasure of this with other mortgages, the present plaintiffs being cited by *Stewart*, answered specially that the identical slaves now sought to be sold, were not subject to the mortgage of the Clinton and Port Hudson Railroad Company. *Stewart* met the plaintiffs upon that issue, and by the final decree of our predecessors, (8th An., 64,) it was decided against him.

He cannot be permitted to agitate the question anew under the pleadings and evidence contained in this record.

It is, therefore, ordered that the judgment appealed from be affirmed, with costs.

POLICE JURY OF LAFOURCHE *v.* ANTOINE ROSSI et al.

The penalty of a bond given by a purchaser of work to be done on the levee, road, &c., in the parish of Lafourche, cannot be recovered without the production of the *proces verbal* of adjudication, as required by law.

In commutative contracts the party who seeks to put the other in default, must, on his part, perform all that which is incumbent on himself to perform.

Code, 1907.

APPEAL from the District Court, Fifth District, Parish of Lafourche. *Cole*, J. *Bush*, for plaintiff and appellant. *Belcher*, for defendants.

BUCHANAN, J. This is a suit to enforce the penalty of a bond given by the purchaser of work to be done upon the levee, road, ditches and bridges, on a tract of land belonging to one *Theophile Anfoux*, in the parish of Lafourche Interior, at a sale made by the Inspector of the Second District of the said parish, for roads and levees.

The case comes up, principally, upon a bill of exceptions to the charge of the District Judge who tried the cause. The Judge charged the jury that, previous to recovery on the bond, it is necessary to produce in evidence the *proces verbal* of adjudication required by law, of the work for which the bond was given as a penalty, in the event of the non-completion of the work, or to show the existence and loss of such *proces verbal*.

The Judge did not err. The law under which this bond was taken (Act of

7th February, 1829, sec. 20, B. and C. Dig. 753,) obliges the Inspector of Roads and Levees to make a *proces verbal* of the work to be done on the land of each delinquent proprietor, and to adjudicate, after certain advertisements, to the lowest bidder, the said work. The person to whom the work is adjudged has an action *in rem* for his compensation—which action is brought by petition—to which the *proces verbal* of adjudication must be annexed. See sec. 30th of the same Act, (B. and C. 756.)

In the present case, it is proved by the testimony of the Inspector himself that he never made a *proces verbal* of the works which were necessary to be made on the land of *Theophile Anfoux*.

It is therefore clear that the purchaser of said works at the Inspector's sale would have had no recourse for his indemnification against the property, in case he had completed the work to the satisfaction of the Inspector. The parish authorities were bound to have afforded the party with whom they contracted all the guarantee for his repayment which a strict compliance with the law, on their own part, would offer. In commutative contracts, the party who seeks to put the other in default, must, on his part, perform all that which it was incumbent on himself to perform. Civil Code, Art. 1907.

There is, in fact, no proof, oral or written, before the court, of what work was included in the defendant *Rossi's* adjudication; and although the Inspector swears, in general terms, that "the works and repairs on the land of *Mr. Theophile Anfoux* were not done and finished according to law," yet it is proved that *Rossi* made a levee on that land, for which he has never been paid; and that the levee, such as it was, has answered the purpose of its construction, by keeping out the water. It may admit of some question whether *Rossi* in fact had not a good claim against the parish, instead of being liable to the parish for damages.

Judgment affirmed, with costs.

PAULIN BLANQUE et al. *v.* FRAME A. WOODS.

The endorsement of the payee must be considered as proved when the note is offered in evidence, without objection, as the endorsement then constitutes a part of the instrument declared upon.

APPEAL from the District Court, Sixth District, *Robertson*, J.

T. G. & P. H. Morgan, for plaintiffs. *J. M. & J. E. Elam*, for defendant and appellant.

STOFFORD, J. This cause comes before us upon an assignment of errors by defendant.

The first error assigned is, that the plaintiffs neglected to prove the endorsement of the payee under whom they held the promissory note sued on.

By the answer, it does not appear that the genuineness of the endorsement was denied; there was no general denial, and only a special denial as to the account sued on. But if there had been an issue on the point, under the ruling of a majority of this court in the recent case of *Maxwell & Co.* v. *Kennedy & Co.*, the signature of the endorser must be considered as proved; for the note was offered in evidence without objection on the part of the defendant's counsel, and the endorsement then constituted a part of the instrument as declared upon.

The next error assigned is, that there is no proof that the defendant occupied the Conti Street Veranda during the months of January, February and part of March, 1853.

There was no need of such proof: it mattered not whether the defendant occupied the premises or not, for by the acts offered in evidence he had expressly assumed to pay the rent as charged.

The last assignment of error is, that the plaintiffs are not alleged and shown to be heirs of *Mrs. Delphine McCarty*, wife of *Louis Lalourie*, and, as such, were represented by *Thomas Bailey Blanchard & Co.* These allegations were substantially involved in the allegations of the petition taken in connection with the documents annexed, and, not having been denied by the answer, must be considered as admitted.

Judgment affirmed, with costs.

C. J. MEEKER & Co. *v.* O. KLEMM.

Liability for contribution to a general average rests upon the broad and equitable principle that no one shall enrich himself at another's expense.

The measure of each person's contributory share to a general average should be regulated proportionally by the extent to which each of the contributing parties has been benefited by the sacrifice.

A usage regulating the enforcement of an obligation which violates the principle on which the obligation itself is based, and without which it would not exist at all, cannot be maintained.

The valuation of a ship or vessel in a policy of insurance, when disputed and discredited by evidence creating a reasonable probability of its incorrectness, cannot be assumed as an arbitrary basis in an apportionment for a general average contribution.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Benjamin, Bradford & Finney, for plaintiffs. *Maybin*, for defendant and appellant.

LEA, J. The sole question for solution in this case is, whether, in a contribution for a general average loss, the ship, for the purposes of contribution, is to be estimated at her actual value, as ascertained by appraisement, or at the valuation fixed in the policy of insurance. If we refer to the principle upon which a liability for contribution to a general average loss is based, we find that it rests upon the broad and equitable doctrine that no one shall enrich himself at another's expense: "Where, by a sacrifice, deliberately made, of the property of one of the parties concerned in an adventure for the benefit of the other parties interested, whereby his loss is directly converted to their gain, it is but just that those 'whose property has been saved by the sacrifice should contribute to place the owner who has sustained the loss in the same condition in which he would have been if, not his property, but that of another, had been sacrificed.'" See Stevens & Bennecke on Insurance, page 227. And this doctrine carries with it another as its natural sequence—to wit, that the measure of each person's contributory share should be regulated proportionally by the extent to which each of the contributing parties has been benefited by the sacrifice: "Qui sentit commodum debet sentire et onus." It is an obligation not based upon contract, but one resting upon natural equity.

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It may be conceded, at least for the purposes of argument, that the witnesses have established a custom, general though not universal, in the adjustment of general averages in the maritime cities of this country, to adopt the valuation of the ship in the policy of insurance as the contributory value, instead of the actual or appraised value. Granting the existence of such a usage, how far is it binding upon those who do not choose to acquiesce in such a rule of apportionment?

No doubt the valuation in the policy furnishes, as a general rule, a safe and convenient basis of apportionment, because it happens generally to be about the true value of the vessel to the owners, and for this reason the assumption of this basis has been generally acquiesced in. In the case at bar, however, it is shown conclusively that the valuation in the policy is far beyond the true value of the vessel. Now, a usage regulating the enforcement of an obligation which violates the principle upon which the obligation itself is based, and without which it would not exist at all, cannot be maintained. The valuation in the policy is binding only between the parties to the contract of insurance; and though, as Mr. Bennecke observes, "when *there is no reason to doubt its correctness*, it is frequently the best guide for determining the contributory interest." Yet it by no means follows that it is an exclusive guide not open to contradiction. In the case at bar there is not only reason to doubt its correctness, but it is clearly proved to be an incorrect valuation. Our researches have not enabled us to find a single case in which the valuation in the policy, when *proved to be incorrect*, was arbitrarily substituted for the known and appraised value as the basis of contribution.

We have been referred to several decisions of the courts of New York and Pennsylvania, as establishing the *lex marcatoria* on the subject in the two leading commercial States of the Union.

We find nothing in these decisions to justify the confidence with which they have been quoted as supporting the doctrine contended for on the part of the defendant. In the case of *Leavenworth* v. *Delafield*, 1st Caines, 373, the court expressly say that the contribution should be apportioned by a calculation based upon the *actual value* of the ship at the port of departure, less one-fifth for ordinary wear and tear, exclusive of outfits, *without regard to the valuation in the policy.*

In the case of *Gray* v. *Waler*, 2d Sargeant & Rawle, 229, cited as the case which presses with most force upon the point, the charge of the court to the jury, which was sustained by the Supreme Court, was, "that the value of the vessel was to be estimated according *to what she was worth* when she sailed from her port of departure, making a reasonable allowance for any deterioration she might have suffered by wear and tear up to the time when the loss took place."

The statement of the case shows that an assessment of the value of the ship was made by the jury, upon data supplied by the evidence. In the case at bar the vessel was appraised immediately after her return from the Brazos—she having experienced no disaster after the termination of the voyage on which the jettison occurred. Giving effect to the valuation in the policy as *prima facie* evidence, we think the appraisement made by competent experts, which stands uncontradicted, together with the remarkable difference between this appraisement and the valuation in the policy, sufficiently establish the incorrectness of the latter as a basis for a computation of general average contribution. We wish,

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however, to be understood as deciding only that a valuation of a ship or vessel in a policy of insurance, when disputed and discredited by evidence creating a reasonable probability of its incorrectness, cannot be assumed as an arbitrary basis in an apportionment of general average contribution.

It is ordered that the judgment appealed from be affirmed.

ELVIRA MCCALOP *v.* NOLAN STEWART et al.

Testamentary disposition in the following words: "I give to my great grandchildren—*Kitty's* children and *Lucy's*, if she has any—all the balance of my property of all kinds; but be it known and understood, that *Elvira*, my daughter, is to have the care and management of it during her life in this world, and her and *Stewart* is to take possession of it and carry it on, and have the proceeds, if there be any, but shall not be bound to give a bond or security for anything.

If *Elvira* and *Stewart* should die before *Kitty* and *Lucy*, then the property to fall into their hands to be carried on in the same way, and the proceeds to go to them. The property is not to be sold, but to be kept together until the heirs come of age; but as they come of age, they shall be entitled to a share with their parents."

There is no prohibited substitution in such a disposition. The great grandchildren are the instituted heirs. They are certainly not charged with the return of the testator's estate to any third person, nor to preserve it for any third person. The testator clearly expresses his intention that the property which he bequeathes to his great grandchildren should be kept together, and that there should be no partition of it until the heirs come of age. This disposition is expressly sanctioned by Article 1224 of the Civil Code.

The dispositions in favor of the testator's daughter and her husband, and in favor of his granddaughters, the mothers of the instituted heirs, are not substitutions, but are usufructs within the purview of Article 1509 of the Code.

Code, 1482, 1489, 1507, 1509, 1224, 531, 534.

APPEAL from the District Court, Sixth District, Parish of West Baton Rouge, *Robertson*, J. *J. M & E. Elam*, for plaintiff. *T. G. Morgan*, for defendant and appellant.

BUCHANAN, J. *James McCalop* died in 1850, possessed of an estate inventoried at more than two hundred thousand dollars. At the time of his death, he had the following legitimate descendants:

1st. His daughter, the plaintiff, wife of *Nolan Stewart;*

2d. Two granddaughters, the daughters of plaintiff, named respectively *Kitty*, wife of *Williams*, and *Lucy*, wife of *Dougherty;*

3d. Three great grandchildren, the children of *Mrs. Williams;*

4th. One great grandchild, the child of *Mrs. Dougherty.*

James McCalop made his will in the olographic form, which has been probated, and of which *Nolan Stewart*, one of the defendants, and husband of plaintiff, was qualified as executor.

The plaintiff brings this action to annul the will of her father, as being in prejudice of her rights as forced heir, and as containing *fidei commissa* and substitutions.

The will of *McCalop* commences by two particular legacies, which the plaintiff declares in her petition it is not her intention to disturb. It then proceeds as follows:

"I give to my great grandchildren—*Kitty's* children and *Lucy's*, if she has any—all the balance of my property of all kinds; but be it known and under-

stood, that *Elvira*, my daughter, is to have the care and management of the whole of it during her life in this world; and her and *Stewart* is to take possession of it and carry it on, and have the proceeds, if there be any, but shall not be bound to give a bond or security for anything.

"If *Elvira* and *Stewart* should die before *Kitty* and *Lucy*, then the property to fall into their hands to be carried on in the same way and the proceeds to go to them. The property is not to be sold, but to be kept together until the heirs come of age; but as they come of age, they shall be entitled to a share with their parents."

It is admitted in argument, by counsel of defendants, that the plaintiff has the right to have the dispositions of the will of her father, in favor of others than herself, reduced to the disposable portion. That portion, in this case, was two thirds of the property of the testator. Civil Code, Articles 1480, 1482. The testamentary dispositions must therefore be reduced to that amount. C. C., 1489.

But the plaintiff claims the nullity of the dispositions of the will in favor of her grandchildren, *in toto*, as containing a prohibited substitution.

We have not been able to perceive any such substitution in the will in question. The definition of a prohibited substitution, contained in Article 1507 of the Code, is that "by which the donee, heir or legatee is charged to preserve for, or to return a thing to a third person." Now, in *McCalop's* will, his great grandchildren are the instituted heirs. *They* are certainly not charged with the return of his estate to any third person, nor to preserve it for any third person. The testator clearly expresses his intention that the property which he bequeaths to his great grandchildren, shall be kept together—that there shall be no partition of the same—until the heirs come to age. But this disposition is expressly sanctioned by the Article 1224 of the Civil Code. Again, the dispositions in favor of the testator's daughter and her husband, and in favor of his granddaughters, *Mrs. Williams* and *Mrs. Dougherty*, the mothers of the instituted heirs, cannot be viewed as substitutions. They are usufructs, and as such, are within the purview of Article 1509 of the Code. The duration of these usufructs is different, and it depends upon contingency whether that in favor of the testator's granddaughters shall have effect at all.

That in favor of his daughter, the plaintiff, is only to terminate with her life. It is an unconditional usufruct, which commenced immediately on the decease of her father. But the usufruct in favor of the testator's granddaughters is conditional, and not intended to take place at all, except on the happening of a certain contingency, to wit: their survivorship of their mother. As to one of those granddaughters, the condition has already failed, for *Mrs. Williams* has died since the institution of this suit. Again, as to the duration of the usufruct to the granddaughters, it was not, like that of their mother, contemplated to be co-extensive with their lives, but only to last during the minority of their children, the instituted heirs. Therefore, if the plaintiff should live until her grandchildren come of age, the usufruct of *Mrs. Williams*, her surviving daughter, will never take place. The prevailing idea of this will seems to be the assuming to the heirs of the testator, during their minority, an administration of the estate which their ancestor had provided for them, by parties selected by that ancestor, and who will be the most likely to watch over their interests with jealous care. The testator could not effect this object by an appointment of testamentary tutor; for the fathers and mothers of his heirs

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were all living. Under these circumstances, he adopted the method of a substitution of usufruct in the grandmother and grandfather of those heirs (the former his own only child); and failing those, in the mothers of the heirs. There is nothing in the dispositions of the will in this regard, which is contrary to law. Usufruct may, from its origin, (*dès son origine,*) be conferred on several persons, in divided or undivided portions. C. C., 531. Usufruct may be established simply, or to take place at a certain day, or under condition; in a word, under all such modifications as the person who gives such a right, may be pleased to annex to it. C. C., 534.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the plaintiff be recognized as forced heir of *James McCalop*, deceased, to the extent of one third of his property, and as such that she be put in possession of one third of his estate as owner; that in other respects, the will of *James McCalop* be maintained with right of usufructuary to the plaintiff in the remaining two thirds of his estate, during her life; and that the costs of the District Court be paid by the succession of *James McCalop*, and those of this court by the plaintiff and appellee.

Auguste Christine, Tutor, &c., *v.* Pierre Verbois, Executor.

Nuncupative will by public act annulled because there was nothing in the context to show that the witnesses were present when the will was received by the notary.

APPEAL from the District Court, Sixth District, parish of Iberville, *Robertson*, J. *Labauve*, for plaintiff. *Robertson*, for defendant and appellant.

Voorhies, J. The nuncupative testament, by public act, of the late *Elmire Christine* is sought to be annulled by this action, on several grounds of nullity, one of which is, "that the will was not dictated by the testatrix and received by the notary, in presence of three witnesses, as no mention of the same is therein made."

The Code, Article 1571, requires the nuncupative testament by public act to be received by a notary in presence of three witnesses residing in the place where the will is executed, &c.

In the present case, the act *per se* does not appear to have been dictated by the testatrix and written in presence of the witnesses. The caption recites that the act was written by the notary at the request of the testatrix and as dictated by her, but makes no mention that it was done in presence of the witnesses. In the conclusion, the notary certifies that the testatrix signed the act in presence of the witnesses, "after having read the same in an audible voice, in presence of the testatrix and the said witnesses, without interruption or turning aside." Certainly this cannot be construed as implying that the will was received by the notary in presence of the witnesses. We have been unable to discover, from the context of the instrument, anything that would sanction the conclusion that the witnesses were present when the will was received by the notary.

Judgment affirmed, with costs.

Succession of James H. Coleman.

B., the guardian, appointed in Mississippi, of a minor having property in this State, filed a petition in the proper court, representing that the minor's property here was unproductive, and that she had no other; that it was to the interest of the minor that it should be sold, and the proceeds invested, and being unable to induce any person to become the tutor of the minor, he prayed the appointment of a special tutor and under-tutor, and that a family meeting be convoked to deliberate on the propriety of selling the property. The prayer was allowed, the appointment made, and under the advice of the family meeting the property was sold, and G. became the purchaser. He refused to comply with the terms of the sale, on the ground (among other grounds) that no special tutor could be legally appointed to the minor.

The appointment of a special tutor in this case was not legal, and the sale was a nullity.

In the sale of minors' property all the formalities of law must be observed for the validity of such sale.

Minors, when they become of age, can always avail themselves of nullities resulting from the omission of any of the formalities established by law in the sale of their property.

The purchaser of a minor's property at a judicial sale cannot be compelled to a compliance with the terms of the sale, unless the proceedings are clothed with all the formalities of law requisite to vest in him a legal title.

The appointment of the special tutor should be considered as mere surplusage. The petition for the sale was made by the foreign guardian, and the proceedings of the family meeting advising the sale might have been transmitted to the judge by any relative, or even a stranger. (Lea, J., dissenting, with whom concurred Spofford, J.)

Any embarrassment on the question of the right of the special tutor to receive the price might easily be avoided by making the price payable to the foreign guardian. (Lea, J., dissenting, with whom concurred Spofford, J.)

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Haynes, for appellant. *Clarke & Bayne*, for appellee.

Voorhies, J. On the 3d of February, 1853, *William H. Dameron* was appointed administrator of the succession of the late *James H. Coleman*. On the 15th of March following, *Malachi Bradford* filed a petition in the same court, alleging that he was the appointed guardian of his grand-daughter, *Angelina Coleman*, by the State of Mississippi, his domicil, where she was supported by him; that she had no other property than that which was under the administration of the court, and being unproductive, it was to her interest that the same should be sold and the proceeds thereof invested; and that he had in vain endeavored to induce some of her friends and relations to become her tutor. He concludes by praying that a special tutor and under-tutor be appointed to her, and that a family meeting be convoked to deliberate upon the propriety of the sale of the property and investment of the proceeds thereof.

On the same day, an order was granted appointing *William H. Dameron* as *special tutor*, and *Thomas A. McDaunold* as under-tutor, without requiring of the former any bond and security, &c. Upon the advice of a family meeting, convened and homologated as prayed for, the property, described as a certain lot of ground in the square bounded by Constance, Magazine, Richard and Felicity streets, in the First District of New Orleans, was offered for sale at auction, and adjudicated to *Alexander Gaffney*, for the price of $1400, payable one-fourth cash and the residue at one, two and three years' credit.

Upon the refusal of *Gaffney* to comply with the terms of the sale, a rule was taken upon him by *Dameron*, as *curator* and *special tutor*, to show cause why he should not do so. In answer to the rule, *Gaffney* urged several reasons for his refusal, among others: 1st. "That there was no legal order for the sale;

the said order being granted on the application of a *special tutor*, an officer who could not be appointed to the minor for the purpose of selling the real estate belonging to the minor, and the family meeting recommending the sale was prematurely and illegally convoked. 2d. That the effects of the estate have never been delivered to the tutor, nor has he been put in possession of the same," &c.

Gaffney is appellant from a judgment making the rule absolute.

We think the judge *a quo* erred. There are four sorts of tutorships known to our laws: tutorship by nature, tutorship by will, tutorship by the effect of the law, and tutorship by the appointment of the judge. (C. C. 264.) The law requires, in the cases prescribed, that "the judge shall appoint a tutor to the minor, by and with the advice of the meeting of the family." (C. C. 288.) In certain cases, the judge is authorized, with the advice of a family meeting, to appoint a discreet and responsible person as tutor to a minor, who shall in all respects comply with the existing laws in relation to tutors, except that of giving security for his administration. (Session Acts of 1834, p. 118, § 4.) "When the minor is without a tutor, any person who has a claim against him may apply to the competent judge to request that a tutor *ad hoc* be appointed to him, which tutor shall not be bound to give any security, but shall take an oath before the court who has appointed him, to defend the interest of the minor to the best of his knowledge." C. C. 295.

In cases of partition, the Code (Article 1291) provides: "If there are several minors who have opposite interests in the partition, and have the same tutor and curator, there shall be appointed to each of them a special tutor, whose functions shall cease as soon as the partition is terminated."

We are not aware of any other cases in which a tutor *ad hoc* or special tutor may be appointed to a minor. We think it is clear that the appointment in the present case does not fall within either of these exceptions. Assuming that the property in question belonged to the minor, as alleged, it is evident that the adjudication of it under those proceedings must be considered as a nullity. In the sale of minors' property, we consider it to be well settled that all the formalities of law must be observed for the validity of such sale. The conveyance derives its force and validity from the law; hence, where the law is not followed, it is clear that the authority which stands in place of the owners' consent is wanting. Applying this principle to the case at bar, it is manifest that the minor's consent is wanting, inasmuch as she cannot be considered as legally represented by a *special* tutor. Minors, when they become of age, can always avail themselves of nullities resulting from the omission of any of the formalities established by law in the sale of their property. 6 R., 471; 9 ibid., 78; 2 A., 648.

The cases on which the appellee relies, to the effect that a party is not permitted to look beyond the decree of a competent court authorizing the sale of minors' property, are, we think, clearly distinguishable from the present. The right of a purchaser of minors' property at a judicial sale to inquire into the regularity of the proceedings, we think may be fairly conceded, and cannot be compelled to a compliance with the terms of the sale unless such proceedings are clothed with all the formalities of law requisite to vest in him a legal title.

It is therefore ordered and decreed that the judgment of the court below be reversed, that the rule herein taken against the appellant, *Alexander Gaffney*, be discharged, and that the appellee pay the costs of both courts.

LEA, J., (with whom concurred SPOFFORD, J.,) dissenting. I think the adjudication of the property to the defendant in the rule was valid, and sufficient, in law to pass a title. It was based upon—

1st. A petition to that effect, made by the foreign guardian of the minor whose capacity is not questioned, and who suggests that the sale is necessary for the support and maintenance of the minor—the property being unproductive.

2d. An order of court, based upon this petition, convoking a family meeting.

3d. The action of the family meeting, duly convened, advising that the sale be made, as prayed for.

4th. The order of sale by the judge.

5th. The adjudication made in pursuance of the order of sale thus granted.

Now, it is true that in the course of the proceedings, at the suggestion of the foreign guardian, a special tutor was appointed, and the proceedings of the family meeting were submitted by him to the court for its approval; but this appointment may be considered a mere surplusage. Any relative, or even a stranger, may have transmitted the proceedings to the judge, whose order was based upon the original application for a sale, supported by the recommendation of the family meeting. The title of the purchaser is, I think, one which the minor could never hereafter disturb. The only difficulty which could possibly arise might be incident to a question as to the right of the special tutor to receive the price; and any embarrassment on this point might easily be obviated by making the price payable to the foreign guardian, or to his order.

The minor ought not to be deprived of the benefit of a satisfactory sale of the property. It is to be observed that the foreign guardian and special tutor are both acting together in the interest of the minor, and are represented by the same counsel.

ELIZABETH KELLAR and HUSBAND *v.* PARISH & THOMPSON.

Where plaintiffs allege that the defendants, and those under whom they claim, hold illegal possession, defendants' titles are admissible to rebut the allegation of illegal possession.

Defendants' titles are also admissible to prove prescription when pleaded by the original defendants, and which their warrantors were authorized and interested to maintain.

APPEAL from the District Court, Tenth District, Parish of Carroll.

Dubose, for plaintiffs and appellants. *Selby*, for defendants.

SPOFFORD, J. The plaintiff has appealed from a judgment against her in a petitory action.

She complains that the District Judge erred in admitting certain title deeds and judicial proceedings in evidence which were offered on behalf of the warrantors, *Clark* and wife. The objection was, that the document had not been specially set forth in the pleadings of *Clark* and wife.

The court did not err. The plaintiff herself alleged that the defendants and those under whom the defendants held had been in illegal possession of the land demanded in her petition ever since the year 1834. The titles under

which that possession was held were admissible to rebut the plaintiff's allegation that the possession was illegal. They were also admissible to sustain the plea of prescription of ten and twenty years, which the original defendants had specially pleaded, and which their warrantors were authorized and interested to maintain. The plaintiff could not have been surprised, for these titles were substantially set out in the answer of *Kerr* and wife, warrantors.

The defendants have established a title by prescription.

It may be conceded that the plaintiff's undivided one-half interest in lot No. 6, township 21, north of range 13 east, was not legally divested, by the parish judge's sale, of the south half of said lot, because there had been no partition, and because of irregularities in the sale and in the proceedings anterior to the sale.

Still, on the 10th February, 1836, *Wm. A. King* and wife sold the whole of lot No. 6, by public act, to *Zachariah Dorsey* and *Williamson Lyles*, whose good faith is not impeached by any evidence, and is therefore presumed. (C. C., 3447.) On the 2d December, 1836, *Dorsey* sold this lot to *Lyles*, to effect a partition, and *Lyles* died possessed of the same under authentic title. At his succession sale the lot in question was adjudicated to *James D. Kerr*, on the 2d February, 1841—a mortgage being reserved upon it for the payment of the price. *Kerr* failing to pay the price, an order of seizure and sale was issued against the land, and on the 5th May, 1846, it was adjudicated to *N. H. Clark*, and a formal deed was made to him. On the 22d June, 1850, *Clark* sold the land by authentic act to the defendants, *Parish & Thompson*.

The citation in this suit was not served until the 26th April, 1853.

The defendants, therefore, hold the land in dispute by an unbroken chain of recorded titles translative of property since the 10th February, 1836. And the plaintiff admits that defendants and their authors have been in possession since 1834. It matters not that the title of *Dorsey* and *Lyles* was derived *a non domino;* for it was formal and sufficient upon its face to transfer the property.

The plaintiff has been absent from the State since 1831. From 1834 to 1848 the term of prescription for immovables, under a title, was twenty years, as against an absentee. (C. C., 3442.) By the Act of March 14th, 1848, (Sess. Acts, p. 60,) non-residents were put on the same footing with residents in this regard; and the term of prescription thenceforward, in a case of this kind, was fixed at ten years, or reduced one-half. Reckoning the time that had elapsed prior to the statutory change according to the old law, and the time that has elapsed since according to the new law, we find that the defendants and their authors had been in possession of the land sued for in good faith, under titles translative of property, long enough to perfect their title by prescription—more than two years before the service of citation in this suit. As to the mode of making the calculation, see *Shackleford* v. *Robinson*, 10 Ann., p. 583; *Goddard* v. *Urquhart*, 6 L., 660; *Xanpi* v. *Orso*, 11 L., 57.

The judgment is therefore affirmed, with costs.

David P. Williams, Administrator, &c., of S. S. Prentiss, for the use of Wyche & Hammet, *v.* Govey Hood.

Motion to dismiss appeal, on the ground that W. & H. had not joined in the appeal bond. *By the Court:* The order of appeal is in favor of the plaintiff, generally, and it was not necessary that the appeal bond should be signed by W. & H. The signature of the surety is sufficient.

The fact that the tutrix of P.'s children made herself a party to the suit is no evidence that W. & H. have abandoned the appeal. The tutrix is a proper party, for the legal title to the bill sued on is in the succession of P.

In a suit on a bill of exchange by an administrator, the defendant will not be permitted to attack the legality of the appointment of the administrator.

The defendant has no right to complain of the mode in which this suit is brought, for it gives him the opportunity of pleading any defences he may have against either the nominal or the real plaintiff.

It is not competent for a party, against whom one of his letters is offered in evidence, to show by the parol evidence of the witness who wrote the letter for him that he "intended" something different from what the letter expresses.

APPEAL from the District Court, Tenth District, Parish of Carroll, *Perkins, Jr.*, J. *Short & Parham*, for plaintiff and appellant. *Selby*, for defendant.

Sprorord, J. The administrator of the succession of the late *Sargeant S. Prentiss* brought this suit against the drawer of a bill of exchange, duly protested both for non-acceptance and non-payment.

The bill was drawn by the defendant to the order of *S. S. Prentiss*, but never endorsed by the latter.

The petition alleges that shortly after the bill was drawn, the commercial firm of *Wyche & Hammet* advanced money on it to *Prentiss*, who delivered the instrument to them. The suit is brought for their use.

There was a judgment in the District Court for the defendant, and the plaintiff appealed.

Pending the appeal in this court the suit was revived in the name of *Mrs. Prentiss*, tutrix of the minor heirs of *S. S. Prentiss*, upon a suggestion that the administrator was *functus officio*.

Our attention is called to a motion to dismiss the appeal.

The first point made seems to be that the real plaintiffs in interest, *Wyche & Hammet*, have not joined in the appeal bond.

The order of appeal is in favor of the plaintiff generally, and it was not necessary that the appeal bond should be signed by *Wyche & Hammet*. The signature of the surety is sufficient. *Fish* v. *Friend*, 3 Rob., 264; *Wells* v. *Lamothe*, 10 L., 411; *Bank* v. *Erwin's Heirs*, 6 L., 324; *Doane* v. *Farrow*, 10 M., 74; *Richardson* v. *Terrel*, 9 M., 34.

The other point in the motion to dismiss is that *Wyche & Hammet*, the real plaintiffs, have abandoned the appeal. We find no evidence of this in the fact that *Mrs. Prentiss*, tutrix, has made herself a party to the suit, instead of the administrator. She is a proper party, for the legal title to the bill is still in the succession of *Prentiss*. The equitable interest of *Wyche & Hammet* is only to the extent of their advances to *Prentiss*, who seems to have handed them the bill as collateral.

In his answer, it was first alleged by the defendant that *David P. Williams* was a non-resident of the State, and that his appointment as administrator of

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a Louisiana succession was therefore a nullity, so that he was incompetent to sue for debts due the succession.

The defendant could not be permitted to attack the judgment appointing an administrator in this collateral manner.

It was also contended by the defendant that the administrator could not give away the funds of the estate by suing for the use of third persons.

The administrator gave away nothing. The legal title, and perhaps a residuary interest being in the succession, the administrator acted properly in bringing the suit in his representative capacity, and for the use of *Wyche & Hammet*, who had advanced money to the deceased intestate upon the draft.

The defendant certainly has no right to complain of the mode in which the suit is brought, for it gives him an opportunity to plead any defences he may have as against either the nominal or the real plaintiff. *Dayton* v. *Commercial Bank*, 6 Rob., 18.

This is a sufficient answer to the argument of the defendant, that *Wyche & Hammet* were only interested to the extent of $500 or $600, whilst the draft is for $1550, and that the debt cannot be divided without the assent of the debtor.

The whole bill is sued for, and all the parties interested in its collection are named in the pleadings, so as to give the defendant the widest latitude in his defence.

The distribution of the money, if collected, is a matter to be settled between the succession and *Wyche & Hammet*, and does not concern the defendant.

We now come to the merits of the cause—the motion to dismiss and the exceptions being overruled.

The defence, which was successfully pleaded in the inferior court, is that the draft was given to retain the deceased payee as counsel in a suit which the respondent contemplated recommencing, in which *Mr. Prentiss* had been previously engaged and paid, and in which a nonsuit had been taken; that it was given at the urgent request of *Mr. Prentiss*, when he was in declining health, and shortly before his death, with a view to enable him to raise money for a journey to recruit his health, that he might be able to prosecute the suit upon his return; but that, in consequence of his premature death, the consideration of the draft wholly failed.

We are unable to concur in the views taken by the District Judge of the evidence offered in support of this defence.

The agreement of the parties was in writing. After reciting that *Hood* was involved in a lawsuit *then pending*, touching the validity and genuineness of a will of his sister, *Lucinda Chambliss*, in which the said *Hood* was instituted heir, and that he was desirous of obtaining the professional services of *Mr. Prentiss* in the *said litigation*, the latter bound himself to render such services in establishing the will, and attending to the litigation incident thereto, until the final decision of the question of the validity of said will, and for that purpose to attend the court in Carroll, or any other parish where such litigation might be pending, as often as necessary, and to argue said cause in the Supreme Court, should it be taken there.

And in consideration thereof, *Hood* on his part bound himself to pay said *Prentiss* the sum of $2500 as a certain fee—to wit, $1000 cash in hand, and the remaining $1500 *at the conclusion of the suit*. And *Hood* further agreed to pay said *Prentiss*, in case the will should be established as valid, the addi-

tional fee of seven and one-half per cent. upon the value of the property embraced in the will which *Hood* should receive, by establishing the validity thereof.

The $1000 were paid in February, 1849, upon the execution of the agreement.

Mr. Prentiss attended to the suit, and made a journey to the parish of Morehouse, whither the venue was changed, and where *Hood's* counsel, as was stated in the argument, took a voluntary nonsuit in the fall of 1849; of this no complaint is made by *Hood*, and the step must be presumed to have been taken in his interest.

In June, 1850, *Prentiss* wrote a letter to *Hood*, in which he disclosed his illness and his need of funds to enable him to follow the advice of his physician, in seeking the restoration of his health by a change of climate. The letter contains the following explicit statements: "By our agreement, in relation to your suit in the *Chambliss* will, the remainder of my certain fee — to wit, $1500, *is now due.* *General Thomas* informed me you settled with him, giving your draft on your merchants here, payable in December next. I must request you to make for me a similar arrangement. I send you a draft to be signed by you and directed to your merchants here, payable 1st January, which I hope will suit your convenience. I have added in interest at six per cent. from date, though it will cost me twice that, at least, to get the draft discounted." At the conclusion, he added that he hoped to return from the Virginia mountains in the fall, strong and vigorous, and ready to carry out such future proceedings as *Hood* might determine on against *Chambliss* and *Wilson*, whether as regards compromise or another suit.

To this letter *Hood* replied in a few days, by acceding literally to the request of *Prentiss*, and sending him the draft now sued on. The reply does not, even by implication, contest the assertion of *Mr. Prentiss* that the money was then due, under the terms of the original agreement. On the contrary, the bill itself bears upon its face an implied acknowledgment that it was due, for it was drawn, not for the sum of $1500, simply, but included an additional sum of $50 as interest for the delay that would elapse before its maturity.

We have here, then, in the writings and acts of the parties, their own interpretation of the meaning of that clause in the original agreement, which stipulated that the $1500 should be paid "at the conclusion of the suit." However obscure its meaning might have been without such aids, we are compelled to infer that this clause really meant the conclusion of the particular suit then pending, and that the amount was due when the draft was drawn.

The District Judge would probably have come to the same conclusion but for the oral testimony of a witness, who said that he wrote the reply to the letter of *Mr. Prentiss* for the defendant, *Hood*, (who signed it,) and that he was "*satisfied* that, so far as *Hood* was concerned, he *intended* the draft sued on as accommodation paper, and witness *intended* to embrace the same idea in the letter he wrote to *Prentiss* for *Hood*. Witness further states that he *intended* in the letter to say that the $1500 was not due, but was to be given for service yet to be rendered."

This vague testimony as to unrealized intentions affords an illustration of the wisdom of that ancient rule of evidence which forbids that written instruments shall be contradicted or controlled by parol.

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The plaintiff excepted to the competency of the testimony, and we think the exception should have been sustained. It is urged here, however, that the objection was raised too late. The District Judge did not think so, for he signed the bill of exceptions without intimating any such reason for his ruling, but assigned as the true reason the fact that the witness wrote the letter at the request of *Hood*.

We are bound to presume, then, that the objection was raised and the bill of exceptions tendered seasonably.

The money being due according to the terms of the agreement, as practically construed by the parties themselves at the time the draft was drawn, the subsequent death of *Mr. Prentiss* did not discharge the drawee, *Hood*, from his obligation to pay it, any more than it gave him an action for the repetition of the $1000 he had paid at first, in contemplation of services to be rendered by *Mr. Prentiss*, "until the final decision of the question of the validity of the will."

It is therefore ordered that the judgment appealed from be reversed; and, proceeding to render such judgment as should have been rendered, it is ordered, adjudged and decreed, that *Mrs. Prentiss*, as tutrix of the minor heirs of *S. S. Prentiss*, suing herein for the use of *Wyche & Hammet*, do recover of the defendant, *Govey Hood*, the sum of fifteen hundred and fifty dollars, with five per cent. interest thereon, from the 4th January, 1851, until paid, and the costs of suit in both courts.

WARD & JONAS *v.* EZEKIEL GRAVES.

More than two clear days must elapse between a judgment by default and a definitive judgment, and the error is not corrected by the fact that the judgment was not signed for two days after the definitive judgment was rendered.

APPEAL from the District Court, Tenth District, Parish of Carrol, *Snyder*, J. *Short & Parham*, for plaintiff. *Selby*, for defendant and appellant.

SPOFFORD, J. The judgment by default in this case was rendered on the 22d May: it was made final on the 24th May.

The defendant has assigned the prematurity of the definitive judgment as error patent upon the record.

It is answered that the judgment was not signed until the 26th May, and that then more than two clear days had elapsed since the preliminary judgment by default.

The error is none the less on that account; according to the record the definitive judgment was given on the 22d May [24th May.—REP.]; the formality of signing it afterwards did not alter the fact that it was rendered too soon. C. P., 312, as amended by Act of April 30th, 1853, p. 268; C. P., 544, 546.

The exceptions filed by defendant were correctly overruled.

It is ordered that the judgment appealed from be reversed, and that the cause be remanded for a trial according to law, the costs of this appeal to be borne by the plaintiffs and appellees.

George C. Brower *v.* His Creditors and the Creditors of B. Brower & Co.

On the death of B. B. the partnership of B. B. & Co. owed his widow a sum of money. The widow married V., the surviving partner of B. B. & Co., who formed a new partnership with G. C. B. In this contract of partnership the wife of V. intervened, and consented that the money due her as widow in community of her late husband, should remain with the new firm as a loan, upon which she was to receive interest quarterly. *By the Court:* The terms of the contract of partnership show conclusively that Mrs. V. was not a partner, but a creditor.

The stipulation in the act of partnership by which Mrs. V. agrees not to be considered as a creditor until all the other debts are provided for, is a contract of suretyship for her husband, for the benefit of his creditors. It is a contract entered into by her, without any consideration enuring to her own benefit, both for her husband and conjointly with him, by which she renounces her own rights as a creditor for the benefit of those who may hereafter become his creditors. Such a stipulation is repudiated by the spirit and letter of our laws.

Code 2412.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Durant & Hornor, for appellants. *Clarke & Bayne*, for appellee.

Lea, J. The litigation in this case grows out of an opposition filed by *S. E. Moore & Co.* to a claim of *Mrs. Vanzandt* for $9494, placed upon the tableau of distribution filed by the Syndic.

In the latter part of the year 1849 *George C. Brower* and *William T. Vanzandt* formed a copartnership in this city, which was carried on under the style of *B. Brower & Co.* until it was dissolved by a *cessio bonorum* made in 1855.

Another firm had previously existed under the same name, of which *Baldwin Brower*, the former husband of *Mrs. Vanzandt*, was the principal member. *B. Brower* died in 1845. The share of the legal representatives of the deceased was not withdrawn from the firm, but in pursuance of stipulations in the contract of partnership, it was continued until 1849, when the new firm was formed.

At the time the partnership was entered into between *Geo. C. Brower* and *Vanzandt* there was due to *Mrs. Vanzandt*, formerly the widow of *B. Brower*, by the old firm, the sum of $9494 25.

In the contract of partnership between *G. C. Brower* and *Vanzandt*, *Mrs. Vanzandt* intervened, and consented that this balance, coming to her as widow in community of her late husband, should remain with the new firm as a loan upon which she was to receive interest, payable quarterly.

It appears from the evidence that the widow of *B. Brower* and wife of *Vanzandt* consented to look to the new firm as her debtor for the portion coming to her from the final liquidation of the succession of her deceased husband, which was in part effected by the very sale by which the new firm purchased the stock and took the place of the old firm.

Now, it is contended that *Mrs. Vanzandt* is not a creditor, for the reasons that she is a partner in the new firm, and liable for its debts, and that by her marriage with *Vanzandt* he became the absolute owner of her personal property wherever situated; and, moreover, that by her express act she has waived her right, if she ever had any, to receive a dividend.

We think the terms of the contract of partnership show conclusively that *Mrs. Vanzandt* was not a partner, but a creditor. That her right as such

consisted in her then unliquidated interest in the succession of *Baldwin Brower*, and as such it was a chose in action, which up to that period had not been reduced to possession, and over which it does not appeer that her husband ever exercised any act of dominion or administration. See 2d Ann., 983; also *Mercenaro* v. *Bertoli*, lately decided; also New York Statutes of 1848 and 1849.

Again, *Mrs. Vanzandt* did not lend or give money to her husband which was lent by him to the firm. By the very terms of the contract she was acknowledged as a creditor of the firm in her own right: this acknowledgment was based upon a good and valid consideration, and the only question to be determined is whether she has done any act or made any contract which debars her from urging her claim as a creditor.

We have been referred to a stipulation contained in the act of partnership, by which *Mrs. Vanzandt* agrees not to be considered as a creditor until all the other debts are provided for.

By whatever name such a stipulation may be called, it is nothing more nor less than a contract of suretyship for her husband, for the benefit of his creditors. It is a contract entered into by her, without any consideration enuring to her benefit, both for her husband and conjointly with him, by which she renounces her own rights as a creditor for the benefit of those who may thereafter become his creditors. Such a stipulation is repudiated by the spirit and letter of our laws. See Art. C. C., 2412.

We think there is no error in the judgment appealed from.

Judgment affirmed.

SAMUEL DAVIS *v.* ROSEMOND DUGAS.

A judgment by default in Indiana, after personal citation, when sued upon in this State, cannot be opened to let in a defence that might have been pleaded to the original action.

The action of debt will lie here if it will lie in Indiana; the judgment is shown to be executory in Indiana, but even if an affidavit, or *scire facias*, were required to revive it there, the action of debt answers the same purpose.

A transcript of a later date than the one sued on, containing copies of writs and returns, &c.—which had been omitted by mistake in the first transcript—was properly received in evidence.

APPEAL from the District Court, Fifth District, Parish of Assumption, *Cole*, J. *C. & A. Johnston*, for plaintiff. *Mailhot & Mills*, for defendant and appellant.

SPOFFORD, J. This is an action of debt upon a judgment rendered in the Circuit Court of Spencer county, State of Indiana.

The defendant has appealed.

He insists that the Indiana judgment was rendered against him by default only, and therefore is not binding upon him, but is open to any defence which might have been pleaded to the original action, and that the plaintiff is bound to prove his original demand.

This doctrine is wholly inadmissible. There was a personal citation by the Sheriff of Spencer county, Indiana, who certifies that he read the *capias* to the defendant. Although the latter made no appearance in the Indiana court, we are bound to presume that the court proceeded according to law in rendering a final judgment against him. The note which was the original ground of ac-

tion has become merged in the judgment. That judgment is conclusive upon the defendant, unless he shows that he was not cited, or that the court was without jurisdiction, or that the judgment was procured through fraud.

He has failed to do either.

If the judgment were open to question, the defendant has not suggested that he had any special defence to the original action.

The distinction formerly made by Articles 746 and 747 of the Code of Practice between judgments by default or on attachment, and other judgments, was only as to the power of granting executory process in certain cases, which is now withdrawn. Act 1st June, 1846, p. 166.

The action of debt will lie upon a judgment of either kind.

This action will lie here, if it will lie in Indiana. The judgment is shown by evidence to be executory in Indiana; but even if an affidavit or *scire facias* were required to receive it there, the action of debt answers the same purpose. If the defendant has paid the debt he should have pleaded it; but he makes no such pretension.

The later transcript was properly received in evidence; it contained copies of writs and returns, &c., which had been omitted by mistake in the first transcript. Clerical errors of this kind are always subject to correction.

A plea of prescription based upon the statute of 30th April, 1853, was interposed by the defendant in the inferior court, but seems to have been abandoned in the argument here. It will suffice to remark upon this plea that the statute invoked by it was not approved until after the defendant had been cited to answer the present action.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

NICHOLAS BARNES *v.* JAMES L. CRANDELL, Sheriff, and H. FRELLSEN & Co.

The neglect or delay of the creditor to sue, or to use legal remedies, does not release the surety.

The surety is at liberty, if he thinks the creditor not sufficiently energetic, to pay the debt and become subrogated to his right, and manage the claim to his own satisfaction.

It is only in those cases where the surety loses his right of subrogation by the act of the *creditor* that the surety is discharged.

APPEAL from the District Court, Tenth District, Parish of Madison, *Snyder*, J. *Bemiss & Wallace*, for plaintiff and appellant. *Short & Parham*, for defendants.

MERRICK, C. J. This suit was commenced by injunction by a judgment debtor to prevent the sale of certain slaves on execution.

The action is based on the following allegations, viz.:

"Petitioner alleges that he is advised to say that he is released from the said *Frellsen* judgment, amounting to about $2480, with interest, by reason of the said *Frellsen* not pursuing the principal obligor, one *J. W. Evans*, for whom your petitioner was merely *surety*, and that if timely steps had been taken by him, the said *Frellsen*, to secure said debt, by enforcing the special mortgage given by said *Evans* to secure said debt, and had otherwise pursued the necessary legal steps, he could have secured the said debt from said debtor.

BARNES v. CRANDELL.

"Having failed in this, and having suffered the mortgaged property to pass from the hands of said debtor, and having lost his right of subrogation, your petitioner is advised that said *Frellsen* has lost all recourse upon him."

The defendants except to the plaintiff's petition upon the ground that he has set forth no ground for an injunction. There would be no room to doubt, were it not for the last clause above quoted; for the plaintiff has not alleged any fact from which it appears that as surety he has been discharged. The neglect or delay of the creditor to sue or to use legal remedies does not release the surety. He is at liberty, if he thinks the creditor is not sufficiently energetic, to pay the debt and become subrogated to his rights, and manage the claim to his own satisfaction.

But as on the trial of the exception the petition is taken as true, we have to consider the clause referred to above—viz.: "And having lost his rights of subrogation, your petitioner is advised that said *Frellsen* has lost all recourse upon him."

We are of the opinion that this allegation cannot be taken to mean any more than this—viz.: "Your petitioner, having lost his rights of subrogation by the acts aforesaid, is advised," &c.

It is only in those cases where the surety loses his right of subrogation by the act of the *creditor*, that he is discharged.

Whether such defence would avail the defendant whose liability has once been fixed by a judgment or not, we express no opinion. But we think that the judgment debtor who would avail himself of such fact as a defence, and require the courts to pass upon the same, should allege it distinctly in his petition. Not having done so in the case before us, we are of the opinion that the judgment must be affirmed.

Judgment affirmed.

MANETTE and VIRGINIE DUPLESSIS, f. c. w., v. BETSEY YOUNG, f. c. w.

A surviving wife is called to the inheritance before the natural brothers or sisters. Code 911, 917, 918, 923.

APPEAL from the District Court, Second District, *Rousseau*, J.

Reese, for plaintiffs and appellants. *Lombard & Foulhouze*, for testamentary executor.

BUCHANAN, J. The defendant, widow of *Honoré Duplessis*, a free colored man, was put into possession of his estate by order of court. Five years afterwards the plaintiffs, natural sisters of *Honoré Duplessis*, brought this suit, claiming the property left by the deceased, as his heirs; and the question presented for decision is, the priority in the order of inheritance between a surviving wife and the natural brothers or sisters.

This is the identical question determined by the court in the case of *Victor* v. *Tagiasco's Executor*, 6 L. R., 642, upon the construction of Articles 911, 917, 918 and 923 of the Civil Code. Upon the principles of that decision the defendant is entitled to this inheritance. See also *Layn* v. *Pasco*, 5 Rob., 12.

It is therefore adjudged and decreed that the judgment of the District Court be affirmed, with costs.

WARRICK MARTIN, Syndic, v. JAMES A. MOORE.

Under Article 172 of the Code of Practice, the signature of the advocate, or of the party may be affixed to the petition, through the agency of another.

APPEAL from the District Court, Tenth District, Parish of Carroll, *Snyder*, J. *Short & Parham*, for plaintiff and appellant. *Selby* and *Durant & Hornor*, for defendant.

MERRICK, C. J. This suit is upon a promissory note.

The defence rests on an exception that the petition was not written or signed by *Messrs. Short & Parham*, whose signatures appear to the petition as attorneys.

The proof introduced by the defendant shows that the petition and signature are in the hand-writing of *A. W. Green*, and that the letters "S. & P., attorneys," on the back of the petition, is in the hand writing of *Mr. Short*.

Messrs. Short & Parham prosecute the appeal in this court as counsel for the plaintiff, and it is not pretended that they did not appear and were not noted as counsel in the court below.

In the absence of all proof to the contrary, we are bound to presume that the petition was written under their dictation.

It is contended by the defendant that the Article No. 172 of the Code of Practice requires that the petition should actually be signed by the plaintiff, his attorney in fact, or by his advocate.

We think, under this Article, that the signature of the advocate, as well as the party, may be affixed through the agency of another. Any other construction might deprive a party of the most important counsel who should happen to be temporarily disabled from writing.

The defence to this suit is so devoid of merit, that had there been an answer to the appeal praying for damages as in case of a frivolous appeal, we should have allowed the same.

Judgment affirmed.

FELLOWS & CO. v. JAMES G. CARSON.

The pendency of a suit by a third person for the land, however unfounded it may be, perhaps justifies the purchaser, according to the letter of Article 2585 of the Code, in requiring security from the holder of the note given for the land, which, by the terms of the instrument, is subject to all the equities between the original parties.

APPEAL from the District Court, Tenth District, Parish of Carrol, *Snyder*, J. *Stacy & Sparrow*, for plaintiffs. *Caldwell*, for defendant and appellant.

BUCHANAN, J. The defendant being sued upon his promissory note, of which the plaintiffs are endorsees and holders, has appealed from a judgment condemning him to pay the sum unconditionally; and urges in this court, as he did in the court below, that he is threatened with eviction from the land which was the consideration of the note sued on; and has a right, under Article 2585 of

the Civil Code, to retain the amount of this note in his hands until the holder give him security against the threatened eviction.

The suit to which defendant alludes is that of *Galloway* and others against *Canon*, just decided in this court in favor of defendant. The favorable termination of that suit of course renders it unnecessary to amend the judgment of the District Court; but the pendency of the suit, however unfounded it may have been, perhaps justified defendant, according to the letter of Article 2535, in requiring security from the holder of the note, who, by the terms of the instrument, was subjected to all the equities between the original parties.

It is, therefore, adjudged and decreed, that the judgment appealed from be affirmed, with costs of the District Court; those of appeal to be paid by the appellees.

FRANKLIN HAINES *v.* ADOLPHE VERRET.

Plaintiff proceeded *via executiva* on a supposed authentic act of mortgage, and procured an order of seizure and sale of the land sold by him to defendant, who had neglected to pay a balance of the price. Defendant sued out an injunction on the grounds: 1. That the act was not authentic; 2. That the fees and costs of copies were exorbitant; 3. That he was in danger of eviction. Plaintiff answered the petition in injunction, admitted that the act was not authentic, and converting his proceeding into the *via ordinaria*, prayed for judgment against the plaintiff in injunction.

By the Court: The effect of this answer was to reinstate the parties in their original position as plaintiff and defendant in an ordinary suit. The injunction had fulfilled its office, and the order of seizure and sale was at an end; the petition in injunction stood as the answer to the original petition for executory process, now converted into a petition for a judgment personal against the defendant, with a recognition of a mortgage on the land.

The petition in injunction contained a prayer for a trial by jury, which the District Court refused to allow. *Held:* the court did not err. The obligation to pay the plaintiff the price of the land was unconditional, and there was no affidavit denying defendant's signature, or averring that it had been obtained through fraud or error, or of want or failure of consideration.

The certificate of the Recorder was properly received in evidence. He was the obligor in the act of mortgage, and of course knew his own signature. Code, 3331.

A mortgage is binding between the parties without registry. Code, 3316.

APPEAL from the District Court, Fifth District, parish of Terrebonne, *Cole*, J.

J. C. & A. Beatty, for plaintiff. *Bush*, for defendant and appellant.

SPOFFORD, J. (MERRICK, C. J., dissenting,) The plaintiff proceeded *via executiva* upon what he supposed to be an authentic act of mortgage, importing a confession of judgment, and procured an order for the seizure and sale of the land sold by him to the defendant, who had neglected to pay the balance of the price.

The latter sued out an injunction upon the three following grounds, verified by his affidavit:

1. That the act of mortgage was not authentic, because the term of office of the notary before whom it was passed had expired previous to the completion of the act.

2. That the fees and costs of copies were exorbitant.

3. That the defendant had just reason to fear that he would be disquieted by an action of mortgage against the land he had bought of the plaintiff, and was in imminent danger of being evicted, on account of a tacit mortgage in favor of some minors (children of plaintiff's wife by a former marriage) of whom he was co-tutor.

He therefore prayed that the plaintiff, in the order of seizure, be ruled to give him security against eviction, before he should be compelled to pay the balance of the price.

An injunction issued, and the defendant in injunction—plaintiff in the order of seizure and sale—came into court, and answering the petition in injunction, abandoned the order of seizure he had obtained, admitted that the act was not authentic for want of capacity in the notary, but converted his proceeding into the *via ordinaria*, and prayed for judgment against the defendant (plaintiff in injunction) for the sums claimed in his petition for the order of seizure and sale.

The effect of this answer was to reinstate the parties in their original position, *Haines* being plaintiff and *Verret* defendant in an ordinary action. The injunction had fulfilled its office, and the order of seizure was at an end; the petition in injunction stood as the answer to the original petition for executory process, now converted into a petition for a judgment personal against the defendant, with a recognition of the mortgage upon the land.

This is in conformity with the usual practice when the *via executiva* is abandoned for the *via ordinaria*.

And upon this view of their relative positions the parties acted upon the trial. The original plaintiff, *Haines*, introduced his evidence first, the defendant, *Verret*, (plaintiff in injunction) then adduced his, and *Haines* closed with rebutting testimony.

It becomes important thus to consider the true posture of the parties in order to determine whether the Judge erred in overruling the prayer for a trial by jury, with which the petition for an injunction closed. The jury trial was refused, after the proceedings were changed into an ordinary action.

The Judge then did not err, because the defendant did not make the necessary affidavit to entitle him to a trial by jury.

His obligation to pay the plaintiff a specific sum of money was unconditional in the sense of the 24th section of the Act of 20th March, 1839. The plaintiff's warranty against eviction from the property sold did not transform the defendant's absolute promise to pay into a contingent obligation, any more than the implied warranty that the consideration of a promissory note shall not fail converts such an instrument into a conditional obligation. In the affidavit for an injunction, there was no averment that the signature to the act sued upon was not genuine, or that the same was obtained through fraud or error, or of want or failure of consideration.

The certificate of the Recorder was properly admitted. He was the obligor in the act of mortgage himself, and of course knew his own signature. C. C., 3331. *Ellis* v. *Sims*, 2 An., 254.

It would be immaterial, however, if the certificate were rejected. The mortgage is equally binding between the contracting parties without registry. C. C., 3316.

On the merits, we concur in the opinion of the District Judge, that the defendant has failed to establish that he has just reason to fear that he shall be disquieted in his possession. He was moreover aware before his purchase of the tacit incumbrance of which he complains. C. C., 2535; *Rogers* v. *Davis*, 18 L., 52.

It is, therefore, ordered that the judgment appealed from be affirmed, with costs.

HAIDEE v. VERRET.

MERRICK, C. J., dissenting. Service of petition and citation are both necessary to bring a party into court. *Zacharie* v. *Blaudin*, 4 L. R., 157.

The party so served with process is defendant. In the case before us the plaintiff in injunction had a demand, according to his petition, against the defendant *independent of the demand to restrain the order of seizure and sale*. This demand conferred upon the plaintiff the right to pray for a trial by jury.

The defendant to the injunction could, if he had so chosen to do, amend his petition *via executiva*, and pray for a citation, and thus change his proceeding into one *via ordinaria*. Instead of so doing, he admits in his answer that the injunction was well taken, and avers that he changes his action into an ordinary one, and prays for judgment on his notes against the plaintiff in injunction. This, instead of bringing the plaintiff into court in any manner as a *defendant* to an original demand by way of citation, is, in my opinion, simply a changing of the executory process into an ordinary reconventional demand, and did not deprive the plaintiff in this suit of his position as plaintiff, or of his right to a trial by jury.

SUCCESSION OF DANIEL CLARK.—On the Application of MRS. MYRA CLARK GAINES for the Probate of the Will of DANIEL CLARK.

The rules for the opening and proof of testaments, commencing at Article 1639 of the Code, do not pronounce the penalty of nullity for their non-observance, and they nowhere say that other cases may not arise in which the strict letter of these rules may be inapplicable, and that the Judge may not receive in extraordinary cases other equally satisfactory proof that the requirements of the law have been fulfilled.

The formalities required by law for the execution of wills are essential to their validity. But whenever these forms have been observed, there is then a valid will entirely independent of its probate, or any subsequent proceedings which may be commenced on the same.

If a will is really valid, the irregular proof on which it may have been admitted to probate will not be permitted to affect the rights of parties under it. So the olographic will of *Daniel Clark* of 1811, which was admitted to probate without proof that the witnesses recognised the handwriting of *Daniel Clark* from having frequently seen him write and sign his name, as required by the old and new Code, if it had afterwards been attacked for want of this proof, would nevertheless, doubtless have been sustained on satisfactory evidence that it was entirely written, dated and signed by the testator.

The loss or destruction of the will of *Daniel Clark* of 1813, and the long period of time which has elapsed since his death, justify a resort to secondary evidence, which would not have been necessary if the will had not been lost or destroyed, and if so long a period had not elapsed before an attempt had been made to admit it to probate.

Article 1648 of the Code contemplates that the olographic will should be presented before the Judge before whom it is to be proven; yet it cannot be seriously contended that the loss or destruction of the will could prevent the legatee from establishing the will by secondary evidence.

It is not necessary that there should be a technical *contestatio litis*, in order to give the Supreme Court jurisdiction.

The rules established by the Code for the proof of olographic wills are imperative and prohibitory, and the court is without authority to admit to probate an olographic will not proved in the manner required by the Code. (LEA, J., dissenting.)

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Smiley & Perrin, *Bonford* and *Moise & W. M. Randolph*, for *Mrs. Gaines*. *G. B. Duncan*, for *Richard Relf*.

MERRICK, C. J.* In this case we adopt the carefully prepared statement of facts of the Judge of the lower court. It is in these words, viz:

"The petitioner alleges that on the 16th day of August, 1813, the late *Daniel*

* BUCHANAN, J., took no part in this decision.

Clark, her father, departed this life, having previously, viz: on the 13th day of July, 1813, executed an olographic last will and testament, by which he recognised her as his legitimate and only daughter, and constituted her his universal legatee, said bequest being subject however to the payment of certain specified legacies, and that he appointed *François Dusuan de la Croix*, *James Pitot* and *Joseph Bellechasse* the executors of said will; that said will was wholly written, dated and signed in the handwriting of the testator, and at his death left among his papers at his residence; that after his death diligent search was made for the said will, but that the same could not be found, nor has it been since, and that it was either mislaid, lost or destroyed. It is unnecessary to recapitulate more in detail the alleged contents of the will, or to advert to the history of events, as set forth in the petition, under which the court is called upon to recognize this lost document as a valid testament after an interval of more than forty years since the death of the alleged testator. The litigation, of which the present proceeding appears to be an up-springing shoot, is incorporated in the jurisprudence of the country, and a reference to it will not materially assist in the solution of the question submitted for adjudication. The petitioner asks that the will, such as she describes it, be admitted to probate, registered, and ordered to be executed.

Succession of Clark.

"To entitle the petitioner to a judgment, recognizing the existence and validity of the will, it is necessary that she should establish affirmatively, and by such testimony as the law deems requisite:

"1st. That *Daniel Clark* did execute a last will containing the testamentary dispositions set forth in her petition.

"That *Clark* died without having destroyed or revoked it.

"In looking for the testimony which might solve the question whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most with the deceased in the latter part of his life, and especially (if they could be found) to those who were with him in the last moments of his existence, when the hand of death was on him. Such witnesses, if they had no interest in diverting his property into any particular channels, might be considered as the best and most reliable that could be produced, and it appears to be precisely testimony of this character that the petitioner presents in support of her application.

"It appears that *Boisfontaine* had business relations with the deceased, which brought him into frequent intercourse with him, and that for the last two days of his life, and up to the moment of his death, he was with him; that *De la Croix* and *Bellechasse* were intimate personal friends, and that they were with him shortly before his death. Now these witnesses all concur in stating that *Clark said* he had executed a will posterior to that of 1811. They also testify that within a few months prior to his death he was making arrangements for the disposal of his property by a last will. He called on *De la Croix* to get his consent to act as executor, and also as tutor to his daughter *Myra*, expressing his intention of making generous provision for her in his will. *De la Croix* further states that *Clark* afterwards presented to him in his (*Clark's*) 'cabinet' a sealed packet, which he declared to be his last will, informing him at the same time that in case of his death it would be found 'in a small black trunk which he had there.'

"*Boisfontaine*, who was with *Clark* when he died, says that *Clark* in his last illness spoke of executing his last will, said it was to be found in a room down

SUCCESSION OF CLARK.

stairs, in a small black trunk; that he had left the greater portion of his property to his child *Myra;* that *Bellechasse*, *De la Croix* and *Pitot* were to be his executors; and that about two hours before he died he instructed his confidential servant *Lubin*, that in case of his death, the small black trunk above referred to was to be delivered to *De la Croix*, and enjoined upon him, as soon as he (*Clark*) was dead, to be sure and take it to him. He states that *Clark* expressed his satisfaction that he had provided for his daughter *Myra*, leaving her all his estate, and that *De la Croix* had consented to act as her tutor. He also states that he was present about fifteen days before *Clark's* death, when *Clark* took from the small black case a sealed package, and presented it to *De la Croix*, stating that it was his last will, recapitulating some of its provisions, and reminding him of his promise to act as tutor to his daughter. He further states that several persons, shortly before *Clark's* death, had seen the will, and corroborated *Clark's* statement as to its contents, and that *Judge Pitot*, *Lynd*, the notary, the wife of *William Harper* and *Bellechasse* were among the persons referred to. Now," the Judge *a quo* proceeds, "I think there can be no doubt, setting aside the testimony of *Bellechasse* and *Mrs. William Harper*, that *Clark* did execute a will shortly before his death; that the principal object of making this will was to recognize as his daughter the present applicant, and to make suitable provision for her; that the executors of this will were *Pitot*, *Bellechasse* and *De la Croix*, and that *De la Croix* was appointed tutor of his daughter *Myra;* that this will must have been in existence until within a very short time previous to *Clark's* death, if not after that event, and that *Clark* himself died believing it was in existence.

"That such was the opinion of *De la Croix* himself at the time is evident from the fact that twenty-four hours had scarcely elapsed after the probate of the will of 1811 before he made oath that he verily believed that *Daniel Clark* had made a 'testament posterior to that of 1811, that its existence was known to several persons,' and he accordingly applied for and obtained an order of the court commanding every notary in the city to declare whether such document had been deposited with him.

"If the foregoing facts may be considered as proved, independent of the testimony of *Bellechasse* and *Mrs. William Harper*, the additional testimony of these last named witnesses, with reference to the form of the execution of the will and its contents will rest upon a basis of probability, which must strengthen if it does not anticipate its conviction of its truth, for it is to be remembered that *Clark* knew how to draw an olographic will in due form, having already done so in the execution of the previous will, and knowing what was necessary to its validity, it would be improbable in the extreme that he would omit any of the few necessary formalities.

"When *Bellechasse* and *Mrs. Harper*, therefore, testify directly to the execution of the will, as having been written, dated and signed in the proper handwriting of the testator, they testify to the existence of facts which are, at least, probable, and upon the assumption that the will was executed, are matters approaching to certainty, independent of their testimony; so with regard to the appointment of executors, of the tutor, and of the general dispositions of the will as described in the petition.

"They state *Clark* did what he told others he intended to do, and what from the whole tenor of his conduct it was very probable he would do.

"It does not appear, however, that all the contents of the will, as sworn to by *Mrs. William Harper*, are also sworn to by *Bellechasse*, and though the testimony of the latter does not contradict that of the former, but confirms it, yet his testimony does not relate to any portions of the will, except such as relate to its form, the institution of his daughter as universal legatee, and the appointment of *De la Croix*, *Pitot* and *Bellechasse* as executors. Indeed the examination of witnesses does not appear to have been conducted with any reference to a detailed description of the will.

"They, however, both state distinctly that they read the will; that it was wholly written, dated and signed by *Clark;* that he thereby instituted *Myra Clark*, his daughter, his universal legatee, and appointed *De la Croix*, *Pitot* and *Bellechasse* his executors. From an examination of the whole testimony, and considering the conduct of the deceased, his repeated declarations up to the very day of his death, together with his anxiety to make ample provision for his daughter," the Judge of the lower court adds, "I feel satisfied that the legal presumption (which in the case of a lost will would necessarily exist) that it was destroyed or revoked by the testator must be considered as satisfactorily rebutted."

In addition to the statement of facts and conclusions in regard to them of the Judge of the lower court, it may be remarked that *De la Croix* states that the endorsement upon the will which he saw sealed up were in these words: "Pour être ouvert en cas de mort." This indorsement does not appear upon the will of 1811, and the will which he saw was doubtless the will of 1813.

In regard to the testimony of *Col. Bellechasse* and *Mrs. William Harper*, there is nothing in this record which impeaches their credibility. If it be objected that the amount of property left by *Clark* may have induced them to swerve from the truth, the reply has equal force that there would be just as strong a reason for any other party in interest to have prevented the execution of the will by its destruction.

It may be remarked further, that the universal legacy being established beyond question, the particular legacies which tend to diminish the estate which will come into the hands of this universal legatee are sufficiently proved on general principles against such legatee by the testimony of a single witness, because these legacies are alleged and set up in the petition of the party who is to be charged with them, and she cannot be permitted afterwards to deny what she has alleged in her pleadings.

Agreeing fully, as we do, with the conclusions arrived at by the District Judge as to what has been proven, the only remaining question for us to solve is one of law, and it is: Has this will been proven in conformity to Article No. 159, p. 244, of the Old Code or of Article No. 1648 of the New Code, which require for the proof of the olographic will the testimony of two credible witnesses, who declare that they recognize the testament as being entirely written, dated and signed in the testator's handwriting, as having often seen him write and sign during his lifetime?

The witnesses have sworn that the will was entirely written, dated and signed by *Daniel Clark*, but they nowhere say that they have often seen him write. They show an intimacy and relationship which leaves little room to doubt that they really were well acquainted with his handwriting, and had probably seen him write often, as required by the Code, but they have not expressly said so. The question can, therefore, be answered only by determining whether the

provisions of law contained in this Article of the Code are sacramental, and must be pursued in all cases, or whether they are merely directory, and the courts have power, in certain cases where this proof is wanting by reason of accident, to avail themselves of the secondary proof, the next best of which the nature of the case will admit.

It would seem that there was a distinction between rules of law which prescribe the form in which wills and testaments are to be made and those which direct the courts in what manner they shall be admitted to probate and ordered to be executed. The first, commencing at Article 1567 of the Civil Code, are positive enactments which are essential to the validity of the will. Their non-observance renders the supposed will null and void by express provision of law. C. C., 1588. The rules, on the other hand, which are sketched by the Legislature for the opening and proof of testaments, commencing at Article No. 1690, do not pronounce the penalty of nullity for their non-observance, and they nowhere say that other cases may not arise in which the strict letter of these rules may be inapplicable, and that the Judge may not, in extraordinary cases, receive other equally satisfactory proof that the requirements of the law have been fulfilled.

In a nuncupative will by public act it is required that certain formalities should be observed before a notary public and three witnesses. Without these observances the will would not exist as such.

The olographic will must be entirely written, dated and signed by the testator. Without the observance of these requirements there is no legal will.

And so of the other forms. But whenever these forms have been observed, there is then a valid will entirely independent of its probate or any subsequent proceeding which may be commenced upon the same. But the law says that this valid will shall remain inoperative until it receives the order for its execution by the Judge of the probate court. But it has never been pretended that this validity of the will is in any manner effected by the character of the proof which the Judge of the lower court may deem sufficient on which to base his order. If the will is really valid, the irregular proof on which he may base his decree cannot render it invalid. The will subsists, and though the judgment might be corrected on appeal, yet, if it were suffered to remain, the courts would never permit a party to lose his rights by a mere irregularity in the proof upon which the decree was founded. *Falkner* v. *Friend*, 1 Rob., 48.

So in the case before us, the will of 1811 was admitted to probate by *Judge Pitot*, upon the single declaration of the witnesses "that the same was in the proper handwriting of him, the said *Daniel Clark*." No one will pretend that this will was rendered invalid because those witnesses did not swear that they had often seen *Daniel Clark* write. Had the will afterwards been attacked on the ground that the will was not in the handwriting of *Daniel Clark*, it would doubtless have been sustained on satisfactory proof that it was entirely written, dated and signed in the handwriting of the testator.

The distinction which we have drawn between the positive enactments of law in regard to the form for the execution of wills and the directory provisions in regard to the proof of the same, seems to have been fully recognized by our predecessors. In the case of *Bonthemy* v. *Dreux et als.*, 12 M. R., p. 639, the court maintained a nuncupative will by private act which had been admitted to probate on the testimony of a single witness, notwithstanding Article No. 189, p. 244 of the Old Code. This distinction was also taken in the case

of the *Succession of Robert, Pilié, Executor*, 2 Rob., 433; also, in effect, in the case of the *Succession of Eubanks*, 9 An., 147, where a witness was admitted to testify who did not possess the qualifications required by Article 1584 of the Civil Code.

This distinction also pervades the jurisprudence of France on this subject. By Article No. 1007 of the Code Napoleon it is made the duty of the Judge to make a proces verbal of the presentation of the olographic will, the opening of it, the state in which he found it, and the order of deposit with the notary. These provisions appear to be directory only. Pailliet, Note 2 to Article 1007 C. N., says: "La présentation du testament au président du tribunal, l'ouverture des testaments par ce magistrat, et le procès verbal qu'il doit dresser ainsi que de l'état du testament, sont sans contredit des précautions que la loi a cru nécessaires, pour qu'on pût être assuré de plus en plus de la volonté des testateurs; mais la loi n'a point attaché à l'inobservation de ces formalités de peine de nullité, et on ne saurait la prononcer, surtout lorsque rien n'indique la fraude de la part de l'héritier institué ou du légataire." See note and authorities there cited.

Taking it, therefore, for granted that the distinction which we have indicated exists, the next question which presents itself is, do the circumstances of this case take it out of the rule prescribed by Article No. 1648 of the Civil Code? We think the loss or destruction of the will, after the death of *Clark*, and the long period of time which has elapsed since his death, justify a resort to secondary evidence, which would not have been necessary if the will had not been lost or destroyed, and if so long a period had not elapsed before an attempt had been made to admit it to probate. We think this view of the law is fully sustained both by reason and authority.

Article 1648 contemplates that the olographic will shall be presented before the Judge before whom it is to be proven; yet no one would seriously contend that the calamity which deprived the legatee of the will would prevent him from establishing its contents by secondary evidence. Were this the law, a reward would be offered to villainy, and it would always be in the power of the unscrupulous heir to prevent the execution of the will.

The case of *Thomas et al.* v. *Thomas*, 2 L. R. 166, was a controversy in regard to a lost will which, it had been alleged, had already been admitted to probate. The objection to the proof was:

"That parol proof of the execution of the will could not be given in that court; that a will, being an instrument clothed with certain formalities prescribed by law in order to give it effect, no evidence of its loss or its contents could be offered until its existence with the requisite formalities had been proved."

Judge Porter, as the organ of the court on this point, remarks with his usual felicity:

"The first objection is entitled to more consideration, but we still believe it unsound. The law of evidence would have a poor claim to the praise justly bestowed on it if it did not foresee and provide for such a case as this. That rule which is the most universal, namely: that the best evidence the nature of the case will admit shall be produced, decides the objection, for it is only another form of expression for the idea that when you lose the higher proof you may offer the next best in your power. The case admits of no better evidence than that which you possess, if the superior proof has been lost without your

fault. The rule does not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control. It only means, that so long as the higher or superior evidence is within your possession, or may be rendered by you, you shall give no inferior proof in relation to it. Particular rules, which require written proof, always relax themselves to meet absolute necessity, or that necessity which is occasioned by occurrences common among men.

"There is nothing in a will being required to be made in a particular form, which makes it an exception to this great law of necessity. It may increase the difficulty of proof, but furnishes no reason to refuse hearing it. The court in this case had proof before them, which much diminished the danger of parol evidence."

In the case of the *Succession of Maria J. Robert, Pillé, Executor*, 2 Rob., 434, which was a contest growing out of an olographic will executed in France, and there deposited, the proof was by witnesses who were acquainted with the handwriting of the testatrix. It does not appear that they had often seen her write.

The court, after holding this sufficient as being all which was required by the law of France, says:

"It has been insisted, however, that Article 1648 and 1649 of our Code show that the original will ought to be produced in order to be identified with the testimony of the witnesses who have recognized it, and that in its absence the evidence would be incomplete. This position would perhaps be correct if the witnesses were in personal attendance before the court of probate. But these Articles are not negative laws; they do not say that no other kind of proof shall be admitted, and we doubt very much whether, under their application, if an olographic testament, executed here, had by some accident been destroyed before being legally proved, a true copy of it, identified with the original by the testimony of two credible witnesses who had seen both, and who would be able to swear to the genuineness of the original in the manner pointed out by law, should not be considered as sufficient compliance with the provisions of our Code. Surely we are not prepared to say that in such a case the legal rights acquired under the will would also be defeated, and that the party would be left without a remedy. This is indeed an analogous and even stronger case, and as in our opinion the law-makers cannot have intended to require an impossibility, we must conclude that, under such circumstances, the proof furnished by the appellants is a sufficient compliance with the requisites of the Codes, and that the inferior Judge did not err in ordering the execution of the will under consideration."

In view of these decisions of our own courts in regard to the construction of Article No. 1648, it is not necessary to examine the decisions of the court on analogous articles of the Civil Code and the Code of Practice in order to arrive at a conclusion on this.

The doctrine of the common law is in consonance with this view taken by our own courts. The books are filled with adjudged cases in regard both to lost deeds and wills. We will content ourselves by citing one: the case of *Dare* v. *Brown*, 4 Cowen, 469. The suit was brought upon a lost will devising real estate. By the statute laws of New York, a will devising real estate was required to be proved by three credible witnesses. The Supreme Court of New York says, in regard to this lost will:

"The will of *Benijah Brown* was proved by one of the subscribing witnesses. He stated it was executed in the presence of himself, *James Walton*, and another person whose name he did not recollect, but he had no doubt of his being a credible witness. This," the court adds "was all the evidence which could be expected under the circumstances of the case."

Considering that the administration of justice requires something more than the application of the letter of the law designed for one class of cases of ordinary occurrence to all others, however they may have been modified by accident, and believing that the spirit of our laws provides for the case which the applicant has presented us, we conclude that the will of 1813, such as she has set forth in her petition, should be admitted to probate.

It has been objected (as we understand the argument) that this court has no jurisdiction of this case on appeal, under the Constitution, because there is no *contestatio litis* formed, and because there are no proper parties to the appeal. We dismiss this objection with the single observation, that it is not necessary under the Constitution that there should be a technical *contestatio litis* in order to give this court jurisdiction, and if the attorney of absent heirs was even necessary as a party, his presence here is sufficient to sustain this appeal.

We are not insensible to the argument that this claim has remained for forty years, without being set up in a court of justice in a form to be prosecuted to effect, and that rights have been acquired under the sales made under the will of 1811. The staleness of petitioner's suit is best answered by the reference to the litigation in which petitioner's alleged rights have been prosecuted in other forms, and we may suppose it did not become necessary to resort to the unusual proceeding of applying for the probate of a last will until after those cases were decided.

The plaintiff presents to us a *prima facie* case which entitled her to relief. The decision which we make does not conclude any one who may desire to contest the will with her in a direct action, and to show that no such will was executed. On the other hand a refusal to probate the will places it beyond the power of the applicant to set up her rights under the will against any other person.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and proceeding to render such judgment as should have been rendered in the lower court, it is ordered, adjudged and decreed, that the will of *Daniel Clark*, dated New Orleans, July 18th, 1813, as set forth in the plaintiff's petition be recognized as his last will and testament, and the same is ordered to be recorded and executed as such, and it is further ordered, that *François Dusuan de la Croix* be confirmed as testamentary executor of said last will and testament, and that letters testamentary issue to the said *De la Croix*, and that the costs of this proceeding be borne by the succession.

LEA, J., (dissenting.) The able and carefully-prepared opinion of the Chief Justice has failed to convince me that the document purporting to be the last will and testament of *Daniel Clark* should be recognized as such. This case turns principally upon the solution of a legal proposition, which has been correctly stated in the opinion which has been read—to wit: Whether the provisions of our Code in relation to the proof of wills "are merely directory," and "the courts have power, in certain cases where the required proof is wanting, by reason of accident, to avail themselves of secondary proof—viz., the next best

of which the nature of the case will admit." It is urged, and the decree of the court has decided, that a distinction is to be drawn between the law regulating the execution of wills, and that which prescribes the manner of proving them. For instance, the law is imperative that an olographic will should be dated, and it is conceded that no amount of testimony, however conclusive, both as to the fact and even the precise date of its execution, will supply the want of a date; but the same law, though in a different article, has declared that an olographic will must be proved by two witnesses, who possess certain qualifications, and who derive their knowledge from a particular source. This part of the law, *it is decided*, is not imperative, but directory, and is subject to the application of the ordinary rule of evidence—viz.: that when the best evidence is not attainable, the next best may be resorted to. A single remark made by the organ of the court with reference to the proof of the will of *Maria J. Robert*, (see 2d Rob., p. 432,) appears to be the basis upon which much of the reasoning in this case rests. The court remarked in that case that Articles 1648 and 1649 were not negative laws; but an examination of the case shows that this remark had no necessary logical connection with the conclusion at which the court arrived. The decision in that case I have no doubt was correct, not because these articles were not negative in their character, but because in the nature of things, so far as they were dispensed with, they had no application to the case in hand. One of the parties was seeking to prove a will registered in France—the laws of that country prohibiting a removal of the original. It was held that that portion of the articles referred to which required the production of the will was not applicable.

It was in this connection that the learned judge who rendered the opinion made the remark that these articles were not negative; but no such proposition was necessary to his conclusion. It appears to me that it was a case in which a negative law was not applicable. So in the case of *Eubank*, recently decided, which is quoted by the Chief Justice as being one "wherein a witness was permitted to testify who did not possess the qualifications required by Article 1584 of the Civil Code." The only question was, whether a woman could be one of the witnesses to prove an olographic will. It was held that she might be, and that Article 1584, which prescribes that no woman shall be a witness to a will, has reference exclusively to subscribing witnesses, but had no application to the proof of olographic wills. I have examined the decision with care, and I have entirely misunderstood it if either the learned judge who wrote it, or the court which assented to it, intended to sanction the doctrine that a witness should be permitted to testify who did not possess the qualifications required by law. Again, the case of *Thomas* v. *Thomas*, referred to, was one in which the ordinary rules of evidence regulated the proof of the contents of a lost will, but an examination of the case shows that it had nothing to do with the probate of a will.

In a question involving title, proof was offered, not to have a will probated, but to establish the contents of a will *which had been probated*, and which, after its probate had been lost in the parish judge's office, it was held that such a case was to be regulated by the ordinary rules of evidence. No question was presented with reference to the substitution of those rules for the positive provisions of the Code. Without entering into a more protracted examination of the cases referred to, I may be permitted to say that in none of them, in which the pleadings call for it, have I found a recognition of the doctrine that the articles

of the Code regulating the proof of wills could be set aside or dispensed with, as not being imperative and prohibitory. And were it otherwise, I should consider the doctrine one which no precedent could consecrate. Laws, whether directory or prohibitory, are alike entitled to obedience; different consequences may attach to the violation of these laws, but though cases may occur to which they are not applicable, laws can never be dispensed with except by a power which is above the law, or one which violates it. Now, it appears to me that the character and meaning of the law may be determined by a reference to its object. If the object of the law in reference to the proof of wills was to regulate the measure of evidence only in cases where that measure was attainable, then it is evident that it is mere surplusage. A law which prescribes that a certain amount of proof shall be required to establish a will, provided the applicants can produce it; and if they cannot procure it, that they may proceed to prove it in any other manner which may be satisfactory to the magistrate, carries within itself an inherent nullity. It would be operative only when it was useless, and would cease to be operative upon the first attempt to give it a practical effect.

The article referred to in this case, therefore, is not only negative, but negation is of its very essence; deprive it of its negative character and it ceases to be a law at all—it exists only as it prohibits. When the law, therefore, says that the olographic will must be proved by *two witnesses*, it means, as it appears to me, that *one* witness shall *not* prove it; and so with regard to every other provision applicable to the case presented. If any party in interest should appear before us on an appeal from a decree of a probate court admitting a will to probate upon the testimony of one witness, I apprehend that we should have very little hesitation in reversing the decree, no matter how well it might be fortified by proof that it was impossible to obtain two witnesses, or that witnesses who might have proved it were dead. I think we should say, in such a case, that the article *was* prohibitory, and that the ordinary rules of evidence were not applicable and could not be substituted for the positive statutory provisions of the Code.

If, then, the article of the Code is imperative and prohibitory, as I think it is, it is the duty of the magistrate to whom a will is offered for probate to see that the requirements of the law are complied with. If it is an olographic will which is offered for probate, it is his duty to require that it shall be proved by two witnesses who recognize the document as being wholly written, dated and signed by the testator; and the knowledge of this fact they must have acquired from having frequently seen him write and sign his name. And it appears to me that the magistrate receiving the proof of the will cannot dispense with any of these requirements without an omission of duty. Having considered the general rules regulating the proof of wills, it remains to be determined how far the case presented furnishes such an exception as to justify a departure from their ordinary application. It is admitted—and on this point there is no division of opinion—that in no part of the testimony is it stated that either of the witnesses ever saw *Clark* either write or sign his name; but it is urged that this being the case of a lost will, the rules regulating the proof of testaments not lost are not applicable.

So far as the articles of the Code were not intended to apply to such a case as that presented, they of course cannot be invoked or enforced.

When the law, therefore, refers to the production of a will, the case of a lost will, so far as it relates to its production, is not contemplated, any more than is a provision referring to the presence of witnesses in court reference can be supposed to be had to a case where the witnesses are dead or absent. Acting upon this reasonable doctrine, the inferior court allowed proof to be offered of the fact that a document purporting to be a last will and testament of *Daniel Clark* had been either lost or destroyed, and also proof of the contents of the document supposed to be lost. The recorded testimony of witnesses long since dead was received in evidence both as to the character and contents of this document. All that the dead had sworn to, and all that the living could swear to, was received without objection. If more testimony was not received it was because no further testimony was attainable; but upon a consideration of the whole of it the court thought, perhaps erroneously, that the proof did not meet the requirements of the law. The inferior court considered that, without assuming that to have been proved which it is admitted was not proved, it had no authority to admit the will to probate; and it is because (as it appears to me) this court has assumed that the witnesses, if they could be brought to life, would swear to what they have not sworn to; would give testimony beyond what they had already given; would, in fact, give a particular answer to a particular question that I feel compelled to dissent from the opinion which has been rendered.

I have endeavored to show, that if the witnesses were alive, it would be the duty of the court to inquire into the particular sources of their knowledge of *Clark's* handwriting. Now, in my opinion, the court was not authorized to assume that an answer to the question whether they had frequently seen *Clark* write, would have been an affirmative one. For a legal inference, the court was not, it appears to me, authorized to travel beyond the record, and as a mere deduction of fact, it, by no means, follows that familiarity with *Clark's* handwriting and signature must have been based upon the fact that they had ever either seen him write or sign his name.

Every person who has been called upon frequently to receive the proof of wills, and indeed every person who has had occasion to examine frequently the handwriting of different persons, must recognize it at once, as within his personal experience, that such knowledge of one's handwriting is often acquired in a manner to enable any one to swear to it with all reasonable certainty, without ever having seen the writer put pen to paper. It is not my purpose to elaborate this point or to extend my remarks beyond what may be considered necessary to a statement of the views upon which my dissent is placed. I withhold my concurrence in the decree which has been rendered, because, in my opinion, it substitutes conjecture for certainty in proceedings in which, above all others, neither assumption nor conjecture are admissable.

Same Case on a Re-Hearing.

MERRICK, C. J. A re-hearing was granted in this case to consider the propriety of amending the judgment heretofore rendered, so as to reserve *Richard Relf* (inadvertently made a party to the record in this court) the right of hereafter contesting the decree.

The counsel for the appellant make no objection to the amendment, but propose that this right should be limited, so that he should be permitted to attack the will by a direct action only.

We are referred to an expression in the opinion read, wherein we say that the decree which we make (admitting the will to probate) does not exclude any one who may desire to contest the will with the appellant in a direct action, and to show that no such will was executed. This must not be understood as expressing the opinion that other means of defence may not be used, as by way of answer or exception, whenever the will is set up as a muniment of title. *Kilgore* v. *Ratliff's heirs*, 2 N. S., 301; *O'Donogon* v. *Knox*, 11 L. R., 388; *Robert* v. *Allier*, 17 L. R., 18.

It will be time to express an opinion upon this point whenever the question is properly presented.

Without indicating what modes of defence parties may adopt, we think the judgment in this case should not conclude *Richard Relf*, but that he, as well as those not parties to the suit, having an interest so to do, should be allowed to oppose to the will when set up against them, whatever defences the law permits in like cases.

It is, therefore, ordered that the judgment heretofore pronounced by us in this case, be amended by adding to the same the words: Reserving to said *Richard Relf* the right, if any he have, to oppose said will in any manner allowed by law, as fully as he could have done had he not been a party to these proceedings.

DAVID C. GRIFFING *v.* STEPHEN M. ROUTH.

A runaway slave, supposed to belong to defendant, was concealed in defendant's fodder house, among the fodder. Two slaves of defendant were sent to capture him. They thrust a broadsword into the fodder to frighten him out, and in so doing, inflicted a wound of which he died. *By the Court:* It was a grossly negligent and wanton act on the part of the defendant's slaves to thrust a dangerous weapon like a broadsword into the fodder where they believed a fellow-slave was concealed. It matters not that they did not intend to kill him. The master is liable for the damage done by this inexcusable negligence and barbarity, to the extent of being compelled to pay for the slave killed or to abandon his own guilty slaves to the person injured.
Code, 180, 181, 2300.

APPEAL from the District Court, Tenth District, Parish of Tensas, *Snyder*, J. *Farrar*, for plaintiff. *Chilton* and *W. M. Perkins*, for defendant and appellant.

STOFFORD, J. Some slaves of the defendant killed a slave of the plaintiff under the following circumstances:

The defendant was absent at the north. One of his slaves ran away. A runaway was ascertained to be lurking about the premises. The defendant's overseer, supposing him to be the runaway slave of the defendant, sent the driver with another of the hands to the fodder-house, with orders to capture

him. They found that the fugitive was concealed under the fodder. With a view to frighten or force him out, one of them began thrusting a broadsword (used for pruning hedges) down into the fodder. In doing so, he plunged the sword into the runaway's abdomen, and wounded him so severely that he died in a few hours, notwithstanding surgical aid was procured as soon as possible. It turned out that he was the slave of the plaintiff.

A jury of the vicinage rendered a verdict in favor of the plaintiff for the value of the slave thus killed; and the District Judge, refusing a motion for a new trial, gave judgment pursuant to the verdict. The defendant has appealed.

The appellant complains that there is not sufficient evidence that the plaintiff owned the boy that was killed. We think his own admission is sufficient.

He contends that if the slave did belong to plaintiff, then, being a runaway, he could not be worth $1200, the sum awarded by the jury. There is positive evidence that he was worth that sum, which the jury believed.

Again, it is urged that the slave killed was himself acting wrongfully, being at the time a runaway and a trespasser, and that, as he brought his death upon himself, the plaintiff cannot recover.

But the wrong doing of the slave did not contribute naturally and directly to his being killed with the broadsword. This distinguishes the case palpably from the cases of *Lesseps* v. *The Pontchartrain Railroad Company*, 17 L., 361, and *Fleytas* v. *Pontchartrain Railroad Company*, 18 L., 339, cited by the defendant's counsel. In one of these cases, the slave was killed in consequence of his own temerity in driving his cart across the railroad track, when he knew the cars were approaching at full speed; in the other, the slave was lying on the track asleep, intoxicated, or in a fit, (of which there was no evidence,) and the opinion of the court states that the testimony did not show that the engineer was guilty of a want of due care.

It was a grossly negligent and wanton act on the part of the defendant's slaves to thrust a dangerous weapon, like a broadsword, into the fodder where they believed a fellow-slave was concealed. It matters not that they did not intend to kill him. The master is liable for the damage done by their inexcusable negligence and barbarity, to the extent of being compelled to pay for the slave killed, or to abandon his own guilty slaves to the person injured.—"The master shall be answerable for all the damages occasioned by an offence or *quasi-offence*, committed by his slave, independent of the punishment inflicted on the slave." C. C., 180; see as to abandonment, Arts. 181, 2300.

The judgment is, therefore, affirmed, with costs.

MATTHEW WATSON *v.* SAMUEL TEMPLETON.

Objection by drawer of a bill of exchange of insufficient demand of the acceptor. The notary went to the place of business of the acceptors, (*Wm. Laughlin & Co.*,) and finding it shut, made protest for non payment, without making inquiry for the residence of the acceptors. *By the Court:* We consider a demand, within the usual business hours, at the commercial domicil of a partnership, for the payment of a note, or bill due by the firm, a sufficient presentment. It was not necessary to make a further demand at the private residence of the individual partners. The place of business is the domicil of the firm, and it is their duty to have suitable persons there to receive and answer all business demands. We express no opinion as to the degree of diligence requisite, where the obligation is that of one doing business alone, and where the debtor has both a domicil and place of business, the latter being closed at the time of the presentment.

Notice by the notary to the last endorser exclusively, is a strict compliance with commercial usage, especially if he be ignorant of the residence of the other parties.

Where the distance is such as to require the interval of several days for the purpose of communication, then "the day" which each endorser is allowed, within which to give his notices in turn, will commence with that on which he himself receives notice.

APPEAL from the District Court, Tenth District, Parish of Carrol, *Snyder*, J. *Selby*, for plaintiff. *Caldwell*, for defendant and appellant.

LEA, J. This is a suit by the holder against the drawer of a protested bill of exchange.

The defendant's counsel has urged in argument, that the evidence establishes an insufficient demand of the acceptor and a want of proper diligence in notifying the drawer. Other matters also have been urged on behalf of the defendant, which we consider it unnecessary to discuss.

On the 19th February, 1850, the defendant drew his draft upon *Wm. Laughlin & Co.*, of this city, in favor of *C. J. Searls*, for the sum of $2500, payable ten months after date. This bill, after acceptance, was, in due course of business, discounted by the Planters' Bank, of Nashville, and was, by the officers of that institution, transmitted for collection to the Mechanics' and Traders' Bank of this city, where the acceptors resided. The bill is dated in New Orleans, though the drawer, it appears, resides and did reside at the time the draft was drawn, in the parish of Carroll, in this State, to which place he removed from Warren County, in the State of Mississippi, the place of his previous residence.

On the maturity of the note, a presentment for payment was made at the place of business of the acceptors by a notary public, who, finding it shut, made protest for non payment, without making further inquiry for the residence of the acceptors, and on the same day, sent notice of the same, by mail, to the President of the Bank of Nashville, enclosing in the same letter the notices for the other parties to the bill. These notices were received in due course of mail, on the 6th January, 1851, by the officers of the bank, who, after diligent inquiry made of several persons, and especially of the party from whom they had received the bill, being unable to obtain any positive information with reference to the defendant's place of residence, on the same day on which they themselves received notice, deposited the original and duplicate notices of protest in the post-office at Nashville, directed separately to the defendant at five different post-offices in the State of Mississippi, being those at which they supposed they would be most likely to reach the defendant.

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Now it remains to be determined under this state of facts:

1st. Whether a proper presentment and demand of payment was made by the notary;

2d. Whether the notary took the customary and legal steps for giving notice of protest to the other parties to the bill;

And 3d. Whether the plaintiff used due diligence in attempting to give notice to the drawer.

We consider a demand made, within the usual business hours, at the commercial domicil of a partnership, for the payment of a note or bill due by the firm, a sufficient presentment. It was not necessary to make a further demand at the private residence of the individual partners. The place of business is the domicil of the firm, and it is their duty to have suitable persons there to receive and answer all business demands made at that place. We express no opinion as to the degree of diligence requisite where the obligation is that of one doing business alone, and where the debtor has both a domicil and place of business, the latter being closed at the time of the presentment. See Story on Promissory Notes, § 235.

We think the notary, under the circumstances, complied strictly with commercial usage in giving notice exclusively to the last endorser.

Mr. Chitty lays down the rule as follows: "It is usual for the holder only to give notice to the person from whom he immediately received the bill or note especially if he is ignorant of the residence of the other parties (as in the case at bar); and if so, his neglect to give notice to the other prior endorsers and to the drawer, cannot, on any sound principle, deprive either of the endorsers of the right to proceed against the person who endorsed to him and all prior parties: provided, he, in his turn, has duly forwarded notice." The rule is, therefore, clearly settled, that each party to a bill or note, whether by endorsement or mere delivery, has, in all cases, until the day after he has received notice, to give or forward notice to his prior endorser, and so on till the notice has reached the drawer."

See Story on Promissory Notes, sec. 331, and notes.

And where the distance is such as to require an interval of several days for the purposes of communication, then "the day" which each endorser is allowed, within which to give his notices in turn, will commence with that on which he himself receives notice. The notary testifies in this case that he was ignorant of the residence of the drawer, and that the office of the acceptors, where such enquiry might have been made, being shut, he directed the notices according to the law and usage in such cases. For a further illustration of this subject, see the opinion of Chief Justice Slidell in the case of *Carmena* v. *The Bank of Louisiana*, 1st An., 370.

Up to the time, therefore, that the Bank of Nashville received notice of protest, there had been no discharge of the drawer. Were its officers guilty of any such laches, after that notice had been given, as operated a release of his liability? It appears to us that they used all reasonable diligence in endeavoring to discover the residence of the defendant. The endorsee of the note, from whom they received it, gave them no information. They were not bound to make public proclamation, or to go to the useless expense of advertising for information concerning the residence of one whose domicil was in another State.

The doctrine on this subject is clearly and concisely stated in Kents' Com-

mentaries, vol. 3d, sec. 44, p. 105, from which we extract a single sentence, as specially applicable to this case: "The law does not presume that the holder of the paper is acquainted with the residence of the endorsers; and if the holder or notary, after diligent enquiry as to the residence of the endorser, cannot ascertain it, or *mistakes it* and *gives the notice a wrong direction*, the remedy against the endorser is not lost."

It has not been suggested, and we are at a loss to conceive what further enquiries, with any reasonable hope of obtaining additional information, the officers of the bank could have made.

We think there is no error in the judgment appealed from.

Judgment affirmed.

HUNTER, MURPHY & TALBOT *v.* THE GENERAL MUTUAL INSURANCE COMPANY OF NEW YORK.

A liability for a general average contribution cannot properly be called a risk; it is an obligation incident to a sacrifice made to avert a risk. It is based upon the equitable rule that no one should enrich himself at another's expense.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Moise & W. M. Randolph, for plaintiffs. *Briggs*, for defendant and appellant.

LEA, J. The conceded facts of this case, limit the investigation of the court to a single question of law. The plaintiffs shipped on board the bark Cyane, bound from Richmond to New Orleans, fourteen slaves, which they caused to be insured to the extend of $7075, by the defendants, "solely against loss by drowning in consequence of the stranding or shipwreck otherwise of the vessel, the assurers being warranted against all other risks, and especially against mutiny, elopement, natural death, and the interference of foreign governments on these subjects."

The vessel on which the slaves were embarked, stranded near Abaco, and to save the crew and the remainder of the cargo, including the slaves, a jettison of a portion of the cargo became necessary.

The plaintiffs in this suit seek to recover the amount which they were obliged to pay as their apportionment of a general average contribution. It is contended that, by the special stipulations of the policy, the liability of the insurers is restricted to a loss by drowning in consequence of shipwreck, and as it is not alleged, nor is it the fact, that any of the slaves were drowned, they are not liable under the policy.

It is admitted that the premium was paid, that the jettison was proper, and that the adjustment was correctly assessed. The whole case then turns upon a question of interpretation. Does the clause above quoted release the insurers from a liability to reimburse the assured for the money paid under the average contribution? In the policy, there is a clause specially authorizing the recovery of a general average contribution, but it is urged that this clause forms a part of the printed portion of the policy, and is controlled by the written stipulations restricting the liability of the insurers against any risk, except that of death by drowning.

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Had the plaintiffs effected an ordinary insurance upon merchandize, the defendants, in the absence of any restrictive clause, would clearly be liable for the reimbursement. This clause, it appears to us, was clearly intended to designate the specific risk against which the company intended to protect the plaintiffs. But a liability for a general average contribution cannot properly be called a risk; it is an obligation incident to a sacrifice made to avert a risk. It is based upon the equitable rule that no one should enrich himself at another's expense; but it is not itself a risk according to any proper interpretation of that term. Assuming, therefore, that the written stipulations of the contract should control the interpretation of the printed clauses, we can perceive no necessity for the application of such a rule, as the enforcement of both involves no contradiction. And this interpretation is sustained by a consideration of the natural equity of the case. He who participates in the benefit, should divide the burthen of a sacrifice. Jettison is never made except upon the supposed necessity of the sacrifice of a part, for the purpose of saving the remainder of the cargo.

It is admitted that the jettison in this case was properly made. The presumption, therefore, is that, had the jettison not been made, the cargo, including the slaves, would have been lost. The insurers, therefore, were directly benefited by the sacrifice, which was made to avert a loss for which they would otherwise have been liable.

We think there is no error in the judgment appealed from.

Judgment affirmed, with costs.

Le Baron & Son *v.* J. Dupont.

When the cross interrogatories are not answered, the depositions should not be received in evidence.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Benjamin, Bradford & Finney*, for plaintiffs and appellants. *Briggs*, for defendant.

Buchanan, J. This case presents an issue of fact whether the mahogany of which the proceeds are attached at the suit of *Le Baron & Son*, belongs to their debtor, *John Dupont*, or to *Gabriel Le Blanc*, the plaintiff in the other suit. It is proved by witnesses examined for *Le Baron & Son* that the mahogany was purchased by *Dupont* in his own name—that he chartered the brig Octavie to bring it to New Orleans—that the Octavie being wrecked at the port of shipment, he chartered another vessel, the brig Sarah Thorndike, to carry the mahogany—that this charter party was made by *Dupont* in the name of his father-in-law, *Gabriel Le Blanc*, as charterer, for the reason, as alleged by him, that said *Le Blanc* would be on the spot to attend to the shipment—that *Dupont* came to New Orleans with the mahogany, and sold it to *Siebricht* as his own property.

Against this evidence there is the presumption arising from the insertion of *Le Blanc's* name in the charter party of the Sarah Thorndike, as charterer, and in the bill of lading as shipper and consignee of the mahogany. But the first

of these documents is explained by the evidence of *Ireland* and *Salazar*, as above, and the bill of lading is shown to have been always in the possession of *Dupont*. A witness, *Radovich*, has also been examined for *Le Blanc*, but his evidence does not contradict, in the slightest degree, that of *Le Baron's* witnesses. There is a bill of exceptions to the admission by the District Judge of the depositions of three witnesses examined for *Le Blanc* under a commission. Appended to the commission were interrogatories and cross interrogatories. But none of the cross interrogatories were answered by the witnesses, nor even, as it seems, communicated to them. This ground of objection was improperly overruled by the District Court. The depositions should have been rejected, and we are bound to dismiss them from our consideration. The attaching creditors have made out their case to our satisfaction.

It is therefore adjudged and decreed, that the judgment of the District Court be reversed; that the appellants, *Le Baron & Son*, recover of *Jean Dupont* two thousand and eighty-four dollars and fifty-six cents, with interest at eight per centum per annum from 12th June, 1849, until paid, and costs of these consolidated suits in both courts, with privilege upon the property attached; and that there be judgment against the appellee, *Gabriel Le Blanc*, with costs.

WATTS, TEMPLETON et al. *v.* THE POLICE JURY OF CARROLL.

Inhabitants of a parish who are put to great trouble, inconvenience and injury in reaching the court-house, have such an interest in the erection of a new one in a proper place, as provided by law, as to authorize a mandamus to compel the Police Jury to proceed to the construction of the new court-house.

The vote of the Police Jury, refusing to make an appropriation for the building of a court-house, and their inaction with regard to the levy of a tax for many months after the parish site had been selected and reported by the Commissioners, were in violation of the command of the sixth section of the Act of 4th March, 1853; and a mandamus was the suitable remedy. C. P. 844.

Although the parish had no title to the site for the court-house reported by the Commissioners, they could have acquired title by a forced expropriation upon a previous indemnity to the owners. Code 2604 *et seq.*

APPEAL from the District Court, Tenth District, Parish of Carroll, *Snyder*, J. *Short & Parham*, for plaintiffs. *Caldwell* and *Stacy & Sparrow*, for defendants and appellants.

STOFFORD, J. The question here is, whether the District Court erred in issuing a peremptory mandamus to the defendants, commanding them to proceed to assess and cause to be collected, a special tax, to defray the expense of a new court-house and other public buildings for the parish, as located by the Report of the Commissioners, and to cause the said buildings to be erected as required by the Act of 4th March, 1853. Sess. Acts, p. 12.

It is objected that the relators disclosed no such interest in the question as would authorize them to sue out a mandamus. They allege, and the petition is sworn to, that they live in the parish, near the Bayou Mazon, and are put to great trouble, inconvenience and injury, in being compelled to go so far from the centre of the parish as the town of Providence, for the purpose of attending court—an evil which the Legislature intended to remedy by the act aforesaid. If it were necessary for them to allege any further interest than that which all citizens of the parish had, that the law relative to the public buildings of the

parish should be executed, the allegations of the petition are certainly sufficient, and no such special issue was made upon them as to require further proof than the relators' affidavit.

Again: it is said that the election relative to the new parish site was void, because the clerk did not count the ballots cast for and against removal, but merely made a calculation from the returns of the different election precincts. The count appears to have been made in conformity with the requirements of the second section of the Act of March 4th, 1853, ordering the special election, and there is no allegation that the result was not correctly announced.

It is next contended that the Police Jury had not refused to assess and cause to be collected the tax, and that a discretion was vested in them as to the time and mode of doing it, with which the court could not interfere. Their vote refusing to make an appropriation for the building of a court-house, and their inaction with regard to the levy of a tax for many months after the parish site had been selected and reported by the Commissioners, were in violation of the command of the sixth section of the Act aforesaid, and a mandamus was the suitable remedy. (C. P. 844.) Whatever discretion was left to the Police Jury as to the mode of assessing the tax, it was not discretionary with them to omit it altogether.

Finally, it is urged that a parish site had not been selected by the Commissioners, and that the parish owned no land at the spot indicated by their Report, so that the demand for the levy of a tax was premature. The Report of the Commissioners ascertained with reasonable clearness the site they had chosen; and although a title had not been acquired by the parish, the Commissioners reported that the adjoining proprietors were ready to give the land. If they had not so reported, still there was a mode prescribed by law for the forced expropriation of such land as was found necessary for the public use, upon a previous indemnity being paid to the owners. (C. C. 2604 *et seq.*) To provide means for paying this indemnity, as well as for erecting the public buildings, a special tax was necessary.

We do not think the judgment was erroneous in any of the particulars pointed out by the appellant.

Judgment affirmed, with costs.

OTHO FARMER'S HEIRS *v.* JOHN FLETCHER.

Decision in *Purvis* v. *Harmason*, 4 An., 422, and *Thomas* v. *Phillips*, 7 An., 546, affirmed.

APPEAL from the District Court, Ninth District, Parish of Concordia, *Farrar*, J. *Stacy & Sparrow*, for plaintiffs and appellants. *J. P. Farrar*, for defendant.

MERRICK, C. J. This action, which is one of revendication, presents substantially the same question decided by this court in the cases of *Purvis* v. *Harmason*, 4 An., 422, and *Thomas* v. *Phillips*, 7 An., 546.

The claim was confirmed under No. 70, Class B., approved by Act of Congress 29th April, 1816, of claims to lands in the western district of Louisiana. See Statutes at Large, 3d vol., p. 329, sec. 1.

In this class it was entered as the claim of "*Ferdinand L. Claiborne*," "original claimant, *Otho Farmer*," "400 arpents," "settlement by permission."

The present case differs from the cases cited only in the remarks of the Commissioners in their report to Congress. Under No. 70, they say:

"In this claim is filed a plat of survey executed by *Peter Walker*, bearing date the 11th of April, 1803. The survey is made in favor of *Otho Farmer*, and certified by said surveyor to have been made by order of *Don José Vidal*, the commandant, etc., of the port of Concordia. On the back of the paper containing the plat is the certificate of the said commandant, bearing date also the 11th April, 1803, setting forth that the survey was executed with his approbation, and that there were no objections to the claim, and that the papers should be presented to the intendent for the completion of the grant. No conveyance from the original claimant, *Farmer*, has been adduced, and although proof of occupancy has not been furnished in the claim, the board deem it to have been such a claim as ought to have been confirmed on the ground that no other evidence or document than that above mentioned would have been requisite in perfecting the title under the usages and customs of the Spanish government."

On the survey were the following endorsements:

"The conveyance from *Otho Farmer* to *Fred. Zerbau* is wanted. It may possibly be found in the records of the parish of Concordia, or in the possession of *Gen. F. L. Claiborne*. It should be transmitted to the Board of Commissioners, that their certificate of confirmation of the claim may issue in the name of the legal representatives of said *Zerbau*, if confirmed.

"Wanted proof of settlement," "Recorded folio 65," "*Otho Farmer*," "400 arpents," "11th April, 1803," "Registered at the office of Port Concordia, 14th March, 1804," "*Frederick Zerbau*."

These endorsements upon the survey form no part of the report of the Commissioners to Congress, and cannot, therefore, be considered as controlling in any manner its effect.

That report places the name of *Ferdinand L. Claiborne* as the claimant of the land through *Otho Farmer*. We see nothing in the remarks accompanying the report recommending the confirmation of the claim to any one except *F. L. Claiborne*. The Act of Congress, therefore, must be held to have confirmed the claim in his name.

Counsel have questioned the correctness of the decision in the cases of *Purvis* v. *Harmason* and *Thomas* v. *Phillips*. Whatever our opinions might have been had the question been an original one, we think the rule in those cases is one of property, and now too well established to be disturbed. Doubtless none but the gravest considerations induced the court in the first of these cases to overrule the doctrine affirmed by many previous decisions, and extending through a period of many years.

Judgment affirmed.

ADEMIRAM SEAVERS v. JEAN JOURNEE and ELIZABETH WEBER.

A suit claiming property and rent is a totally different action from that of rescission of a sale for fraud, and will not interrupt prescription as to the latter.
Code, 1989.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.
Jourdan, for plaintiff. *Dufour*, for defendants and appellants.

SEAVERS v. JOURNEE.

MERRICK, C. J. This is a revocatory action, brought against *Elizabeth Weber*, the original vendor of *Peter Weber*, her brother, and *Jean Journée*, her vendee, for one-half of the property, consisting of a house and lot.

The sale was made by *Peter Weber* to his sister for $450, and he immediately absconded after the sale, which was made by notarial act on the 5th day of March, 1851, the price being paid in cash. The defendant, *Elizabeth Weber*, and her vendee have been in actual possession ever since.

The present suit was instituted on the 17th day of February, 1854, being nearly three years after the sale.

The defendants plead the prescription of one year, under Article 1989 of the Civil Code.

The plaintiff contends that the prescription pleaded has been interrupted by legal proceedings.

The plaintiff, after *Peter Weber* had absconded, instituted a suit by attachment against him, and seized the house and lot in controversy. The defendant, *Elizabeth Weber*, intervened in the suit, as will be hereafter noticed. The house and lot were sold under the attachment, (the defendant all the while remaining in possession,) and the same were bought by the plaintiff and *Moses Levy*. They had their sale confirmed by a monition.

On the 30th day of April, 1852, they instituted their action of revendication against the defendants to recover the property and damages for its wrongful occupation.

The plaintiff and *Levy*, on the 26th day of May, 1852, amended their petition and alleged that the sale from *Peter Weber* to *Elizabeth* was fraudulent and simulated, and prayed rescission of the same, and that the petitioners be put in possession. This amended petition never was served, yet judgment was rendered against the defendants. A new trial was granted, because they were not notified of the filing of the amendment. Final judgment was rendered, dismissing the suit, which was affirmed on appeal, one of the grounds being that the amendment was not served, and introduced a new cause of action. It is apparent that these proceedings, if they had been commenced in time, could not, with the exception of the amended petition, (which is without effect, because not served,) interrupt prescription as to the revocatory action. The service of a petition claiming the property, and a citation thereon, as well as a demand for rent, is a totally different action from the action of rescission for fraud.

It is further contended, that the intervention of *Elizabeth Weber*, in the attachment suit of plaintiff against *Peter Weber*, wherein she sets up her title to the property, and plaintiff alleges the sale to her to be fraudulent, must have the effect of interrupting the prescription. Conceding this to be so, yet more than one year elapsed from the dismissal (15th April, 1852,) of defendants' intervention, as in case of non-suit, on account of the absence of her lawyer, and the institution of this suit.

We therefore think the plea of prescription in this case must be maintained.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendants, and that the plaintiff pay the costs of both courts.

James C. Kathman *v.* The City of New Orleans.

On motion to dismiss appeal.

The 41st section of the Charter of the city, which dispenses the city from furnishing bond and security in all judicial proceedings, "where, by existing laws, bond and security are required of litigants," is not unconstitutional, as being without the terms of the title of "the Act to consolidate the city of New Orleans, and provide for the government and administration of its affairs." The 41st section does not revive or amend any law by reference to its title. It refers to laws in general terms without any indication of the title of such laws.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Collins, for plaintiff. *Livingston*, City Attorney, for defendant and appellant.

Buchanan, J. (Merrick, C. J., absent.) A motion is made to dismiss this appeal, on the ground that the city of New Orleans, appellant, has not given an appeal bond. It is urged that the 41st section of the Charter, which dispenses the city from furnishing bond or security in all judicial proceedings, "where, by existing laws, bond and security are required of litigants," is contrary to the 115th and 116th Articles of the Constitution of 1852, and to the 118th and 119th of that of 1845, in force when the Charter (Consolidation Act) was adopted.

That Act is entitled "Act to consolidate the city of New Orleans, and provide for the government and administration of its affairs."

It appears to us that the provisions of the 41st section fall within the terms of the title. The prosecution and defence of lawsuits in which the city may be involved form (as the docket of this court abundantly proves) a very important part of the administration of its affairs: and the privilege accorded it, of exemption from obligations imposed upon other suitors in the State courts, however objectionable on the score of policy, at least must be admitted to have required special mention, as constituting a remarkable feature of that portion of the municipal administration.

Neither do we think the Articles 116 and 119 apply to this case. The section in question does not profess to revive or amend any law by reference to its title. It refers to laws *as existing*, in general terms, without any indication of the titles of such laws. Nay, the use of the word "existing," in this connection, implies a recognition that the laws alluded to are in full force—at least so far as the whole community (with the exception of this municipal corporation) is concerned. Again we may observe, that the justice or propriety of such exceptional legislation is not very obvious. But it is not a solitary instance of the kind on our statute-book; and we should be especially careful about extending constitutional prohibitions by implication.

The motion to dismiss is therefore discharged.

JAMES C. KATHMAN et al. v. THE CITY OF NEW ORLEANS.

Any neglect of duty on the part of the assessors, involving a want of ordinary care and diligence in the discharge of their duties, occasioning damage, would give rise to an action on the part of the State or the city against them to repair the loss occasioned by such neglect. Or the damage arising from such neglect may be set up by way of defence against the amount due to assessors.

In assessing property the title papers are not required to be produced to the Assessor when he makes the assessment; and the defendant should be permitted, in order to show omissions by the assessors, to prove, by parol evidence, that certain individuals possessed real estate and had not been assessed.

The law does not require absolute perfection in the assessment, as this in a large city like New Orleans would be impossible. The assessors are only held to use due diligence and care in ascertaining the property subject to taxation, and the names of the persons to whom it is to be assessed.

The sum allowed by law to the assessors from the city is the amount due by the State; and if the Auditor has made an error in his calculation, it cannot prejudice the city.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Collins, for plaintiffs. *Livingston*, City Attorney, for defendant and appellant.

MERRICK, C. J. This suit is instituted to recover of the defendant the sum of $9116 40, for the copy of the assessment-roll made out by plaintiffs as assessors, and furnished the defendant. Acts Sess. 1854, p. 46.

By the Act referred to it was made the duty of the assessors to furnish a copy of the assessment-roll to the city of New Orleans, and they were to receive annually from the city the same amount of compensation which shall be due them by the State.

The Auditor of State allowed their claim for the sum above mentioned.

The defendant in their answer deny the power of the State to compel them to pay this sum to the assessors, the officers of the State;

That if bound to pay anything, it is only for that part of the assessment-roll on which they are permitted to assess taxes;

That the assessment-rolls are defective; the assessments are incorrect; that a large amount of property is not assessed; that numerous corrections have been made; that the charges of the corrections exceed the sum of $1800; that the expense for advertising, printing, stationery, &c., amounting to a large sum—say $5000—are charges against said assessors; that under the law, if the city is liable—which is expressly denied—the assessors are bound to deliver to it a copy of the assessment-roll, free from all charges and perfect in every respect, for the amount specified in the Act.

The defendant, on the trial of the case, offered to prove by *Ovide DeBuys*, the Controller of the city of New Orleans, that the assessment-rolls were incorrectly and inaccurately made out; that a large amount of real estate was assessed to owners unknown; that the amount so assessed exceeds $1,000,000; that by ordinary diligence the plaintiff could have discovered the owners of said property so assessed.

Defendant offered to prove, further, that the city employed competent persons to correct the assessment-rolls, and has paid and is liable to pay for corrections so made. To the introduction of this evidence plaintiffs objected, on the ground that no such proof can be made by such evidence; that no claim in

reconvention or compensation is set up; that the Controller does not receive the rolls until homologated, and then they are final; that defendant's claim for damages is not equally liquidated. The objections to the testimony were sustained, and the testimony rejected.

Any neglect of duty on the part of the assessors, involving a want of ordinary care and diligence in the discharge of their duties, occasioning damage, would give rise to an action on the part of the State or the city against them to repair the loss occasioned by such neglect. We see no objection, therefore, to the defence set up to the action of the plaintiffs to recover for their services, wherein the defendants allege such want of care and the consequent damage they have sustained, and the necessary expense they have been forced to incur to repair the loss. It may be remarked that the notice given to all persons of the completion of the assessment-roll, and the final delivery of the same to the Controller, could not have the effect of the thing adjudged as to the city, and thereby preclude all examination as to the manner in which they had performed their duties. We see, therefore, no objection to the introduction of the testimony under the answer, especially as it grows out of the acts of the plaintiffs for which they claim—the wages or salary of their employment; and it is therefore closely connected with their demand.

The objection that the city could not show the ownership of real estate as an object of taxation, by parol proof, is, as the question is here presented, untenable. In matters of assessment the title papers are never required to be produced to the assessor when he makes the assessment; and we think the city should have been permitted, in order to prove omissions by the assessors, to show by parol that certain individuals possessed the real estate in question as owners.

While we are of the opinion that the testimony offered by the defendant ought to have been received, it is proper for us to say that the law does not require absolute perfection in the assessment, as this, in a large city like New Orleans, would be impossible. The assessor is only held to use due diligence and care in ascertaining the property subject to taxation, and the names of the persons to whom it is to be assessed.

The assessors are entitled to receive from the city, if they have faithfully and diligently discharged their duties, the same amount as was due by the State; and the city would not be at liberty to confine the allowance to such objects of taxation only as are subject to the city tax. The sum allowed them is the amount due by the State; and if the Auditor has made an error in his calculation, it will not prejudice the city.

As the judgment in this court must be set aside and the case remanded for a new trial, we think it proper to observe that we leave the question open, whether the city is entitled to any compensation for stationery and printing or not; and we express no opinion upon the point—there being no evidence in the record on this subject.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this cause be remanded to the lower court for a new trial, and to be proceeded in according to law, with instructions to receive the testimony of *Ovide DeBuys* for the purposes specified in the bill of exceptions; and it is further ordered that the plaintiffs and appellees pay the cost of the appeal.

Antoine and François Remy v. Municipality No. Two et al.

A document intended as a will, but never probated as such, may be good as an acknowledgment of the paternity of natural children.

Acknowledged natural children, after having been put in possession of their father's succession—no legitimate heirs having been shown to exist, or none appearing—may prosecute any claim belonging to the succession.

Plaintiffs sued for certain batture property, alleged to belong to the succession of their father. Defendants averred that the father had surrendered the property to his creditors in 1809. *By the Court:* The surrender no doubt gave his syndic the right to sell, but the title still remained in *Remy*. Old Code, page 294, Art. 17.

This property was never sold. The creditors received very nearly the full amount of their claims. As no creditor asserts any claim against the succession, and as *Remy* died (in 1821) in possession of the property, it is fair to conclude that his creditors were satisfied, if not paid in full.

Remy died in the actual possession of the property, which he held under a valid title. There could have been no adverse possession anterior to his death, and, therefore, whatever may have been the character of the alleged possession of defendants, it should have been accompanied by a title translative of property, and exercised in good faith to form the basis of prescription.

Possession, to be the basis of prescription, must be inconsistent with an adverse ownership—must be continuous, unequivocal, uninterrupted, and with the intention of holding as owner, or on behalf of one assuming to be owner. In the absence of such adverse possession, the civil possession of the original owner will be presumed to continue.

Mere possession of battures and banks of rivers for the public use can in no case form the basis of prescription, because such possession is not incompatible with a right of ownership in a riparian proprietor.

The several Acts of the Legislature giving to the city police powers over the batture, were never intended to disturb the rights of property, and had such been the object of the statutes, they would to that extent have been nullities.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Elmore & King, *Durant & Hornor*, *Lambert* and *Legardeur*, for plaintiffs and appellants.

Legardeur:

Presription never accrued in favor of the city, and, therefore, cannot be made the basis of a title against us.

The immediate, nay the sole title set up by defendants is the Act of September 20th, 1820, under which the city claims on two distinct and very dissimilar grounds: first, by prescription of ten, twenty and thirty years, and, secondly, failing in this, by assuming that the Act dedicated the batture in controversy to public use. The latter ground has already been examined at length. Our object is now to show that no prescription has acquired under this Act, and that, from its nature, none could ever, by any lapse of time, acquire.

It is a fundamental principle in the law of prescription that, to enable one to prescribe, he must hold and possess as owner. If he does not claim as absolute owner and master, but admits, or his title discloses, that the property is in another, his title is what is called in the civil law a *titre précaire*, and never by any lapse of time can he acquire the ownership by prescription. Such as is the title in the beginning, so it must continue. Time cannot change its nature, nor is it in the power of the possessor to do so by his own acts. "Neminem sibi causam possessionis mutare posse." Pothier, Traité de Possession, Nos. 31, 32, 33, 34. The following authorities confirm this position:

C. C., Art. 3453. To enable one to plead the prescription treated of in this paragraph, it is necessary that the possession be distinguished by the following incidents:

1st. That the possessor shall have held the thing in fact and right as owner, etc. Code, 1808, p. 482, Art. 38; Code Napoleon, Art. 2229; C. C., 3456, 3404. The same possession (as owner) is required for the prescription of thirty years. C. C., 3466.

Troplong, No. 363: "Il faut, en sixième lieu, que la possession soit à titre de propriétaire." It is necessary, in the sixth place, that one should possess as owner.

"La prescription est un moyen d'acquérir la propriété: il est donc nécessaire que la possession dont elle émane soit fondée sur l'idée de propriété. Sans cela, la règle: *Tantùm præscriptum quantùm possessum*, mettrait la propriété à l'abri des atteines de la possession même la plus longue. De là ce principe invariable, que, pour prescrire, il faut une possession à titre de maitre, *animo domini*." No. 364.

"Prescription is one of the means by which property is acquired; it is then necessary that the possession from which it emanates should be based upon ownership, without which the rule *tantùm præscriptum quantùm possessum*, would prevent any title from being acquired, even by the longest possession. Whence, the invariable rule is, that to prescribe, one must possess as owner, *animo domini*." Nos. 364, 469. Duranton, vol. 21, Nos. 319, 220, 242.

Troplong, No. 365: "Dans le droit moderne, on appelle possesseurs précaires tous ceux qui jouissent d'une concession même irrévocable qui ne dépouille pas absoluement le propriétaire, et laisse entre ses mains un droit supérieur que le concessionnaire doit respecter."

"In modern law, those are called precarious possessors who enjoy a concession, even irrevocable, which does not absolutely strip the owner, but leaves him entitled to a superior right, which the possessor ought to respect."

Troplong, No. 476: "Celui qui possède en vertu d'un titre qui lui concède l'usufruit ou l'usage d'une chose, ne peut se prévaloir de sa possession pour convertir son droit à un simple démembrement en droit intégral de propriété: c'est la décision expresse de notre article."

"He who possesses in virtue of a title which confers the usufruct or use of a thing, cannot take advantage of his possession to convert his right to a simple use into a right to the ownership of the thing itself."

Nothing can be stronger evidence than the title itself to determine the nature of the possession." Vazeille, No. 165.

The same possession (as owner) is required for the prescription of thirty years. C. C., 3466; Pothier, Nos. 172, 175; *Walker* v. *Pratt*, 1 Rob., 41. What constitutes ownership is clearly defined by the Civil Code: "Ownership is the right by which a thing belongs to some one in particular, to the exclusion of other persons." C. C., 480.

"Absolute ownership gives the right to enjoy and dispose of one's own property in the most unlimited manner, provided it is not used in a way prohibited by the laws and ordinances." Art. 483.

Pothier, in his Traité de Propriété, No. 4, says: "Le domaine de propriété est ainsi appelé parce que c'est le droit par lequel une chose m'est propre et m'appartient privativement à tous autres."

Ce droit de propriété, considéré par rapport à ses effets, doit se définir le droit de disposer à son gré d'une chose, sans donner néanmois atteinte au droit d'autrui, ni aux lois. *Jus de re libere disponendi*, ou *jus utendi et abutendi*.

"Ownership of property is so called because it is the right by which a thing belongs to me exclusively of all other persons. This right of property, considered in relation to its effects, may be defined to be the right to dispose of a thing according to one's pleasure, provided the right of others are not infringed or the law violated. *Jus de re libere disponendi*, ou *jus utendi et abutendi*. The power to alienate, to use, or to destroy one's property is essential to ownership."

Does the Act of September 20th, 1820, convey to the city a right of ownership in the soil itself, or does it transfer merely a right of possession? Let the following passages of the Act answer: "The parties of the first part, as well in their personal names as in their capacity of actual possessors of the batture in front of the Faubourg St. Mary, or representing them (the possessors), wishing to favor the public in the use of the banks of the river in front of said batture, and to facilitate the communication of the streets to it, they do by these presents make a donation *inter vivos* and irrevocable to the Mayor, Aldermen, &c., of all the rights which said donors have or may have in relation to it:

1st. In all that portion of the batture or alluvion beginning at the lower line of the property of *William Montgomery*, and extending to the limit between the city and the Faubourg St. Mary, and from the foot of the outside of the new levee to the marginal line of the river at its lowest stage.

2d. In the new levee which has been constructed along the whole extent of said batture, as well as the soil upon which it is built, &c.

3d. In the soil necessary for the prolongation of the streets of said faubourg to the new levee.

4th. In the soil of Tchoupitoulas street in its whole length along the faubourg.

"It then declares that the present donation is made on the express condition, without which it would not have been made, that all the ground embraced in the donation shall remain inalienable and not subject to seizure for debt or otherwise, in the hands of the corporation of New Orleans, who shall never, under any pretext, sell, exchange, give or otherwise dispose of the same, in whole or in part, in any manner whatever, nor employ it for other public use than that to which it is naturally destined," &c.

The owners expressly declare that they are the *possessors*, not the *owners* of the batture. No where in the act can an expression be found which intimates in the most remote manner a title in themselves. It is the possession only which they pretend to transfer, and not the ownership. If anything further than the clearest and most positive language were required to manifest this intention, ample evidence might be found in the declaration that the donation is made with a view to accommodate the public in the use of the batture for certain purposes, and in the absolute prohibition against alienating the same by sale, exchange or in any other manner, under any pretext whatsoever. Where language is so clear nothing remains for interpretation.

It is a rule of law in the construction of instruments, "that the intent is to be determined by the words of the instrument where these are clear and explicit and lead to no absurd consequences." (C. C. Art. 1940, No. 3.) That "where the terms are clear and free from all doubt and ambiguity, the letter of it is not to be disregarded under the pretext of preserving its spirit." (C. C. Art. 13.) "It is not allowable to interpret that which has no need of interpretation." Vattel, § 268.

It is to be remarked that defendants have not, in their answer, claimed any other construction or effect except by simply setting up the plea of prescription; nor have they introduced or attempted to introduce, a particle of evidence to show a different intention. We are, therefore, not permitted to disregard the plain terms of the act, and resort to antecedents not discussed by the record, in order, by a forced construction, to change its nature and effect. By no ingenuity can language be employed which can more effectually exclude all design of conveying the ownership, than that made use of in this act.

Such, then, is the nature of the act, and such the interest transferred. We are now, it must be borne in mind, considering it only in relation to the single question of prescription; and to determine this, it is only necessary to inquire whether defendants possess the ownership or merely the use. The law, as we have seen, peremptorily declares that the party claiming title under prescription *must possess as owner*. Their title proves that they do not possess as owner, but acquired the use only. Under such a possession, no length of time, not even a hundred years, could confer ownership by prescription. The essential element upon which the doctrine is based is wanting. Prescription can no more be acquired without possession as owner, than the human body can exist without life, or a crop of grain be reaped without being sown.

In addition to the authorities before quoted, we will refer the court to a case reported (II Dalloz, 287, No. 15,) where the Parliament of Besançon rejected the pretensions of the Jesuits of Dole to the ownership of a tract of woodland, although they had for more than a century exercised the acts of ownership, because the primitive title of their possession conferred only a right of use. See other cases mentioned by Trop., Nos. 523, 524.

In examining the maxim, *Ad primordium tituli posterior semper formatur eventus*, Merlin says: "This maxim is not difficult to comprehend. When a title is produced, under which possession is held, it is the title which must govern;" "consequently, if this title is affected with a vice of a nature to prevent prescription—that is to say, if it is not translative of property, there can be no doubt that the longest possession can produce no effect." Merlin, V. Pres. sec. 1, § 6, Art. 2.

Pothier, Prescription, No. 172, says; "As to the qualities which the possession ought to have, there is this difference between the prescription of ten and

twenty, and that of thirty years: for the prescription of ten and twenty years, the possessor must produce the just title under which his possession began, and show good faith; for the prescription of thirty years, on the contrary, it is not necessary to produce the title. That the possession proceeded from a just title is presumed from the mere lapse of time, so long as the contrary does not appear.

"The contrary, however, appears if the title from which the thirty years' possession proceeds is produced, and it is found to be one which, in its nature, is not translative of property, and consequently not a just title."

The title not being just and translative of property, and the evidence thereof being proved and perpetuated by the production of the title itself, no prescription can ever run. The presumption of justness of title raised by thirty years' possession is destroyed. Hence the maxim: *Melius est non habere titulum, quàm habere viliosum.* Ibid, Nos. 120, 121, 122, 124; Trop, No. 501.

We, therefore, conclude that nothing more than the possession for certain described uses was transferred to the city; that the primitive title of defendants establishes the fact that the city held only as possessor and not as owner; that such a title being what is called in law *precarious*, can never be the basis of prescription, however long the possession may have continued; whence it necessarily results, that the city had acquired no title by the effect of prescription at the institution of the present suit.

But the defendants will perhaps contend that, admitting the city has not acquired a title by prescription, and admitting, further, that it possesses no title whatever, yet our right of action is extinguished by the prescription of thirty years.

This position is based upon the 3512th Article of the Civil Code: "All actions for immovable property or for an entire estate, as a succession, are prescribed by thirty years, whether the parties be present or absent from the State." Code Napoleon, Art. 2262—the same.

It may be said in argument that the action is nearly identical with the Pétition d'Hérédité of the French law. It is immaterial with the present case whether it is or not. If accuracy, however, were necessary in this respect, the following distinction might be drawn: The action called Pétition d'Hérédité, derived from the Roman law, was an action brought by one or more heirs to recover the whole or part of a succession, against one in possession *as heir*, or as successor to the *rights* of the apparent heir. It was essential that the possessor should claim succession rights. If he held possession in any other quality than that of heir, or representative of the rights of the heir, the action would be properly an action of revendication, and not a Pétition d'Hérédité. Duranton, vol. 1, No. 557. Rolland de Villargue, verbo Pétition d'Hérédité, § 1, 2, 10, 13. Pothier, Traité du Droit de Propriété, No. 370. It is, however, of no consequence whether this action be considered the one or the other. The rule of prescription is the same with respect to both actions. Rolland de Villargue, § 16; Duranton, vol. I, No. 540. And the only question now under consideration is, whether the action, be it a Pétition d'Hérédité, or one of revendication, is prescribed by the lapse of thirty years. The prescription invoked is founded upon the Article above quoted, copied from Article 2262 of the Code Napoleon. It is to the expounders of the Napoleon Code that we must look for the true meaning and explanation of the language of this Article.

It has never been contended, in the jurisprudence of the country whence this Article is derived, that its provisions are in all cases to be literally understood and applied. The rules of interpretation require that it should be received in subordination to, or at least in connection with, other Articles of the Code, and be so construed that all may harmonize with and give effect to each other. As a general rule, it is true that all actions, both personal and real, are prescribed by a laps of thirty years. To this general rule there is an exception, not an arbitrary exception, but one growing out of the principle upon which the rule laid down in the article is founded. It is, that an action, within the meaning and reason of art. 3512, is never prescribed by the mere lapse of thirty years, unless the party in possession has acquired an *adverse right*. A construction which would give it the effect of destroying the system of prescription of thirty years, by which property is acquired, might be a construction convenient to defendants in the present suit, but certainly not in accordance with reason or just principles. One part of our Code could never have been

intended by its framers to be so applied or understood as to destroy and render of no effect another, and thus, like two opposing forces of equal power, neutralise each other. This result would unquestionably follow if the article were taken in its literal sense. Our own Code and the French Code say: to acquire a title by the prescription of thirty years, the claimant must possess as owner. If he do not possess as owner, he cannot acquire a title by prescription, no matter what length of time his possession may have continued. Now what is the meaning of this declaration that he *shall acquire no title?* Does it not mean that if the title is not in the possessor by the effect of prescription, it shall remain in the true owner? The title must vest in some person, and in whom should it vest but the real owner? If the title, therefore, being declared not to be in the possessor, still remains in the original proprietor, is there, in the jurisprudence of any civilized country, a rule of law which can take away a right of action on the part of the owner to recover from the possessor what the law positively declares such possessor has no right to? So long as there is a right there is a remedy, is a legal maxim, of universal application. Yet the construction claimed by counsel would virtually defeat the right and render the law of thirty years' prescription in every case a nullity. The law governing this prescription says distinctly: "you have not possessed as owner; your possession has not been continuous and uninterrupted, all of which are essential requisites. Therefore, your possession of thirty years, upon which you rely, can give you no title, no right to the property." The article in question says: if literally considered, although you have no title, still you have a title; because though you have acquired none by prescription, yet you virtually have one from the fact that thirty years having elapsed since the right of action originated, no action can be brought against you by the owner; and being in possession, your title cannot therefore be practically questioned. No matter whether you possessed as owner, or whether your possession had any of the qualities required by law or not, though you had in fact but recently taken possession, if thirty years has elapsed since the true owner might have instituted suit for the property, his right of action being thereby barred, your title is necessarily complete." Here is a direct contradiction. Giving effect to the latter construction, presents the strange anomaly of a right being lost to one without being acquired by another. But the truth is, an action may be brought for immovables so long as the possessor has not acquired an adverse right by prescription. The article 3512 was never intended, and cannot, by a reasonable construction, be made to take away that right, and thus virtually destroy the system of thirty years prescription. The French commentators upon this, as upon all other questions growing out of the provisions embodied in the Civil Code, are full and explicit. They show by the clearest reasoning that an action under this article, is never prescribed by the mere lapse of thirty years, when no adverse right has been acquired. We shall present the reasoning of these authorities: they are so directly in point as to justify being quoted at length. In commenting upon this article, Cotelle, t. 11, p. 449, says: "Mais elle n'exclut la revendication qu'à la faveur de la possession exempte des vices qui empêchent de prescrire, par conséquent de la violence, du précaire et de la clandestinité. Il faut ajouter, pour ce qui regarde la possession de trente ans, que le possesseur n'est point obligé de justifier de l'origine de sa possession, mais elle peut lui être opposée si elle est dans les causes qui s'opposent à la possession, et si le vice n'a point été purgé; car quoique la prescription des biens ne soit que l'exclusion de l'action en revendication, il ne faut pas perdre de vue qu'elle ne peut être fondée que sur la possession; or, si le détenteur n'a pas eu, pendant le temps requis, la possession avec les qualités voulues pour prescrire, la possession n'a pu reposer que sur le maître qui en a été iudûment dépouillé de fait, mais qui la retient toujours par l'intention, comme on l'a expliqué."

"But it (the prescription of thirty years) precludes an action of revendication, only with respect to a possession exempt from the vices which prevent prescription such as violence, a titre précaire (that is, not possessing as owner) and a clandestine possession." Hence, when the possession is affected with either of these vices, the action is not precluded by the lapse of thirty years, under art. 2262, upon the principle that no right having been acquired by the possessor, the title remains in the owner.

He then says; "It is necessary to add, in relation to the prescription of thirty years, that the possessor is not compelled to prove the origin of his title;

lost it may be opposed to him if it be affected with any of the vices which impair the possesion, and those vices be not removed; for although prescription is nothing more than the taking away an action of revendication, the fact must not be lost sight of that it can only be founded on possession; therefore, if the possessor has not had possession during the time required by law, and it be not clothed with all the requisites indispensable to prescription, the possession can belong only to the owner, who has been unjustly deprived of it, but who always retained it *animo*.

Delvincour, p. 132, quoted by Troplong under No. 469, "Mais, pourra-t-on dire, les actions de dépôt, de commodat, ne sont-elles pas prescriptibles par 30 ans comme les autres actions? Et alors, si le dépositaire ou le commodataire n'acquiert pas directement la propriété par la prescription à l'effet d'acquérir, ne l'acquerront-ils pas du moins indirectement par la prescription à l'effet de se libérer, puisqu'il n'existera plus d'action efficace pour les obliger à restituer?

"Je réponds qu'ils peuvent être effectivement libérés par trente ans, de l'action personnelle du dépôt ou du commodat; mais qu'ils ne le sont pas de l'action réelle ou en revendication, parce que le vice de leur titre les empêche de pouvoir opposer la prescription à l'effet d'acquérir. Ils sont donc libérés de toutes les prestations personnelles qui ne pourraient être exigées d'eux que par l'action du dépôt ou du commodat. Ils le sont même du prix de la chose, si elle a péri par leur faute. Mais si la chose est entre leurs mains, elle peut être revendiquée par le propriétaire."

"But it may be said: are not actions of deposit and loan prescribed by thirty years, like other actions? And then, if the depositary or the borrower cannot acquire the property directly by the prescription *acquirendi causâ*, do they not acquire it indirectly by the prescription *liberandi causâ*, since the action to compel restriction no longer exists?

"I answer that they may be effectually released by the lapse of thirty years, from the personal action of deposit or of loan; but that they are not released from the real action or action in revendication, because the vice with which the title is affected, prevents them from pleading the prescription by which property is acquired. They are relieved from all personal liabilities which could only be required in actions of deposit and loan. They are even relieved from an action for the price, if it has perished by their fault. But if the thing still remains in their hands, it may be recovered by the owner."

Vazeille, Prescription, vol. 1, p. 445, No. 365. "To loose an existing thing, it is necessary another should have acquired a right to it."

These authorities support the construction for which we contend, that so long as the possessor has not acquired a title by prescription, the action to recover is not prescribed by thirty years. But Duranton, one of the ablest commentators on the French Code, is, if possible, more full in his consideration of this article.

Duranton, vol. 21, No. 243, p. 388, "Mais on ne fait pas attention que quand l'article 2262 dit que les actions réelles, la revendication par conséquent, se prescrivent par trente ans, cet article suppose que la propriété est perdue par ce laps de temps, et que ce n'est que comme conséquence de la perte du droit de propriété, que l'action en revendication est prescrite: or, la propriété n'est perdue pour le propriétaire qu'autant qu'un autre l'a acquise."

"But we do not reflect that when article 2262 says: real action, consequently action of revendication, are prescribed by thirty years, it supposes that the right of property is lost by this lapse of time, and that it is only as a consequence of the loss of the right of property, that the action of revendication is prescribed, since property is lost to the owner only when another has acquired it." See the remainder of the article; also Nos. 244, 245.

Ibid. 343, vol. 21, p. 562, "Toutes les actions, tant réelles que personnelles, se prescrivent bien par trente ans, mais sous les conditions suivantes, qui ont été développées précédemment, et que nous résumons ainsi:

1o. Pourvu que la chose ou le droit soit prescriptible:

2o. Que celui qui invoque la possession à l'effet d'acquérir, ait eu une possession de la qualité et du temps voulus par la loi;

3o. Que la prescription ait pu courir à son profit;

4o. Qu'elle n'ait pas été interrompue;

5o. Et que son cours n'ait pas été suspendu, soit à raison de la qualité du propriétaire ou du créancier, soit pour une autre cause déterminée par la loi."

"All actions, both real and personal, are prescribed by thirty years, but under the following conditions, which have been heretofore developed:

1st. Provided the thing or the right is prescriptible;

2d. That he who invokes possession as a means of acquiring, should have a possession clothed with all the qualities, and that it should have contined during the time required by law;

3d. That prescription may run in his favor;

4th. That it be not interrupted;

5th. That it be not suspended, either on account of the character of the owner or creditor, or for any other cause prescribed by law."

Ibid., No. 344, p. 562, "En effet, il faut bien remarquer que je ne perds pas mon droit de propriété, et l'action que j'ai pour revendiquer mon immeuble, par le seul laps de trente ans, si aucun autre n'en a joui à titre de propriétaire pendant ce même laps de temps, ou au moins pendant dix ou vingt ans, avec juste titre et de bonne foi, puisque nous retenons la possession *animo tantum*. Il faut, pour que mon droit de propriété soit perdu, et que l'action qui en résulte soit éteinte par l'effet de la prescription, qu'un autre ait lui-même acquis ce droit, et ce n'est généralement que par une possession ou jouissance de trente ans qu'il l'aura acquis.

Ainsi, je néglige pendant quinze ans de prendre possession des biens d'une succession qui m'est dévolue, et que, pour plus de simplicité, j'avais d'ailleurs acceptée; au bout de ce temps, un tiers, parent du défunt, ou autre, s'empare de cette succession, comme si elle lui appartenait, et les choses restent dans cet état pendant plus de quinze ans encore, mais moins de trente, nul doute, quoiqu'il se soit écoulé plus de trente ans depuis l'ouverture du droit à mon profit, que je ne puisse encore intenter utilement l'action en pétition d'hérédité; car mon adversaire n'a pas possédé pendant trente ans, et mon action n'était prescriptible par ce laps de temps, que dans la supposition qu'il aurait lui-même acquis le droit par le même temps: la loi n'entend faire éteindre le droit de l'un qu'en raison de ce qu'un autre l'acquiert. S'il en était autrement, une possession de quelques mois, de quelques jours même, pourrait suffire pour opérer l'acquisition de la propriété d'un côté et sa perte de l'autre, et c'est ce qui n'a pu entrer dans la pensée du législateur, puisqu'il exige, pour cette acquisition, une possession d'une durée déterminée.—Nous retenons la possession *animo tantum*, tant qu'un autre ne s'en est pas emparée, et, dans l'espèce, je possédais dès la mort du défunt, parce que, dans notre droit, *le mort saisit le vif;* ce qui veut non seulement dire que l'héritier recueille le droit, même à son insu, et le transmet à son propre héritier, s'il meurt sans avoir même accepté la succession, mais encore qu'il continue, sans aucune interruption, la possession du défunt. En vain celui qui s'est emparé de cette hérédité, pendant que je négligeais d'en prendre possession, argumenterait-il du principe que l'effet de l'acceptation de la succession remonte à son ouverture pour prétendre que c'est lui qui est censé avoir possédé dès la mort du défunt, et par conséquent qu'il se trouve avoir aujourd'hui une possession plus que trentenaire: cela serait vrai s'il était à l'abri de l'action en pétition d'hérédité par l'effet d'une possession réelle de trente ans, mais son langage n'est qu'un cercle vicieux. Dans la prescription afin d'acquérir, le but direct et principal de la loi n'est pas de punir le propriétaire négligent, c'est de consolider la propriété dans la main de celui qui possède depuis tel ou tel temps; or, mon adversaire ne possède pas depuis ce temps; il n'a donc pas prescrit, et par cela même mon action n'est point éteinte, quoique j'aie négligé de prendre les biens de la succession pendant plus de trente ans."

It is to be, indeed, remarked, that I do not lose my right of property, and the action I have to recover my immovable by the mere lapse of thirty years, if no one has enjoyed possession as owner during the whole of that time, or at least during ten and twenty years, with a just title and in good faith, because I retain the possession *animo tantum*. It is necessary, in order that my right of ownership be lost and the action which results from it be extinguished by the effect of prescription, that another should himself have acquired that right, and generally he can only acquire it by a possession of thirty years.

Thus, I neglect for fifteen years to take possession of the effects of a succession devolving upon me, and suppose, for greater simplicity, which I have accepted. At the expiration of this time, a third person, relative of the deceased, or another person, takes possession of this succession as if he were the owner,

and things remain in this state for more than fifteen years, but less than thirty, "no doubt, although more than thirty years have elapsed since the opening of the succession, that I can still maintain my right en pétition d'hérédité, for my adversary has not possessed for thirty years, and my action is prescriptible by that lapse of time only on the supposition that the possessor has himself acquired the right by the same lapse of time. The law does not extinguish my right, except in cases where another has acquired it. If it were otherwise, a possession of a few months or a few days, even, would be sufficient to operate an acquisition of property on one side, and its loss on the other, which never could have been intended by the framer of laws, since it requires for this acquisition a possession for a determinate length of time. One possesses *animo tantùm* so long as another has not acquired, and in this way one's possession has continued since the death of the ancestor, because, in our law, *le mort saisit le vif*." In the prescription *acquirendi causa*, the direct and principal end of the law is not to punish the negligent proprietor, it is to consolidate the property in the hands of him who has possesed during a certain time. "Since my adversary has not possessed during that length of time, he has, therefore, not prescribed; my right of action is not extinguished, although I have neglected to take possession of the effects of the succession for more than thirty years." See *Gravier et als.* v. *Gravier*, 2 L. R., 458, where the Supreme Court held that the prescription of thirty years does not necessarily extinguish all debts—consequently, that an action may be brought after the lapse of thirty years.

These conclusions of Duranton are received by Troplong in his Treatise of Prescription with approbation, and are embodied in a note to No. 823. All authors, it is true, do not treat the subject so elaborately as Duranton; but it is believed no authority can be found to contradict the doctrine above laid down. It is natural and just, and gives to the article an application which can lead to no absurd results.

It must be observed that the position that our right of action is not prescribed by thirty years, necessarily supposes, what we have demonstrated above, that no title has been acquired by the city by prescription or otherwise, and the question is whether upon this supposition the right of action is, under the Art. 3512, extinguished. The above authorities lay down the rule, that if no title has been acquired by the city, then the action is not extinguished by that article, though more than thirty years have elapsed. So long as no adverse right has accrued, the true owner possesses *animo tantùm*, and may maintain his action at his pleasure.

In the view above taken we have assumed, for the sake of argument, that more than thirty years had elapsed previous to the institution of this suit. Such, however, is not the fact. The city must base its plea, under this article, upon the length of its own possession. It cannot pretend to possess previous to 1846, when the City Council passed the resolution declaring the batture no longer necessary or convenient to the public use, and ordering it to be laid off into lots to effect a public sale. Thirty years, therefore, had not elapsed. With respect to the city, an action can only be deemed to have originated at the period when it took possession of the property sought to be recovered. The question is not when an action might have originated against others, but when it might have been brought against the party in possession. Duranton declares this to be the rule, at the conclusion of No. 244: "Enfin, ce qui tranche la question, c'est que mon action pour les réclamer de mon adversaire n'a pris naissance que du moment qu'il s'en est emparé; or il y a moins de trente ans, donc en prenant l'article 2262 à la lettre, elle est encore bien fondée aujourd'hui puisqu'on ne peut pas dire que j'ai négligé de l'exercer pendant trente ans." Finally, what puts an end to the question is, that my action to recover from my adversary did not originate until the moment he took possession; and as thirty years have not elapsed, even taking the Article 2262 in its literal sense, it is well founded at the present day, since I cannot be said to have neglected to exercise it during thirty years.

With respect to the last ground, that our action did not originate until our adversaries took adverse possession, we refer to the following case in point, reported in the Journal du Palais, 25th May, 1810: *Begon* v. *Héritiers Bonnet*. "*Pierre Bonnet* died 11th December, 1736. *Jeanne Bonnet*, one of his children, renounced his succession by act 28th July, 1748. The other children took no steps in relation to it. The succession, therefore, remained vacant. In 1764 the administrator leased the effects of the succession to pay taxes.

"Afterwards, *Jeanne Bonnet*, then married to *Sieur Begon*, took possession of the inheritance. After her death, her son, *Peter Begon*, continued her possession without opposition.

"In 1806, the other descendants of *Pierre Bonnet*, the common ancestor, brought suit against *Peter Begon* to recover the succession, on the ground that by virtue of his mother, *Jeanne Bonnet's* renunciation, her share accrued of right to her co-heirs, and that her taking possession was an actual usurpation, which could confer no right, inasmuch as this possession had not continued thirty years. That the prescription of thirty years was not acquired, therefore *Peter Begon*, the heir of *Jeanne Begon*, could not under any pretext relieve himself from the obligation of restoring the whole succession.

"*Peter Begon, Jr.*, answered that an heir who has renounced may always resume the succession, so long as it remains vacant; that the repudiation by an heir always produced one of two effects: either to throw the succession upon the relations of a subsequent degree, if the person repudiating was the only heir, or if he had co-heirs to transmit it to them by accession. That, in the first case the heir may always revoke his renunciation, if relatives of a subsequent degree have not taken possession, and that, in the second case, a renunciation may always be retracted, if the co-heirs have not formally accepted and expressed an intention to profit by it. That in the present case, the children of *Bonnet*, so far from expressing a desire to profit by the renunciation of their sister had constantly abstained from claiming their own hereditary portion. That, under such an hypothesis, *Jeanne Bonnet* could have revoked her renunciation and accepted the succession of their common father, which acceptation would have related back to their ancestor's death, and that seventy years having elapsed since his death, the action of pétition d'hérédité, now instituted by his representatives, was doubly prescribed.

"The decision of the Civil Tribunal of Murat rejected the pretensions of the heirs of *Bonnet* to claim possession of the entire estate, but admitted them at the same time to share concurrently with *Pierre Begon*, their co-heir, without noticing the plea of prescription which the latter had made."

The judgment of the Court of Cassation then proceeds to say: "Considering it to be proved that *Jeanne Bonnet* renounced in 1748 the succession of *Pierre Bonnet*, her father, and that if it were true that they had enjoyed the effects of the succession, they had abandoned them, since the plaintiffs produce a lease of said effects in 1764, for six years, to pay taxes and imposts, which established the fact that a renunciation was made by *Jeanne Bonnet* and her husband; considering further, that *Jeanne Bonnet* and her husband took possession subsequent to the period above determined, but at what precise time is not shown; that notwithstanding her renunciation, *Jeanne Bonnet*, beyond a doubt, became heir by the fact of taking possession before the plaintiffs had determined to accept it; but under these circumstances the defendant, son of *Jeanne Bonnet*, cannot plead prescription against the other co-heirs dating from 1736, the time of *Pierre Bonnet's* death, because the said *Jeanne Bonnet* had renounced her quality of heir, and had only recovered it by taking possession of the estate; whence it follows that prescription did not begin to run until the period of taking possession. The plaintiffs allege that *Jeanne Bonnet* had held possession but nineteen or twenty years anterior to their suit, and this fact not being contested by defendant, it follows that the time which has elapsed is not sufficient to operate prescription."

The plaintiffs might have brought suit for the estate against others, at any time subsequent to 1736, or subsequent to the abandonment by *Jeanne Bonnet*, in 1748; but the court held that the heir in possession could not, in order to support the plea of prescription, avail himself of any lapse of time prior to actual possession, and thirty years not having expired since the commencement of his mother's possession, the action was not prescribed.

This case fully sustains our proposition, that it is only from the date of the possession by the defendants that prescription against our action began to run, if it could run at all, which we most peremptorily deny.

Now, it is too plain for argument that the city had no adverse possession prior to 1846—without which lapse of, time is never allowed to operate.

No title was conveyed to the city by the act of September 20th, 1820, but on the contrary, the transfer of the title was expressly negatived by the transfer of possession only. As the possession began, so must it continue, until changed

by exercising acts of ownership. No inference can be drawn in favor of ownership or adverse possession from the length of its occupation, since this right of occupation or use was conferred by law without infringing upon the rights of the true owner.

Since 1820 the city has been, by law, entitled to the use of all the batture on the outside of New Levee, for the purpose of trade and commerce. This use was absolutely indispensable to the wants of the public. We have before referred to the laws by which its use is regulated, and to the several decisions of our Supreme Court which explain its nature and extent. We have seen that while the ownership of the soil remains in the owner, the use belongs to the public, without prejudice to his title; and so long as the public deem that use necessary, the owner cannot interfere to prevent its enjoyment. No presumption of ownership can be raised in favor of the city by length of possession. The city cannot pretend, nor could the plaintiff, that the use was not necessary down to the year 1846, when the Council, by its resolution, declared it no longer necessary or convenient to the public, and then for the first time assumed a title adverse to that of plaintiff. Not before this period did our right of action accrue. We could not have maintained a useful action, because, although our right as owner of the soil was complete, we had not the right of possession, without which an action of ejectment will not lie.

The fact is self evident and not to be disputed, that the use was absolutely indispensable to the city, until at least within a few years of 1846. It is well known that the batture on the outside of New Levee, in 1820, was but a narrow strip. It then, and for many years after, constituted a portion of the port of the city. It was, strictly speaking, the bank of the river, to the use of which the public had an undoubted right. The immense and constantly increasing commerce of the city of New Orleans required a space of great width for the landing of cotton and sugar, and the produce of the Western country. The accumulations of alluvion for many subsequent years was scarcely sufficient to accommodate its growing business. If a line, therefore, could be drawn (which is impossible) between the period when its use was and when it ceased to be indispensable, the difference between that period and 1846 would not be sufficient to give foundation to the plea of lapse of time. But the truth is, its use must be deemed to have been necessary until the city declared the contrary.

The owner could not successfully contest the question of necessity with the city, until that right was given by Act of the Legislature of 1853. See case of *Sarah Ann Withers, Wife of S. M. Kennedy*, v. *The Municipality No. 2 of the City of New Orleans*, decided Jan. 9, 1855.

The Act is as follows, p. 298: "That whenever any riparian owner of property in the incorporated towns and cities in this State is entitled to the right of accretion, and batture has been formed in front of said owner's land more than is necessary for public uses, which the said incorporation withheld from the owner, he shall have the right to institute suit against said incorporation for so much of said batture as may be necessary for the use of commerce and navigation, and for the necessary public highways and other public uses; and if it be determined by the court that any portion of said batture be not necessary for the public uses above mentioned, the court shall decree that said owner is entitled to said property, and compel said corporation to permit him to enjoy the use and full ownership of such portion of said batture." The passage of this Act is the most satisfactory evidence of the entire inutility of instituting an action before 1846. It is not for the city, moreover, to dispute that necessity, since it continued to appropriate the whole batture to the uses of commerce until that period. Its actual use is an admission of the necessity thereof.

From this it results that, even supposing the city had a title competent to support prescription (which is denied), no prescription could have run against us since 1820, according to the well-known maxim, *Contrà non volentem agere non currit prescriptio.* Pothier, Prescription, Nos. 22, 23, 24, 697; Troplong, No. 700; *Ayrand* v. *Babin's Heirs*, 7 N. S., 481; *Brown* v. *Jenkins*, 9 M. R., p. 542; 3 L. R, 219; 2 N. S., 422. Whatever legally suspends our right to act must also suspend the effect of lapse of time.

It is, therefore, plain that neither prescription or lapse of time could have run against us prior to 1846, when the adverse possession of the city began.

Under these circumstances it cannot be doubted that we have fully succeeded in showing that our action is not prescribed by Art. 3512, and that this ground of prescription is likewise without the shadow of a foundation.

But, be this as it may, we maintain that it has not been proved, and does not appear from the record that the defendants ever had corporeal possession of the premises.

Possession is the foundation of prescription. It is a *fact*, not solely a *right*. It must be proved, not presumed. But two kinds of possession are known to the law—natural and civil. Natural, when a man detains a thing corporeal, as by occupying a house or cultivating a piece of ground. Civil, when a person ceases to reside in the house or on the land occupied, but without intending to abandon the possession. (C. C. 3391, 3392; Part. 3, tit. 30, L. 2.) It is evident, civil possession is but a mental continuation of a prior corporeal one, and must necessarily be based upon it. The civil can have no existence unless preceded by the corporeal. The intention of the corporeal possessor may be transferred to another by title; that is to say, the person who acquires under a title may unite his civil possession to that of his author's corporeal possession, provided the title be a just one. (C. C. 3394.) He who holds, even under a just title, must show corporeal possession in himself under his title, or in his predecessor or author. A corporeal possession must be proved to have existed in the beginning, otherwise no prescription. For example: A. purchased an immovable from B., and received a title in due form. If he, at the time of purchase, took corporeal possession, he may prescribe against the title of third persons, by ten years' possession, which, after the corporeal, may be continued by the civil possession. But if he failed to take corporeal possession, he must then show such possession in B., from whom he derived his title, or in B.'s predecessor. If he cannot trace an uninterrupted civil possession from himself back to an actual corporeal possession by some one of his predecessors, he cannot acquire by prescription under his title. When the plaintiff has once established an original title in himself, the defendant who pleads a superior title, on the ground of prescription, must prove conclusively that his prescription is supported by an original corporeal possession. How strictly this is required by one holding under a title in good faith, will be seen by an examination of the following cases. The Spanish law of prescription is in every essential respect the same with our own, and therefore the jurisprudence of our courts equally illustrate and explain the principles of that law. "When it is necessary to complete a possession already begun, the civil possession suffices, provided it has been preceded by the corporeal or actual possession." *Devall* v. *Choppin et als.*, 15 L. R., 580. "In the prescription of ten and twenty years, under a just title, a corporeal possession must be shown in the beginning; a civil one will then be sufficient to complete the possession already begun. C. C. 3453, 3405; *Wilcoxson* v. *Rogers and Wife*, 13 L. R. 10 and 11; *Ellis* v. *Prevost*, 10 L. R. 251; *Barnes* v. *Gaines*, 5 R. R. 314; *Davis* v. *Dale*, 2 Ann. 205; *Kitridge et als.* v. *Hébert et als.*, 6 Ann. 154; *Green* v. *Hudson*, 7 L. R. 123; *Macarty* v *Foucher*, 12 M. R. 17 and 18. The manner of acquiring possession is clearly defined by the Spanish law. "Two things are necessary to enable a man to acquire possession of an immovable: 1st. The intention to acquire it; 2d. That he takes corporeal possession. If either of these requisites be wanting he cannot acquire possession. Part. 3, L. 6, tit. 30; C. C. 3399.

No evidence of these important and fundamental facts have been adduced by the defendants. The consequence, therefore, is, that their plea of prescription is untenable.

Roselius and *Wolfe*, for city of New Orleans. *R. N. Ogden*, for *Delabigarre*. *R. Hunt*, Curator *ad hoc*, for *Mrs. Livingston*.

LEA, J. The plaintiffs, alleging that they are the duly acknowledged natural children of *Antoine Remy*, deceased, and as such his sole legal heirs (having been put in possession of his succession as such) claim a portion of land on the batture in front of the former Second Municipality of this city, as forming a part of said succession.

This property they claim as belonging to said succession by a regular chain of titles derived originally from *John Gravier* in 1800, and transmitted by successive sales to their ancestor, who died possessed of the same.

Wherefore they claim that the Municipality No. Two, *Miss Amaryllis L. Delabigarre*, *Mrs. Livingston* and *Mrs. Barton*, who, the petitioners allege, set up

some title or claim to said lot of ground, be cited, and that, after due proceedings had, the said petitioners be recognized as the owners of the lot by them claimed.

The answer of the city denies specially the heirship of the petitioners, sets up an act of compromise, entered into in 1820 between the city of New Orleans, *Edward Livingston*, and the riparian proprietors fronting on the batture at that time, as a basis of title, or at least as conferring such title upon the public, of whose interests and rights the city authorities are the administrators, as to form a basis of prescription, which they plead in bar of the plaintiffs' right to recover.

Miss A. L. Delabigarre, for answer, also denies the heirship of the plaintiffs, and pleads the prescription of thirty years.

Mrs. Livingston and *Mrs. Barton* also deny the heirship of the plaintiffs, but aver that their title has been transferred to the Municipality No. Two of New Orleans by two several acts of donation and compromise, the one passed in 1820, and the other in 1851.

The pleadings present, therefore, three questions for solution:

1st. Are the petitioners the legal heirs of the deceased *Antoine Remy?*

2d. Did the property in question belong to *Antoine Remy* at the time of his decease?

3d. If the two foregoing questions are answered in the affirmative—have the defendants, or any of them, acquired, as against the plaintiffs, an adverse title by prescription?

It appears from the evidence that the petitioners were duly acknowledged as the natural children of *Antoine Remy, sen.*, (whose succession they claim) by an act passed before a notary and two witnesses, on the 7th March, 1808. This document, it is true, was intended to be a will, and has never been admitted to probate as such, but though not binding as a will, it is certainly good as an acknowledgment of paternity made in due form of law. It is moreover shown that the petitioners had the name, the reputation, and status of the recognized illegitimate children of *Antoine Remy;* as such they were, after a full compliance with all the formalities required by law, put in possession of the succession of their deceased father. If any legitimate relations of *Antoine Remy* existed at the time of his decease, (which nothing in the evidence establishes) they have allowed a period of thirty-four years to elapse without presenting any claim to his succession.

The petitioners were, therefore, properly put in possession of the succession of their natural father. It is not necessary to enquire whether, if a legitimate heir were to present himself as a claimant of the succession, he would or would not be barred by the provisions of Article 1023 of the Civil Code. It is sufficient that in point of fact no such heirs are shown to exist, or if in existence, they have not presented any claim to the succession.

We think, therefore, that the petitioners have the right to stand before the court as the acknowledged representatives of their deceased father, and as such to prosecute any claims belonging to his succession.

When *Remy, sen.*, died, he was undoubtedly in possession of the property claimed by his representatives under a chain of titles dating back as far as the year 1800. The titles from *Gravier* to *Theard*, and from *Theard* to *Remy* and *Ellingham* conveyed title to the river. By an act of partition between *Remy* and *Ellingham*, the entire ownership became vested in *Remy*, who afterwards,

by act passed in January, 1810, transferred all that portion of the lot lying in the rear of the levee to *Tabary*. The batture portion of it continued in his actual use and possession till he died, and did not pass to *Tabary* by the act of sale.

Now, if *Remy* was in possession under a good valid title, dating back to the year 1800, his heirs must certainly recover it, unless it can be shown that he, or his heirs, had been divested of the title. It is urged, on behalf of the city, that *Remy* divested himself of his title by a surrender of his property to his creditors; and lastly, that by an act of donation and compromise, passed between the Mayor, Aldermen and inhabitants of New Orleans and *Edward Livingston*, and other riparian proprietors, before *H. Lavergne*, Notary Public, on or about the 20th September, 1820, for the purpose of settling the conflicting claims to the alluvion, the piece of ground claimed by the plaintiffs, which was then in existence, together with all its future increase, was donated and abandoned to the said Mayor, etc., for the sole and exclusive occupation and benefit of the public: that the said parcel of ground thereby became a public place (*locus publicus*), and all that has been added thereto has become a public place; that the piece of ground in question has been in the undisturbed possession and occupancy of the public for upwards of thirty-one years, by which possession the right of the public to the said piece of ground has been acquired, ratified and confirmed, even if the title of the public had been considered doubtful without said possession and occupancy, which alleged public possession and occupancy is made the basis of the plea of prescription.

As respects the surrender of the property by *Remy* to his creditors, it no doubt gave his syndic a right to sell the same for their benefit, but the title still remained in *Remy*. Old Code, page 294, Art. 17.

It is clear that this property was never sold, and an examination of the imperfect record of the insolvent proceedings show that the creditors received from the proceeds of the sale of other assets very nearly the full amount of their claims. As no creditor of the deceased asserts any claim against his succession, and as *Remy* died in the actual possession of the property, it is a fair and reasonable conclusion that his creditors were satisfied, if not paid in full.

It is to be remarked that the surrender was made in 1809, and that *Remy* died in 1821.

If the foregoing views are correct, the only question to be determined is whether an adverse title has been acquired by prescription.

As we think it is satisfactorily proved that *Remy* died in the actual possession of the property, which he held under a valid title, there could be no adverse possession prior to that period, and therefore, whatever may have been the character of the alleged possession of the city, it must have been accompanied by a title translative of property, and exercised in good faith, to form the basis of prescription.

Now, even assuming the questionable propositions that the act of donation or compromise of 1820, under which the city claims title, was intended to be, and was in reality, a title translative of property from the donors to the public, and that the city authorities, as the administrators of this property for the use of the public, have the right to invoke on their behalf the plea of prescription; it is clear that the possession which is made the basis of prescription, must be of a character which is inconsistent with an adverse ownership. As against a person having a good and valid title to property, accompanied by an actual

possession under it (for however short a period of time) no one can acquire a right by prescription except by such an actual adverse possession as that above designated, which possession must be continuous, unequivocal, uninterrupted, and with the intention of holding as owner, or on behalf of one assuming to be the owner. In the absence of such adverse possession, the civil possession of the original owner will be presumed to continue. Now, we consider it well settled that, under the laws of this State regulating the public use of battures and banks of rivers, mere possession for the public use can in no case form a basis of prescription, because such possession is not incompatible with a right of ownership in a riparian proprietor. See 18 L. R., 236; also *S. A. Withers* v. *Municipality No. Two*, 10 An. "The possession of the city is purely administrative, destined in its nature to terminate upon the happening of a certain contingency, (which, in the case at bar, has already happened.) It cannot, therefore, be pleaded against the riparian proprietor as the basis of an adverse title in the city." See *Withers* v. *City of New Orleans*, 10 An.

In order, therefore, to support the plea of prescription based upon an adverse possession, we must look for such distinctive acts of possession as are inconsistent with ownership in another, and ownership is defined by the Code to be "the right by which a thing belongs to some one in particular to *the exclusion of other persons.*" C. C. 480. The evidence, in our opinion, fails to establish any act of possession or ownership exercised by the city authorities which was inconsistent with a title in the plaintiffs, or with which the plaintiffs, as owners, could have interfered, under existing laws, prior to the year 1846, when the Council for the first time assumed a title adverse to that of the plaintiffs, by offering for sale batture lots, or passing resolutions to the effect that portions of the batture be sold for the exclusive benefit of the Municipality.

This act of ownership was within ten years prior to the institution of this suit, and cannot be relied upon as forming a basis of prescription.

We have seen, then, that the plaintiffs claim under a good and valid title, paramount to all others, accompanied by an actual physical possession, which continued until the 24th June, 1821, and a civil possession extending to a much later period, which was never interrupted by any act on the part of the city authorities inconsistent with that ownership until the year 1846. The several acts of the Legislature, giving to the city police powers over the batture, were intended to enable them the better to enforce their administrative authority on behalf of the public, who were entitled to the *use of the batture* for the purposes of commerce; they were never intended to change or disturb the rights of property, and had such been the intent and object of these statutes, they would to that effect have been nullities. The civil possession of the representatives of *Remy* was not disturbed by the exercise of the police and administrative powers of the city authorities over the property in question, as they still possessed it in the only manner in which any owner could possess property similarly situated.

We have been referred to the fact, as disclosed by the evidence, that *Remy, sen.*, intervened in the suit brought by *John Gravier* against the city of New Orleans, and it is urged in argument that the plaintiffs are bound by the judgment recognizing *Gravier's* title. The plea of *res adjudicata* is not set forth in the pleading, but if it had been, it is evident that no issue was made up on the demand in intervention, and that the judgment ignores it altogether. More-

over it appears to have been discontinued before trial and judgment on the merits.

The claim of *Miss A. L. Delabigarre* is founded upon a bill of sale from *Gravier* subsoquent in date to that made to the plaintiffs, and so far as the evidence discloses does not appear to have been accompanied by any act of possession whatever, so far as relates to the particular property in dispute.

As *Mrs. Livingston* and *Mrs. Barton* have disclaimed title to the property claimed by the petitioner, there can be no objection to a judgment in favor of the plaintiff, so far as they are concerned.

It is ordered, that the judgment appealed from be reversed, and that the plaintiffs be recognized as the true and lawful owners of the property claimed by them, to wit: that portion of the batture lying and being in front of the lot described in the petition, to wit: a lot of ground situated in the fauburg St. Mary, being numbered 64, and having sixty feet front on the river, and one hundred and sixty feet in depth, the whole as more fully described in the act of sale annexed to the petition.

It is further ordered, that the defendants pay costs in both courts.

A rehearing was applied for in this case, and thereupon the following order was entered up:

LEA, J. In this case a rehearing is granted exclusively for the purpose of considering the propriety of amending the judgment so as to reserve the rights of the city of New Orleans, and of the public, to the use of such portion of the batture, which is the subject matter of litigation herein, as may be necessary for the purposes of commerce, or other public uses.

After the rehearing the following decree was rendered:

LEA, J. In this case, the court having duly considered the arguments of counsel on the rehearing granted herein, it is ordered that the judgment heretofore rendered herein be so amended as to read as follows:

It is ordered, that the judgment appealed from be reversed, and that the plaintiffs, *Antoine* and *François Remy* be recognized as the true and lawful owners of the property claimed by them, to wit: that portion of the batture lying and being in front of the lot described in the petition, to wit: a lot of ground situated in the fauburg St. Mary, being numbered 64, and having 60 feet front on the river and 160 feet in depth, the whole as more fully described in the act of sale annexed to the petition, reserving to the city of New Orleans the possession for the purposes of administration of such portion of the property in dispute as may be subject to the servitudes established by existing laws on land fronting on the Mississippi river, within the limits of the city of New Orleans.

It is further ordered, that the defendants pay costs in both courts.

William Griffith v. H. Frellsen & Co.

In all cases where the thing sold remains in possession of the seller, it is to be presumed that the sale is simulated; and with respect to third persons, the parties are bound to show its verity. C. C., 2456.

APPEAL from the District Court, Ninth District, Parish of Carrol, *Cooley*, J. *Shaw*, for plaintiff and appellant. *Muse*, for defendant.

Voorhies, J. The defendants obtained a judgment against *William L.* and *Sarah A. Stewart*, in the parish of East Feliciana, the domicil of the latter, where the judgment was recorded on the 27th of February, 1852.

The plaintiff is appellant from a judgment dissolving an injunction sued out by him, in which he claimed to be the owner of certain slaves seized as the property of *Sarah A. Stewart* under an execution in that suit, directed to the Sheriff of the parish of Concordia.

The answer of the defendants to the injunction charges that the title set up by the plaintiff is simulated, fraudulent and collusive, and has never been legally recorded nor accompanied with the possession of the slaves in question.

The only evidence adduced on the trial by the plaintiff is a conveyance to him of the slaves in dispute from *Sarah A. Stewart*, by notarial act, executed on the 7th of January, 1842, in the parish of East Feliciana, the domicil of the contracting parties. It does not appear that this conveyance was ever recorded in any other parish than that of Pointe Coupée, and that, too, subsequent to the registry of the defendants' judgment. Neither does it appear that the plaintiff ever had the actual possession of the slaves.

In all cases where the thing sold remains in possession of the seller, it is to be presumed the sale is simulated, and with respect to third persons, the parties are bound to show its verity. C. C., 2456. We are therefore of opinion the injunction was properly dissolved, with damages.

It is therefore ordered and decreed, that the judgment of the court below be affirmed, with costs.

The State v. Henry Wilson.

Appeal from a judgment overruling a motion in arrest of judgment after conviction of murder, on the ground that the words "then and there" were omitted in the concluding sentence of the indictment. *Held:* That if such indictment were defective at common law, it is aided by the statute of 1855, which provides that it shall not be necessary to state any venue in the body of an indictment; and that no indictment shall be held insufficient for want of proper or perfect venue.

Under the same statute any formal defect apparent on the face of the indictment must be taken by demurrer or on motion to quash before the jury is sworn; and every court before which objection is taken for such formal defect, may, if necessary, cause the indictment to be forthwith amended, whereupon the trial may proceed as if no such defect had existed.

APPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Robertson*, J. *Morse*, Attorney General. *Herron*, for appellant.

Spofford, J. *Henry Wilson* was convicted of the murder of *Thomas Lynes*.

STATE v. WILSON.

The trial took place before the District Court of East Baton Rouge, and the jury found an unqualified verdict.

After a vain attempt to procure a new trial and an arrest of judgment in the court below, the prisoner was sentenced to death, whereupon he took this appeal.

The only point made on his behalf in this court is, that the District Judge erred in not arresting the judgment for a defective allegation of the venue in the indictment.

The assault is charged to have been committed in the parish of East Baton Rouge, in the Sixth Judicial District, on, &c. The words "then and there" are repeated upon the averment of every issuable fact through the indictment—the holding of the knife, the striking and thrusting, the giving of the mortal wound, and the instant death of the victim.

The only objection seems to be that the words "then and there" were not repeated in the closing sentence of the indictment, which embodies the conclusion of law drawn from the facts theretofore stated in detail; "and so the jurors, &c., upon their oath do say, that the said *Henry Wilson* the said *Thomas Lynn*, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to," &c.

Under the strict rules of the common law, it was, in general, unnecessary to aver a mere conclusion of law either with time or place, although, if time and place be averred, they should be averred correctly. I Chit. Cr. L. p. 199.

This indictment is drawn with precision, and after the most approved precedents.

But, if it would be defective at common law, it is aided by the statute of March 14th, 1855, entitled "An act to regulate the mode of procedure in criminal prosecutions," which declares (sec. 16,) that it shall not be necessary to state any venue in the body of any indictment, and (sec. 17) that no indictment for any offence shall be held insufficient for want of a proper or perfect venue.

The same statute (sec. 18) requires that every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such defect had appeared. See Acts 1855, p. 171 *et seq.*

This statute seems to have been overlooked by the appellant.

There is no error in the ruling complained of.

The judgment is therefore affirmed, with costs.

M. Dubose v. The Levee Commissioners.

Action of damages for injury to the value of plaintiff's property, by constructing a new levee behind plaintiff's buildings, so as to place them out of the protection of the levee. *Held:* That plaintiff, in claiming damages from defendants, admitted that the levee was constructed by their order, and that under the pleadings, the regularity, in point of form, of their proceedings, as a deliberative body, could not be inquired into.

All landed proprietors whose property lies adjacent to a navigable stream hold it subject to certain conditions, imposed for the common utility.

There is no law prescribing where the levee opposite the town of Providence should be run. The Levee Inspectors and two freeholders are directed by law to lay off the levees *at a suitable distance from the bank of the Mississippi river*, and there is nothing in the law to restrain the discretion thus conferred. *By the Court:* But the Commissioners have not an arbitrary discretion; and if they were wantonly and unnecessarily to set the levee so far back as to ruin the plaintiff's property, he would not be without remedy. At the same time, this court will be reluctant to interfere with the exercise of that discretion which is confided to sworn officers living near the locality; and before doing so, will require a clear case of oppression or injustice to be made out on the part of the complainant.

The law concerning the expropriation of private property for public use does not apply to such lands as may be found necessary for levee purposes.

Code, 661.

APPEAL from the District Court, Tenth District, Parish of Carroll, *Farrar*, J. *Dubose, pro. per.*, for plaintiff and appellant. *Stacy & Sparrow*, for defendant.

Slidell, J. The plaintiff sued the Board of Levee Commissioners in the parish of Carroll, constituted by the Act of March 18th, 1852, (see Acts, p. 234,) as amended by the Act of 25th March, 1853, p. 44, for $7000 damages, alleged to have been occasioned by the wrongful acts of the latter, in running a line across his premises in the town of Providence, near the rear line thereof, and thereby throwing his dwelling-house, and the most valuable portion of his lots, out of the protection of the levee, and totally destroying their value.

The evidence is, that in December, 1852, the plaintiff bought the property, of whose destruction he complains, for the sum of $2000; that the old levee ran and still runs about forty yards in front of his house, and is only about thirty yards above the margin of the Mississippi river, in a low stage of water; that for several years prior to the erection of the new levee in the rear of the plaintiff's house, the bank of the river in front had been rapidly caving; that there was a belief that the old levee would be insecure for the protection of the town many years longer, on account of the continual inroads of the river upon that portion of the bank which fronts the premises in question; that there was a crack in the bank opposite plaintiff's house—which is an indication that the caving will continue; and that, under these circumstances, with a view to the permanent protection of the town and of the alluvial region beyond, the new levee was built in December, 1854, running behind the plaintiff's house, across the rear of his lots, between three and four hundred feet back of the old levee, notwithstanding the plaintiff and some of his neighbors, whose property was levied out in a similar manner, protested against it.

There is no doubt but that the property is less saleable, and is considerably impaired in value by the action of the Levee Commissioners.

The plaintiff submitted his cause to a jury of the vicinage, who found a special verdict to the effect that the land was subject to a servitude, and that the Levee Commissioners had a right to build a levee where it now stands. Thereupon judgment was entered against the plaintiff, and he appealed.

DUBOSE v. LEVEE COMMIS'RS.

The first point made by him, that the Commissioners never ordered the levee to be built where it is. This would seem to be inconsistent with his demand for damages against them. By suing them he has assumed that the act of building the levee was their act, and they, by their course in the defence, have admitted it; under the pleadings, the regularity, in point of form, of their proceedings as a deliberative body, cannot be inquired into.

The only question is, does the act of the defendants, in constructing the levee where it is, furnish a ground of action for damages, under the evidence in this case?

The question resolves itself into two branches:

I. Had the Levee Commissioners a legal right, under any circumstances, to erect the levee where it is?

II. Have they, under the circumstances of the case, exercised that right, supposing it to be one, discreetly, or wantonly, so as to damage the plaintiff without necessity?

All landed proprietors, whose property lies adjacent to a navigable stream, hold it subject to certain conditions imposed for the common utility. "Services imposed for the public or common utility relate to the space which is to be left for public use by the adjacent proprietors, on the shores of navigable rivers, *and for the making or repairing of levees*, roads and other public or common works. All that relates to this kind of servitude is determined by laws or particular regulations." C. C. 661.

Is there any law prescribing where the levee opposite the town of Providence should be run? The 18th section of the Act of 1852 (p. 236) declared that it should be the duty of the Levee Inspectors, together with two freeholders of his levee ward, to lay off the levee therein, *at a suitable distance from the bank of the Mississippi river;* and they were required to take an oath faithfully and impartially to perform this duty. See also the sec. 15 Act March 25th, 1853, p. 46. It will thus be seen that an enlarged discretion was entrusted to the Inspectors and freeholders; they were to declare under oath what was a suitable distance from the river. We have been referred to no law restraining them, in the exercise of that discretion, to any particular distance from the river. And from the anterior legislation upon similar subjects, we infer that there was no arbitrary limit.

The Act "Relative to roads and levees," approved Feb. 7th, 1829, § 8, p. 78, declared "that in future every new levee shall be constructed—to wit: in places where the bank is apt to tumble down (*endroits sujets à éboulis*) at the distance of *at least* one arpent from the water's edge; and in places where the same inconvenience does not exist, at the distance of *at least* sixty feet, provided that in both cases the said distance shall be measured from the summit of the bank of the river." This Act, fixing only a minimum distance from the bank, implies that the maximum distance was unlimited by positive law.

We, therefore, conclude that the Commissioners, acting upon the recommendation of the Inspector of the Levee Ward and the freeholders, had a legal right, if the circumstances required it, to erect the new levee where they did, and that the plaintiff held his land subject to this servitude, for the public utility.

But, in the second place, we are of the opinion that the Commissioners had not an arbitrary discretion; and if they wantonly and unnecessarily set the

levee so far back as to ruin the plaintiff's property, he would not be without remedy. At the same time, in matters of this kind, this court will be reluctant to interfere with the exercise of that discretion which is confided to sworn officers living near the locality, and, before doing so, will require a clear case of oppression or injustice to be made out on the part of the complainant.

The plaintiff in this case has been, apparently, a sufferer, but we are not prepared to say that the Board of Levee Commissioners acted arbitrarily, or wantonly, or unjustifiably in placing the new levee where they did. To reconcile the controlling interest of the public with the subordinate interest of the individual is ever a delicate problem: when they come in conflict the latter must yield. In this case, if the plaintiff suffers, it must be attributed to an unfortunate or improvident investment upon a caving bank. He could not expect the State to warrant him against the abrasions of the Mississippi river, or to move the levee back inch by inch as the river encroached upon the bank, so as to save him the utmost amount of property. The safety of the public has to be first consulted. When a new and expensive levee is to be built, prudence dictates that it should be so located as to be secure for many years from crumbling into the river. The evidence in this cause shows that such were the views which governed the Inspector and Commissioners. The facts with reference to the condition and history of the bank opposite the plaintiff's house seem to have justified their action; and a verdict rendered by a jury of the neighborhood, and supported by the opinion of the District Judge, refusing a new trial, strengthens the presumption in favor of the propriety of the defendant's course.

The law concerning the expropriation of private property for public use does not apply to such lands upon the banks of navigable rivers as may be found necessary for levee purposes. The quantity of land to be taken for such purposes presents a question of police or administration to be decided by the local authorities, whose decision should not be revised by this tribunal except for the most cogent reasons, and where there has been manifest oppression or injustice.

Mayor of Thibodeaux v. *Maggioli*, 4 Ann. 73; *Zenor* v. *Parish of Concordia*, 7 Ann. 150; *Hanson* v. *City Council of Lafayette*, 18 L. 295; C. C. 446, 448; *Boury* v. *Miles*, 6 Ann. 77.

It is therefore ordered that the judgment of the District Court be affirmed, with costs.

HARRIET ASHFORD *v.* CHARLES TIBBITTS et al.

The fact that plaintiff had a legal mortgage on the property, for which a writ of possession, issued in favor of W., would not, if true, be a valid reason to stay the execution of the writ. That execution would not impair her mortgage rights.

The wife's legal mortgage takes effect only from the date when the paraphernal funds went into the husband's hands.

The wife's renunciation is defective when the notary does not detail in the act the nature of the rights she renounced.

APPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Robertson*, J. *Herron*, for plaintiff and appellant. *Seymour*, for defendant.

SPOFFORD, J. The injunction sued out by the plaintiff was properly dissolved. The fact that she had a legal mortgage on the property for which a writ of possession issued in favor of *Woodruff* would not, if true, be a valid reason to stay the execution of the writ. That execution would not impair the mortgage rights.

The plaintiff, however, complains that there was error in that her legal mortgage upon the premises in question was not recognized by the judgment.

The wife's legal mortgage takes effect only from the date when the paraphernal funds went into the husband's hands.

There is no evidence that the husband in this case received the proceeds of the slave *Sally* before *Dorothy Woodruff* obtained her final judgment against *Tibbitts* for the property in controversy.

Seventy-nine dollars of the plaintiff's paraphernal funds appear to have been paid on her husband's order in 1843; but the interest of that sum belonged to the community.

For the principal, we think her legal mortgage should have been recognized, inasmuch as her renunciation was defective, in that the notary did not detail in the act the nature of the rights she renounced. See Acts 1835, p. 153; *Succession of Grenvillor*, 4 Ann., 412.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be so amended as to allow the plaintiff a legal mortgage for the sum of $79, with five per cent. interest from judicial demand, upon all the property of her husband, *Charles Tibbitts*, including the house and lots in controversy, and that in other respects the judgment be affirmed; the costs of appeal to be paid by defendants and appellees.

HUGH LUCAS *v.* J. F. D'ARMOND et als.

Putting in default is a pre-requisite to the rescission of a real contract, but not to a simulated sale, which is not a real contract as to third persons prejudiced thereby.

Articles 1698 *et seq.* of the Code have no application to cases of mere simulation. They refer only to the mode of avoiding a real contract in fraud of creditors—that is, to the revocatory action proper.

Article 1972 of the Code applies only to the revocatory action, and not to the action *en déclaration de simulation*. It is where the contract is serious, though fraudulent, that the decree must avoid it only as to the complaining creditor, and subjects the property to the payment of the plaintiff's debt, unless the vendee chooses to satisfy it himself. But where there is no contract the property may be declared to belong to the pretended vendor; and if the vendor be dead, it should be inventoried as the property of his succession.

APPEAL from the District Court, Seventh District, Parish of East Feliciana, *Merrick*, J. *Muse & Hardee* and *Bowman & Delee*, for plaintiff. *Fuqua*, for defendants and appellants.

SPOFFORD, J. This is an action *en déclaration de simulation*.

The plaintiff, a judgment creditor of *R. L. Bell*, deceased, averred that the latter, shortly before his death, made a simulated sale of the slave *Tom* and a town lot in Clinton, to the defendant, *D'Armond*, with a view to defeat the rights of his creditors; that the transfer was unaccompanied by a tradition of the property, *Bell* remaining in possession thereof until his death; that his

surviving widow and administratrix still continued in possession of said property, notwithstanding the pretended transfer to *D'Armond*, who accepted the nominal title to aid *Bell* in baffling his creditors; that *Mrs. Bell*, administratrix, refused to inventory the said property as a part of her late husband's succession, and that the property actually inventoried would not suffice to pay the privileged claims and the petitioner's judgment: wherefore he prayed that *D'Armond*, and *Mrs. Bell*, administratrix, be cited, and that after a hearing, it be decreed that the said pretended transfer be annulled, as a fradulent simulation, and the property be declared to belong to the succession of *R. L. Bell*, and as such liable to petitioner's judgment.

Both defendants pleaded a general denial.

A jury to whom the cause was submitted returned a general verdict in favor of the plaintiff.

The District Judge, instead of rendering a judgment conformable to the prayer of the petition, upon this verdict, decreed that unless the defendant, *D'Armond*, prefer to pay the plaintiff the amount of his judgment against *Bell*, within fifteen days, it be ordered, adjudged and decreed that the sale in question be set aside, annulled and avoided, as simulated and fraudulent, and the property therein described—viz., the town lot and the slave *Tom*, be seized and sold to satisfy the said judgment.

The defendants appealed; the plaintiff, answering the appeal, prays that the judgment be so amended as to conform to the prayer of his petition.

The defendant, *D'Armond*, has no reason to complain of the judgment.

The plaintiff has proven satisfactorily that he was and is a creditor of *Bell*. The bill of exceptions taken to a part of the evidence is untenable.

There was no necessity for putting *D'Armond in mora* to have the title he held declared simulated. The putting in default is a pre-requisite to the rescision of a real contract, and the authority quoted goes only to that extent. A simulated sale is no sale as to third persons prejudiced thereby.

The defendants misconceive the character of the present action when they cite the rules laid down in the Code relative to the action of the creditors in avoidance of contracts and its incidents. (C. C. 1695 *et seq.*) Those rules have no application to cases of mere simulation, as this is alleged to be. They refer only to the mode of avoiding a real contract in fraud of creditors—that is, to the revocatory action proper. *Erwin* v. *Bank of Kentucky*, 5 Ann., 4; 2 Zacharie, 341, note 2.

Here the allegations are, that there never was a serious sale from *Bell* to *D'Armond*; that the property never passed; that the slave and town lot still belong to the succession of *Bell*, and that *D'Armond's* pretended title is a fiction, a mere semblance interposed to shield the property from the pursuit of *Bell's* creditors, whose common pledge it is.

All that the plaintiff has to show to entitle him to sue is, that he has an interest in removing the mask from this property: this he has shown; all that he has to do to secure relief is to show that the pretended title of *D'Armond* is a mask: this he has shown to the satisfaction of the jury and the District Judge, as well as to ours. The motion for a new trial was properly overruled. No such diligence as the law demands was exhibited.

As the defendant also complains that the judgment does not conform to the prayer of the petition, we think the plaintiff is entitled to the amendment he prays for in this court. Article 1972 of the Code applies only to the revoca-

tory action, and not to the action *en déclaration de simulation*. It is when the contract is serious, though fraudulent, that the decree must avoid it only as to the complaining creditor, and subjects the property to the payment of the plaintiff's debt, unless the vendee chooses to satisfy it himself.

When there is no contract, the property may be declared to belong to the pretended vendor; in this case the vendor is dead, and his administratrix has refused to inventory the property in question as a part of his succession—which it really is.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended; that the act of sale passed before *J. C. White*, Parish Recorder of East Feliciana, on the 5th May, 1853, whereby *R. L. Bell* pretended to sell to the defendant, *T. F. D'Armond*, the slave *Tom* and a certain lot in the town of Clinton, be declared simulated, and therefore void; that the said property be declared still to belong to the succession of *R. L. Bell*, deceased; that it be inventoried as such by the defendant, *Mrs. Jane E. Bell*, administratrix, and duly administered for the benefit of the plaintiff and the other creditors of the said succession; and it is further ordered and decreed that the judgment of the District Court, as thus amended, be affirmed, with costs.

SARAH HILL *v.* JAMES WHITE.

Plaintiff sent her slave from Tennessee to defendant, at New Orleans, for sale. The slave was permitted to go, with one belonging to defendant—which he kept for such purposes—to the steamboat for his clothes, whence he escaped, and plaintiff sought to make defendant liable.

By the Court: The defendant took the slave for sale upon commission; the contract was a mandate mutually beneficial to the parties, and the defendant was bound to the exercise of ordinary diligence—that is, such a degree of diligence as persons of common prudence are accustomed to use in their own affairs of a similar nature.

There was in the knowledge of plaintiff's agent, who brought the slave to New Orleans, facts which showed that more than ordinary diligence would be requisite to prevent the slave's escape; and these facts being withheld from defendant, he cannot be made liable.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Taylor, for plaintiff. *Rozier*, for defendant and appellant.

SPOFFORD, J. The plaintiff, residing in Nashville, Tennessee, through her agents consigned to the defendant, a dealer in slaves in New Orleans, a bright mulatto boy for sale.

After the arrival of the boy at the slave depot, he informed the defendant that he had forgotten his clothes, and left them on board the steamboat which brought him to New Orleans from Nashville. He asked leave to go to the boat for them, and the defendant sent him, accompanied by one of his own slaves, a boy whom he kept for such purposes, and whose fidelity is not brought in question.

The plaintiff's boy went on board, and thence made his escape. Notwithstanding the efforts of both parties, he has not been discovered to this day.

The plaintiff had judgment against the defendant for his value, and the latter has appealed.

As the defendant took the slave to sell for the plaintiff upon commission, the

contract was a mandate mutually beneficial to the parties, and the defendant was bound to the exercise of ordinary diligence—that is, such a degree of diligence as persons of common prudence are accustomed to use in their own affairs of a similar nature. Story's Agency, § 183; Bailments, §§ 23, 455.

If there was anything within the knowledge of the plaintiff or her agents, who brought the boy to New Orleans, which would show that more than an ordinary degree of diligence would be requisite to prevent an escape, they were bound to declare it to the defendant.

We find that there was such knowledge on the part of the agent who wrote the letter of instructions which was to control the defendant in the sale of the slave, and that this knowledge was withheld from the defendant.

The plaintiff had owned the slave but about a month before she sent him to New Orleans for sale. The only positive proof concerning his character relates to that month. There is a hearsay declaration of his former owner, which cannot amount to proof of character anterior to that time. Now, the plaintiff's agent, who accompanied the slave as far as Vicksburg, on the trip to New Orleans, was in constant apprehension that the boy would run away from the boat; he kept the most scrupulous watch of him; when he left the boat at Vicksburg, he practiced a deceit upon him to entice him to New Orleans; he pretended to have hired him on the boat as a cabin-boy, and the deceit was carried out until he was landed at the slave mart. The discovery of this trick was at once calculated to excite an apprehension of some impending evil, to be evaded by flight. The practice of the deceit conclusively proves that the plaintiff's agent thought that something of the kind was necessary to prevent the slave from running away.

Now, nothing of this was communicated to the defendant. On the contrary, a letter was placed in his hands, written on board the steamboat by this agent of the plaintiff, authorizing him to sell, with full warranty, representing the boy as honest, humble and obedient; as having been raised on a plantation, being a good ploughman, &c. Not one intimation was given that he was brought to New Orleans by deluding him, or that he would be likely to avail himself of any opportunity to escape.

The District Judge inferred that the defendant did not consider it safe to trust the boy, because he sent his own slave with him to the boat for his clothes. We cannot regard this as an indication that the defendant had any fear of the boy's flight. It was an exercise of ordinary prudence, because the plaintiff's slave was a stranger in the city. It was proper enough that he should be sent to identify his clothes; and as the defendant had not been put on his guard by the plaintiff's agent, who knew material facts which he did not disclose, we cannot agree with the District Judge in holding that there was a lack of ordinary care on the part of the mandatary, under the circumstances above detailed.

It is, therefore, ordered that the judgment of the district court be avoided and reversed, and that there be judgment for the defendant, with costs in both courts.

CHARLES HOFFMAN & Co. *v.* ADVILLE ATKINS and N. B. RIDDLE.

The defence that the plaintiff has, through his acts, lost any of the securities upon a note, and thereby has become unable to subrogate the surety to his rights, is an admission that plaintiff did have a demand against the surety, and that the same has been discharged by the act of plaintiff.

Such a defence is in the nature of an exception *in factum compositæ*, and should be specially pleaded.

C. P. 327, 346.

APPEAL from the District Court, Seventh District, Parish of West Feliciana, *Ratliff*, J. *Brewer & Collins*, for plaintiffs and appellants. *Powell*, for defendants.

MERRICK, C. J. The answer to the appeal, praying an amendment of the judgment in favor of the appellee, waives the motion to dismiss the appeal.

This is an action upon two promissory notes, signed by *Jacob Michael*, the maker, and endorsed by the payee, *Adville Atkins*, and the defendant, *Riddle*.

The plaintiffs allege that *Riddle* placed his name on the back of the notes as surety for their payment at maturity.

The defendant *Riddle* in his answer admits his signature, and "avers that he is only surety, and as such is not liable for the payment of the debt, for this, that there has never been any legal protest made, or notice of protest given, or any of the requirements of law complied with in the premises to make him liable as surety as aforesaid."

One of the notes having been protested for non-payment, and due notice given, judgment was rendered thereon against both defendants.

As it respects the other note, the plaintiff failed to introduce proof of any notice to *Atkins* of a demand upon the maker. The judge of the lower court rendered a judgment of non-suit in favor of *Atkins*, and a final judgment in favor of *Riddle*, on the ground that as he was but a surety for the payment of the debt, he was discharged because the holder had lost one of the securities to the note by his failure to protest the note and give notice thereof to *Atkins*, and that he was therefore unable to subrogate the surety to any right of action against the first endorser.

We do not think that we are called upon to decide the questions whether *Riddle* was surety for *Michael* or *Atkins*, or both, or whether, as a surety upon the note generally, he stands in any better position than an endorser, with notice?

The pleadings are not sufficient to put at issue the fact asserted, that the plaintiff has through his acts lost any of the securities upon the note, and thereby become unable to subrogate the surety to his rights.

Such a defence implies an admission that plaintiff did have a demand against the surety, and that the same has been discharged by the act of plaintiffs.

This is in the nature of an exception *in factum compositæ*, which should have been specially pleaded. C. P. 327, 346; Inst. 4, 13, § 1; *New Orleans Gaslight Company* v. *Hudson*, 5 Rob. 486.

The defendant, *Adville Atkins*, not being before us, no judgment can be rendered affecting him.

It is therefore ordered, adjudged and decreed by the court that the judgment of the lower court as to said *Napoleon B. Riddle* be avoided and reversed, and now proceeding to pronounce such judgment as to said *Riddle* as ought to have been rendered by the lower court, it is ordered, adjudged and decreed by the court that the said plaintiffs do have and recover judgment against the said *Napoleon B. Riddle*, as surety upon said promissory note, for the sum of eight hundred dollars, with eight per cent. interest on the sum of four hundred dollars, from the 11th day of July, 1855, until paid, and the like rate of interest on the further sum of four hundred dollars, from the 11th day of October, 1855, until paid, together with costs of protest and cost of suit ordered in both courts.

SEAMAN, BECK & CO. *v.* ROBERT BABINGTON.

Unanswered interrogatories will be taken as confessed, although there is no order of court requiring defendant to answer.

APPEAL from the District Court, Eighth District, Parish of Livingston, *Watterson*, J. *J. R. & J. D. Jones*, for plaintiffs and appellants. *Walker*, for defendant.

MERRICK, C. J. This is an action brought to recover a sum of money alleged to be due the plaintiffs upon an open account.

To establish their claim, plaintiffs annexed to their petition interrogatories on facts and articles, and prayed that they might be served on the defendant, and that if they should not be answered within the legal delay, that the same be taken as confessed.

Plaintiffs did not pray that the interrogatories should be answered in open court, nor obtain any order from the court requiring the defendant to answer them.

The defendant pleaded the general issue to the plaintiffs' demand.

On the trial, no proof was adduced, the parties submitting the case to the court on the face of the papers. The plaintiffs insisted that, inasmuch as the interrogatories were not required to be answered in open court, no order was necessary, and they must be taken as confessed.

The District Judge being of the opinion that the order of the court was indispensable, rendered a judgment of non-suit. The plaintiffs have appealed, and contest in this court the correctness of the decision.

Were the question an open one, we should be inclined to adopt the conclusion of the District Court, as we believe it is in conformity with the general tenor of the articles of the Code of Practice and the Act of 1843. Moreover, the introduction of exceptions to general principles in practice, tend to embarrass rather than facilitate the administration of justice.

Nevertheless, we look upon the case of *Coxe* v. *Mitchell*, 7 L. R., 522, the record of which we have carefully examined without finding any order, as decisive of the question. See also cases of *Magee et al.* v. *Dunbar & B.*, 10 L. R., 546, 551; *Polo et al.* v. *Natali et al.*, 14 L. R., 260; *Derbès* v. *Decuir*, 5 R. R., 491.

The judgment of the lower court must therefore be reversed, and judgment rendered in favor of plaintiffs.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the plaintiffs do recover and have judgment in their favor and against the defendant, for the sum of six hundred and fifty-five dollars and seventy-two cents, with five per cent. interest thereon per annum, from the nineteenth day of March, 1855, until paid; and that the defendant pay the costs.

H. SHORT *v.* TRUSTEES OF THE METHODIST EPISCOPAL CHURCH SOUTH.

Action of jactitation—plaintiff alleged himself to be the owner and possessor of a certain lot of ground. Defendants excepted that plaintiff had not the necessary possession to maintain the action. The District Court ordered the exception to be referred to the merits—when defendants, after acquiescing in the order, amended the answer and set up title. *Held:* The amendment of defendants' pleadings waived the question of possession, and converted the action into a petitory one, in which the burden of proof was upon the defendants.

Bond to make title to a lot of ground on which a church was being erected, but in which the dimensions of the lot were not stated, and there being no proof from which it could be inferred what the dimensions were to be. *Held:* Defective as the foundation of title.

APPEAL from the District Court, Tenth District, Parish of Carroll, *Farrar, J.*

Short, in *pro. per.* *Dubose*, for defendants and appellants.

BUCHANAN, J. This is an action of jactitation. The plaintiff alleges himself to be the owner and possessor of a lot of ground in the town of Providence, parish of Carroll, at the north-east corner of Railroad street and Fourth street, measuring fifty feet on the former, and one hundred and fifty feet on the latter.

Defendants appeared and excepted that plaintiff had not the possession requisite to maintain this action; but, upon an order made by the court, to refer this exception to the merits, they filed an amended answer, setting up title in themselves to the land described in the petition. It is worthy of particular remark, that the defendants acquiesced in this order of court by amending their pleadings, and not insisting upon trying the issue of possession as an exception.

The District Court correctly ruled that this amendment of the pleadings of defendants waived the question of possession, and converted the action into a petitory one, in which the burden of proof was upon the defendants. *Millaudon v. McDonogh*, 18 L. R., 102.

The title set up by defendants is, 1st, a donation by verbal gift and delivery from *Mrs. Lucinda Chambliss*, about the year 1847, and 2d, a bond executed by *Govey Hood*, the heir, and *Wilson*, the executor of *Mrs. Chambliss*, on the 29th April, 1848, by which they bound themselves to make a title to defendants to a lot of ground in the town of Providence, on which a Methodist church was then being erected, and which lot included that claimed by plaintiff.

The bond of *Govey Hood* and *Wilson*, which is the sole foundation of defendants' title, gives no dimensions whatever to the lot on which the Methodist church is erected. Defendants pretend, without any warrant whatever in the

proof, that it should be taken to be one hundred and fifty feet square. That such was not the understanding of *Mr. Hood*, may be inferred from the fact that he sold, in January, 1852, fifty feet by one hundred and fifty, at the corner of Railroad and Fourth streets, being the identical land claimed by plaintiff, to one *McFall*. The evidence shows that there are lots in Providence of fifty feet, seventy-five, one hundred, and one hundred and fifty feet front: and it appears that the Methodist church, as erected, does not stand on any portion of the land claimed by plaintiff, and to which he has removed a building, which formerly stood upon another lot.

The defendants have entirely failed in proving title to the land in controversy. The judgment of the District Court is therefore affirmed, with costs.

HENRY SCHADEL *v.* ALEXANDER ST. MARTIN.

Mortgages are so far *stricti juris* that they cannot be extended by implication.

The dissolution of the lease, by the destruction of the premises, does not give the lessee any right to recover back money paid for previous rent.

When there is a partial execution of the principal obligation, the Judge may modify the penalty, unless there is a contrary agreement.

Code 2121, 2123, 2281.

APPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Robertson*, J. *Seymour*, for plaintiff. *J. M. & J. E. Elam*, for defendant and appellant.

MERRICK, C. J. On the ninth day of March, 1854, the defendant leased to the plaintiff a brewery and dwelling house in the town of Baton Rouge for three years, to commence the 15th day of the same month, at a rent of fifty dollars per month. The lease contained the following mutual covenant viz: "For the full and ample compliance of the above contract, the said *Henry Schadel*, engages himself to deposit, as a forfeit in case of evasion or non-compliance, the sum of five hundred dollars in the hands of *St. Martin*, and the said *St. Martin*, on his part, for the same purpose, engages to give the said *Schadel* mortgage to the said amount of five hundred dollars on the property leased as above. The said *St. Martin* further obliges himself to pay the said *Henry Schadel* the amount of eight per cent. interest on the five hundred dollars deposited by the said *Schadel* as a forfeit as aforesaid, the parties then binding themselves mutually in the sum of five hundred dollars each for the faithful performance of this contract."

The mortgage was accordingly executed by *St. Martin*, and the money deposited by *Schadel*. The plaintiff took possession of the property, and paid the rent regularly, until the 15th day of August, when *Jules Bonecaze*, a son of *L. Bonecaze*, the defendant's agent, called on plaintiff for the rent for the month terminating that day. The answer given was, that defendant owed him five hundred dollars, and he would not pay the rent until he was guaranteed its payment.

On the 27th day of August, the brewery burned down, leaving the dwelling house standing. Defendant had an insurance on the building, and the plaintiff on his stock. The insurance company paid to each his respective loss.

SCHADEL v. ST. MARTIN.

On the fifth day of September the plaintiff notified the defendant's agent that the lease was avoided by the fire, and that he would presently remove from the premises, which he did.

The defendant having returned home on the 26th day of September, (after plaintiff had removed from the premises) notified the plaintiff that it was his intention to rebuild the brewery, and place the premises in the condition they were at the commencement of the lease, and that he would submit to an equitable deduction on account of the time he would lose.

Plaintiff instituted this action against the defendant on the 28th day of October, 1854, to recover the five hundred dollars deposited, and eight per cent. interest, and the four months' rent which he had paid.

The defendant rebuilt the brewery on another part of the premises.

The Judge of the lower court gave plaintiff judgment for four hundred and fifty dollars, and eight per cent. interest thereon from the date of the deposit.

The plaintiff moved the court to reconsider the judgment, and the defendant moved for a new trial, both in vain.

The defendant appealed. The plaintiff has filed an answer praying an amendment of the judgment.

In this court the plaintiff and defendant present the following points, arising from the foregoing state of facts:

1st. The judgment ought to be amended, so as to recognize plaintiff's mortgage for the reimbursement of the five hundred dollars.

2d. That the judgment ought to be so amended as to give plaintiff the whole amount deposited and the whole amount of rent paid, inasmuch as the forfeit was without the fault of plaintiff.

3d. The defendant contends that, inasmuch as the plaintiff was in default for the non-payment of and the refusal to pay the rent on the fifteenth day of August, he forfeited to the defendant the five hundred dollars deposited, and that the plaintiff, being in default himself, could not put the defendant in *mora*.

Before considering these objections, we will observe that, although the defendant's counsel notices that the Judge of the lower court did not allow the defendant rent from the 15th to the 27th of August, he does not complain of the judgment in this respect. Indeed he based his motion for a new trial on the grounds above stated.

I. As it respects the first ground taken, it is sufficient to say that mortgages are so far *strictí juris* that they cannot be extended by implication. The lessor did not promise to give a mortgage for the return of the deposit, and in the mortgage which was given it was expressly declared to be "To secure the payment to the said *Schadel* of the forfeiture of five hundred dollars for any infringement of said lease *on the part of said lessor*." It is difficult to perceive how this can include the deposit of plaintiff, which stood itself as a penalty.

II. Conceding for the present that plaintiff's action can be maintained, it by no means follows that he has a right to demand a return of the rent paid prior to the dissolution of the lease by the loss of the thing leased. When he paid the rent the lease was in full force, and he was simply paying a debt. The dissolution of the lease certainly could not give him a right to demand back money which had been paid for an equivalent. C. C., 2281.

III. We look upon the five hundred dollars deposited with the defendant as a penalty. The Code provides that the creditor cannot exact both the penalty

and the principal obligation. C. C., 2121. Whenever there is a partial execution of the principal obligation, it is in the power of the Judge to modify the penalty, unless there is a contrary agreement. C. C., 2123; 7 An., 231. The Judge of the lower court seems to have exercised the discretion in this case in a proper manner, by deducting the rent due from the sum deposited. The refusal to pay the rent did not have the effect of rendering the lease indissoluble.

We think the District Judge has done complete justice between these parties.

Judgment affirmed.

SUCCESSION OF A. L. PETTIS.

An administrator has no capacity to appeal in behalf of parties whom he has placed on his account as creditors, and whose claims have been opposed and rejected by the court.

To consider the acknowledgment by an administrator of a claim against the estate as conclusive of its correctness, notwithstanding an opposition specially made to that item of the account, and without further proof, would be virtually to abrogate Articles 1004, 1005 and 1006 of the Code of Practice.

APPEAL from the District Court, Seventh District, Parish of East Feliciana, *Merrick*, J. *Kernan*, for plaintiff and appellant. *Muse & Hardee* and *Fuqua*, for defendant.

BUCHANAN, J. The administrator of this succession is appellant from a judgment rendered April 20th, 1855, upon an account of administration, which was filed January 13th, 1855. His grounds of complaint in this court are two:

1st. That he has been charged by the judgment with a sum of $2026 78, amount of *R. L. Bell's* bid at probate sale for the interest of the deceased in the partnership of *Pettis & Bell*, notwithstanding he offered proof on the trial of the oppositions to this account that he had not received that amount.

2d. That the judgment has rejected a number of items of debts due to sundry persons by the estate, notwithstanding they were acknowledged by the administrator and appellant to be valid claims against the succession.

The second of these grounds might be dismissed with the remark that the administrator has no capacity to appeal on behalf of parties whom he has placed on his account as creditors, and whose claims have been opposed and rejected by the court. It is no part of the administrator's business to swell the amount of indebtedness of the estate which he administers beyond the limits fixed by the court of the first instance. If convinced himself of the correctness of a claim, he has done his duty by placing it upon the account. In the subsequent contest between the claimant and creditors or heirs, the administrator is supposed to be disinterested, and cannot, therefore, be aggrieved by its decision. This point has been long ago settled in the case of *Ferguson & Hall* v. *Their Creditors*, 19 L. R., 278. Indeed the doctrine contended for by this appellant, that his acknowledgment of a claim against the estate was conclusive, notwithstanding an opposition specially made to that item of his accou t, and without further proof, would virtually abrogate Articles 1004, 1005 and 1006 of the Code

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of Practice. The cases quoted by appellant from 2 N. S., 596; 3 Rob., 288, and 7 An., 152, only decide that vouchers for moneys paid by the administrator are *prima facie* proof in his favor.

As to the item of $2026 78 with which the administrator is charged, it appears from the record that he was made liable for this amount as so much money received by him for the account of the succession by a judgment upon a former account of administration, which judgment was signed on the 10th November, 1854, and from which judgment no appeal has been taken. This question is therefore *res judicata* against the administrator, and the court properly refused to go behind that judgment, and to receive evidence against it.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, and that the appellant, *William Gurney*, pay the costs of this appeal.

Dr. Whitman Wilcox *v.* Wm. W. Leake.

It is for the jury, and not the witness, to determine from all the circumstances disclosed whether the plaintiff occasioned any damage to defendant by his negligence, or want of skill, and if so, to assess the amount of such damage. Hence, the testimony of the witness as to his opinion of the amount of damage suffered is not admissable.

APPEAL from the District Court, Seventh District, Parish of East Feliciana, *Ratliff*, J. *Powell*, for plaintiff. *Brewer & Collins*, for defendant and appellant.

Voorhies, J. The plaintiff brought this suit for the recovery of the sum of $119, for medical and surgical services alleged to have been rendered by him to the defendant.

In his answer the defendant admits that he employed the plaintiff as a physician and surgeon, but avers that the plaintiff inflicted upon him serious and unnecessary injuries by his neglect and want of skill in performing the services for which he was called, whereby he has sustained $2,500 damages, which he claims in reconvention.

The cause was submitted to a jury, who gave a verdict in favor of the plaintiff, awarding him the sum of $72, and rejecting the defendant's demand in reconvention. The latter is appellant from a judgment thereon rendered.

The testimony of *Dr. Whicher* shows the nature of the wound which was received by the defendant, and the circumstances under which the plaintiff's services were required; it is in substance as follows:

He says that the defendant, of whom he was then the attending physician, received in the spring of 1854 a wound in his face; it was a punctured wound, made by a dagger, the point of which entered the corner of his mouth and came out at the angle of his jaw, severing the facial artery and causing thereby great hemorrhage. It was a dangerous wound. Two or three days after it occurred, *Dr. Wilcox* was sent for, at the request of defendant's family. In the interval, the hemorrhage, though checked several times, broke out afresh. *Drs. Dashiel, Graham* and *Ewing* had called to see the defendant before *Dr. Wilcox* was sent for. There was a difference of opinion between the physicians called in as to the manner in which the hemorrhage should be stopped. *Dr.*

Wilcox also resorted to the compress, which checked it for a time, as it had done before. On the second or third visit he determined to attempt to tie the artery.

It is that operation which has given rise to the defendant's complaint. We have carefully examined the evidence in relation to it, and we are not prepared to say that the verdict of the jury is so manifestly erroneous as to authorize us to disturb it.

Our attention has been called to a bill of exceptions to the opinion of the Judge *a quo* in ruling out the following testimony, given by *S. H. Lurty* on the trial of the case:

"From the knowledge which he, witness, has of the manner in which the operation was performed, from the amount of pain which the patient must have suffered in consequence of the bungling manner in which the operation was performed, from the loss of time consequent therefrom, and in consequence of the disfiguration of the face of *Mr. Leake* from the scar caused by the incision made by *Dr. Wilcox*, and from the fact that *Mr. Leake* is a young man, not more than twenty-three years of age, and being a single man, all these circumstances taken into consideration, the witness thinks that *Mr. Leake*, the defendant, has been damaged at least $1000."

We do not think the Judge erred. It was for the jury, and not the witness, to determine, from all the circumstances disclosed by the evidence, whether the plaintiff had occasioned any damage to the defendant by his negligence or want of skill; and if so, to assess the amount of such damage. It is the peculiar province of a jury to make the assessment of damages in such cases, in which much discretion is vested in them, under the rule prescribed in the third paragraph of Article 1928 of the Civil Code. Were it otherwise, the witnesses, and not the jury, would be the judges to determine the matter.

The same reason is applicable, in our opinion, to the other bill of exceptions in relation to the testimony of the Judge *a quo*, which was to the same effect.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

Matthew P. Provan *v.* Charles E. Percy, Administrator of Thomas B. Percy, deceased, and Wm. H. Barrow.

The discharge of the surety, under Article 3030 of the Code, only takes place to the extent to which the acts of the creditor have prejudiced the recourse of the surety for reimbursement of what he may be obliged to pay under his contract of suretyship.

Article 3032 of the Code applies only to obligations payable at a time specified. Such term cannot be extended without the consent of the surety, and if extended, the entire release of the surety follows.

APPEAL from the District Court, Seventh District, Parish of West Feliciana, *Merrick*, J. *U. B. & E. Phillips*, for plaintiff. *Brewer & Collins*, for *Barrow*, appellant.

Buchanan, J. The defendant was surety on the bond of the tutor of plaintiff.

The balance due by the tutor to his ward was settled by a judgment of court at $27,849 66, with a tacit mortgage on all lands and slaves owned by the tutor since the date of the appointment.

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The tutor having died, his estate was administered as an insolvent estate; and upon an account and tableau of distribution, filed by his administrator, the proceeds of the real estate ($18,075 75) were allotted to the plaintiff and another minor, to whom the deceased had been tutor. Both those parties opposed the homologation of the administrator's account; but compromised, and divided the fund between themselves, the plaintiff abandoning $7000 of the amount to the other claimant. The tutor had sold, some years before his death, a house and lot in Bayou Sara, which was subject to the general mortgage of the plaintiff. The plaintiff is admitted to have given the vendee of said house and lot a release of his tacit mortgage upon the same, in consideration of two hundred and fifty dollars paid him. It is proved that the present cash value of the said house and lot is two thousand dollars.

Under this state of facts, the District Court gave judgment against the defendant, in favor of plaintiff, upon the tutor's bond subscribed by the former as security, deducting the total amount of the proceeds of the real estate of the tutor, which was the subject of the compromise, in the same manner as if the plaintiff had received the total amount from the administrator; and also deducting the total cash value of the house and lot sold by the tutor, as if the plaintiff had seized and sold it under his tacit mortgage.

The defendant has appealed, and contends that he has been released *in toto* from his suretyship, by the act of the plaintiff, which has rendered impossible a subrogation to the tacit mortgage of the plaintiff in his favor.

We think the appellant has nothing to complain of. The judgment has allowed him all that the most complete subrogation to the rights of plaintiff could have entitled him to receive from the administrator and from the vendee of the tutor; and the discharge of the surety, under the provisions of Article 3030 of the Code, only takes place to the extent to which the acts of the creditor have prejudiced the recourse of the surety for reimbursement of what he may be obliged to pay under the contract of suretyship. Such is the construction put upon the Article by our predecessors in the case of *Saulet* v. *Trepagnier*, 2 An., 428.

The counsel of appellant quotes the 3032 Article, and contends that, as the discharge of the surety is entire in the case supposed by that Article, the same reason exists for a total discharge in the case at bar.

The Article 3032 refers to obligations payable at a term specified. Such term cannot be extended without the consent of the surety. The consequence of such extention is the entire release of the surety. The reason is plain. The term is part and parcel of the contract of suretyship. The surety has bound himself for a particular time, and no longer. The contract cannot be changed without making a new contract in the place of that made by the surety, who is no party to such new contract, unless he sanctions it by his consent.

Judgment affirmed, with costs.

SACKETT, GRYMES & CO. *v.* L. M. ATTAWAY—JOHN A. MITCHELL, Garnishee.

A judgment rendered on the 22d December, and not signed until the 12th of January, may be treated as rendered at the term at which it was perfected by the signature of the Judge, and an appeal, by motion, may be made at that term.

APPEAL from the Sixth District Court of New Orleans, *Augustin*, J., presiding. *Durant & Hornor*, for plaintiffs and appellant. *Wolfe & Singleton*, for garnishee.

MERRICK, C. J. The motion to dismiss the appeal must be overruled in this case. Although the judgment was rendered on the 22d day of December, 1855, it was not signed until January 12th, 1856. During this period it was in the power of the District Judge to amend it as to form, or even to set aside the judgment *ex officio*, and grant a new trial. C. P., 547; 7 R. R., 451. We think the appellant is entitled to treat a judgment so signed as rendered at the term at which the judgment has been perfected by the signature of the Judge, and that the party may appeal by motion at that term.

On the merits, we see no reason to disturb the judgment of the lower court.

Judgment affirmed.

MARSH & PENDLETON *v.* AMBROSE J. FOSTER.

Appeal from an order of seizure and sale, on the ground that the mortgage notes contained a condition that could not be judicially assumed as having happened. The mortgage notes contained the following clause: "And in case of an overflow of the river, the payment to be extended one year longer, by paying interest." *By the Court:* This clause cannot be considered as containing a suspensive condition. It is clear that the defendant's obligation did not depend upon a future, or uncertain event; on the contrary, its terms were express. Code, 2015, 2016, 2038. The object of this clause, it is in evidence, was to secure to the defendant, in the event of an overflow, the right to prolong the term of his obligation. In order to exercise that right, the burden was on him to show that the event had happened at the time the order of seizure and sale was sued out.

APPEAL from the District Court, Ninth District, parish of Concordia, *Cooley*, J. *Stockton & York*, for plaintiffs. *Stacy & Sparrow*, for defendant and appellant.

VOORHIES, J. This is an appeal from an order of seizure and sale.

The defendant claims the reversal of the order on the following grounds, assigned by him as errors apparent on the face of the record:

"*First.*—The time when the notes and mortgage upon which said order of seizure and sale was granted, would become due and payable, was uncertain. It depended upon the happening or non-happening of a certain event, independent of the will or power of either of the parties. If it had not happened at the time the order of seizure and sale was sued out, then one of the notes was due; if it had happened, then said note would not mature till the 23d of

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April, 1855. This was a matter *en pais*, to be inquired of by the country, and it could not be judicially assumed as true, that said event had not happened. The assuming the fact by the District Judge, and granting the order upon that assumption, was error, and the order illegal."

The two mortgage notes declared upon, contain respectively the following clause, viz:

"And in case of an overflow of the river, the payment to be extended one year longer, by paying interest."

This clause cannot be considered, in our opinion, as implying a suspensive condition. It is clear that the defendant's obligation did not depend on a future or uncertain event; on the contrary, its terms were express. C. C. 2015, 2016, 2038. The object of this clause, it is evident, was to secure to the defendant, in the event of an overflow, the right to prolong the term of his obligation. In order to exercise that right, the burden, we think, was on him to show that the event had happened at the time the order of seizure and sale was sued out. If the event had happened when the order issued, it is clear he would have been entitled to relief on a proper showing, in the same manner as where time had been granted to a debtor for the payment of the debt, although not mentioned in the contract. C. P. 739 *et seq.*

Second.—"As to the other note, it was error to assume that the event specified in it would not happen, and that the note would fall due the 23d of April, 1855. This could neither be known or foreseen at the time of granting the order, which was palpably erroneous."

This ground presents the same question as the first. It suffices to add, that the plaintiff had the right to require that the property should be sold for the whole of his debt, in accordance with the terms of the contract. C. P. 686. In case of an overflow previous to the sale, the property must be sold, if required by the defendant, in relation to the last installment, payable on the 20th of April, 1856.

Third.—"The record, on its face, shows the contract to be usurious. The actual amount of indebtedness was the face of the notes on the 20th of April, 1852. They were made to bear eight per cent. interest from the first day of January previous, and the order was granted on that basis, and for the amount, including the interest stipulated to be paid on the amount of the note previous to the date of their execution."

In the absence of any proof to the contrary, we think it may be fairly assumed that the notes were given as evidence of a debt due by the defendant to the plaintiffs, on the 1st of January, 1852.

It is therefore ordered and decreed, that the judgment of the court below be affirmed, with costs.

George Brooks v. John Cavanaugh.

A judgment by default, confirmed by one law partner, who was ignorant that the other had given time to defendant's counsel to file an answer, will be reversed.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Roberts & Breaux, for plaintiff. *Lathrop* and *C. A. Johnson*, for defendant and appellant.

Lea, J. (Merrick, C. J., absent.) This case comes up on an appeal from the confirmation of a judgment by default, rendered under the following admitted state of facts:

On the 17th of May, the day on which the default was confirmed, the counsel for the defendant called upon *W. J. A. Roberts, Esq.*, one of the legal firm of *Roberts & Breaux*, who were acting as counsel for plaintiff, and who were his counsel of record, and applied for a delay of a few days on which to file an answer, stating, at the same time, reason why it would operate no delay in the ultimate disposal of the case. To this request, *Mr. Roberts* gave his assent. On the same day, and about half an hour after this arrangement had been made, *Mr. Breaux*, the partner of *Roberts*, who it appears had special charge of the case, but who was not aware of the promise made by his partner, caused the judgment by default to be confirmed and made final.

The assent given by *Roberts*, was clearly within the scope of his powers as an attorney at law, and was binding upon his client, until repudiated by him, with notice of the fact given to the defendant or his counsel.

In the case of *Robert et al.* v. *The Commercial Bank*, 13 La., in which there was a consent of counsel not to try the case during the summer months, the plaintiff disavowed the agreement made by his lawyer, went in person to the court-room and had the case set for trial, after due notice to the defendant's counsel, with whom the case was tried contradictorily.

After the agreement, which it is admitted was entered into between the counsel in the case at bar, it appears to us that a sufficient showing was made in support of the application for a new trial, and that the case should be reinstated as it stood at the time the agreement was entered into between the counsel in the case.

In support of this view of the case presented, we refer to the decision lately rendered in the case of *Lacoste* v. *Robert*.

It is ordered, that the judgment appealed from be reversed, and that the case be remanded for further proceedings to be had therein, in accordance with the views expressed in the foregoing opinion. It is further ordered, that the plaintiff and appellee pay the costs of this appeal.

Pearson & Hume *v.* John F. Harper, Executor, &c.

An offer by a debtor to give the creditor in payment or discharge of creditor's claims, a tract of land, if the creditor would give one hundred dollars to boot, will not interrupt prescription.

APPEAL from the District Court, Tenth District, parish of Tensas, *Farrar*, J. *Farrar*, for plaintiffs. *Stacy* and *Snyder*, for defendant and appellant.

Buchanan, J. This is a suit instituted upon the following obligations of defendant's testator, *Stephen M. Ford:* Three notes payable to order, of which one was due the 1st of January, 1843, and two, the 1st of January, 1845; also, an account for merchandise sold, with a due bill at the bottom, (not negotiable,) dated 24th of April, 1843.

This suit was instituted in September, 1855. Defendant pleads prescription; and plaintiffs have offered as evidence of an interruption, a letter of *Ford* to one *McAlpin*, dated 14th March, 1850, and the testimony of a witness, *Johnston*, of conversations with *Ford*, in the year 1853. The letter was properly admitted in evidence. *McAlpin* appears from the letter to have been an agent of plaintiffs. The letter and the testimony contain substantially the same offer on the part of *Ford*, to give plaintiffs in payment or discharge of their claims, a tract of land, provided they would give one hundred dollars to boot. This offer was declined; and upon the principle of the case of *Lackey* v. *Macmurdo*, 9 An., there was no interruption of the prescription.

Judgment reversed, and judgment for defendant, with costs in both courts.

J. M. Trescott *v.* William Lewis et al.

Appeal from a judgment overruling a motion to quash an execution, on the ground that the execution issued on the judgment, instead of the twelve months' bond given by defendant at a sale of his property, bought by him under a previous execution on the same judgment. *By the Court:* Wherein does it concern defendant whether the present *fi. fa.* issued upon the judgment or the bond? He is the principal debtor in both, and he does not pretend by his pleadings that he has ever paid the debt, or that it has been extinguished in any mode known to the law, or that he has any possible defence to it.

A twelvemonths' bond taken under execution upon a judgment does not operate a satisfaction or novation of the judgment.

APPEAL from the District Court, Seventh District, Parish of East Feliciana, *Duffel*, J., presiding. *Fuqua*, for plaintiff. *Muse & Hardee*, for defendants and appellants.

Spofford, J. The defendant, *Lewis*, appealed from a judgment overruling his motion to quash the execution issued in this case.

His ground of complaint is, that the execution issued upon the original judgment, and not upon a twelvemonths' bond, which he had given at a sale of his property under a previous execution upon the same judgment, but which is long past due.

Wherein does it concern him whether the present *fi. fa.* issued upon the judg-

ment or the bond? He is the principal debtor in both, and he does not pretend by his pleadings that he has ever paid the debt, or that it has been extinguished in any mode known to the law, or that he has any possible defence against it.

He concedes—what is perfectly settled—that a twelvemonths' bond, taken under execution upon a judgment, does not operate a satisfaction or a novation of the judgment.

If he has a technical defence to the bond which is not a defence to the judgment, it is a very good reason why his creditor should take out execution upon the latter; if he has no defence to the bond, it is frivolous for him to complain that the *fi. fa.* should have issued upon it rather than upon the judgment, which has never been satisfied, and against which he pretends to no equitable defence.

Judgment affirmed.

DAVID BONE *v.* EDWARD SPARROW, Curator.

By the laws of Pennsylvania and Maryland, if the husband has not, during his life, reduced to possession the choses in action of his wife, they will pass to her representatives.

By the Court: In a case similar to this we have held that the laws of Louisiana must control the distribution of the residuary interest of a succession in this State—the right of action for the recovery of the same being immovable from the object to which it applies.

Code, 468.

APPEAL from the District Court, Ninth District, Parish of Concordia, *Copley*, J. *Shaw*, for plaintiff. *Walton*, for defendant and appellant.

LEA, J. In 1837 *John Ducker*, then a resident of the State of Mississippi, died, leaving a large estate in the parish of Concordia, consisting of landed property, slaves, plantation stock, farming implements, &c.—the whole property being either immovable in its nature or by destination.

Ducker, who was a widower, left one child, a daughter, who on the 12th March, 1840, married *Henry V. Beckley*, in the State of Pennsylvania, where she and her husband continued to reside until the year 1844, when they both removed to the city of Baltimore, where, in the month of August of the same year, *Mrs. Beckley* died. Of the issue of their marriage there survives one child, a daughter, of whom the father became the guardian, by the appointment of the Orphans' Court in Baltimore county—from which guardianship he has, however, for some cause, not stated, been removed, by proceedings had in the Orphans' Court, at the instance of one of his sureties.

Upon the death of *Ducker* in 1837, his succession was opened by the defendant, who was duly appointed curator of the succession and tutor of the minor child of *Ducker*, and who proceeded to administer upon the same. The whole property appears to have been sold in the years 1838 and 1839, and the succession yet remains unliquidated in the hands of the curator.

In December, 1852, *Beckley* made a transfer to the plaintiff in this suit "of all his right, interest, claim, demand and title in and to the personal or movable estate, rights, credits and choses in action of his said wife, of what kind soever, and wherever the same might be situated, in the States of Maryland, Mississippi, Louisiana, or elsewhere." In virtue of this transfer, as above stated, the plaintiff

has claimed and obtained a judgment recognizing him as the owner of the residuary portion of the succession of said *John Ducker*, deceased, after the same shall have been fully administered. The written opinions of learned counsel have been introduced for the purpose of showing that by the laws of Pennsylvania, where the marriage was contracted, and by those of Maryland, which was the matrimonial domicil at the time of *Mrs. Beckley's* death, marriage operates as a transfer of the whole personal or movable estate of the wife to the husband; and that in Maryland, upon the death of the wife, even the choses in action vest immediately in her husband, who may recover, give or assign the same, without taking out letters of administration.

But the same counsel also certify that in the two States above referred to the property of the wife, of which the husband during his life does not become possessed, or in cases of debts due to the wife for which he does not recover judgment, the representatives of the wife will take, and not those of the husband. In other words, if this be the law of Maryland—and under the evidence we must assume it to be such, whatever the law may be elsewhere—if the husband has not, during his life, reduced to possession the choses in action of his wife, they will pass to her representatives.

Now, it appears that *Beckley* died in August, 1853. This suit was instituted in November, 1854. *Beckley* could transfer to his assignees, under the laws of Maryland, as established by the evidence, no greater right than he himself possessed. His inchoate right in the succession of *Ducker*, tested by the laws of Maryland—to wit, the right to reduce the same to his possession during his life, ceased upon the event of his death, and became revived in favor of the representatives of the wife.

There was no reduction into possession of the property now sued for during the lifetime of either the wife or her husband. The fact that the assignee of the husband is now suing for it we consider conclusive on this point. Neither the husband nor his assignee ever exercised any dominion over the fund now claimed, during the marriage nor since. Some stress is laid upon the fact that in 1844 *Beckley* called on the curator for the purpose of collecting any moneys coming to his wife from the estate of her father, and to take possession and charge of any property or rights she had here. It is shown that although the curator paid him some money, he did not surrender the estate to his possession or control; on the contrary, the plaintiff distinctly recognizes the fact that the estate is now in process of administration, and has prayed for and obtained a judgment ordering that he be recognized as owner of the *residuary* portion of the succession of the late *John Ducker*, "now in process of administration." We have considered this question with reference to the laws of Pennsylvania and Maryland on this subject, as explained by the testimony of eminent counsel, introduced without objection; but in a case similar, in many respects, to the one now under consideration, we have held that the laws of Louisiana must control the distribution of the residuary interest of a succession under administration in this State—the right of action for the recovery of the same being immovable from the object to which it applies. See Civil Code, 463; also case of *Marcenaro* v. *Mordella*, 10 Ann., 772.

It is ordered that the judgment appealed from be reversed, and that there be judgment for the defendant, with costs in both courts.

THE STATE ON THE RELATION OF M. A. FOUTE, praying for Writ of Prohibition, *v.* THE JUDGE OF THE FIRST DISTRICT COURT OF NEW ORLEANS and BENJAMIN S. TAPPAN.

All cases are excluded from the jurisdiction of the First District Court of New Orleans, which do not come within the definition of criminal cases, as found in the sixth section of the Acts of 1853 and 1855—"prosecutions for crimes, misdemeanors and offences committed within the limits of the First Judicial District."

The 43d section of the Act of 1855 does not give the First District Court of New Orleans jurisdiction to try a contested election of District Attorney of the parish of Orleans.

If the 43d section of the Act of 1855 applies to the parish of Orleans, the section would be satisfied, without conflicting with previous statutes, by filing the petition contesting the election of District Attorney for the parish of Orleans in any of the five district courts of general jurisdiction in the parish of Orleans.

The First District Court, being a court of limited powers, any extension of its jurisdiction must be strictly construed, and should not be stretched by implication to cases not named.

ON application for a Writ of Prohibition.

R. Hunt, for petitioner.

BUCHANAN, J.* (MERRICK, C. J., absent.) The defendant, *Tappan*, filed a petition in the First District Court of New Orleans, contesting the election of the relator to the office of District Attorney for the parish of Orleans.

The relator excepted to the jurisdiction of the District Court, and the court having overruled the exception, the relator has applied to this court for a writ of prohibition.

To this application the Judge of the First District Court of New Orleans has filed an answer, in which he takes the grounds—

1. That the contest of an election is not "a civil case," and therefore that he is not prevented by the organic law of his court from entertaining jurisdiction.

2. That jurisdiction of this contested election case has been given to his court by an Act "Relative to Elections," approved 15th March, 1855.

3. That, even supposing the jurisdiction has not been expressly conferred by law, yet he is justified in assuming jurisdiction, in order to prevent a failure of justice.

We will examine these points in the order in which they are here stated. And first, of the jurisdiction of the First District Court of New Orleans, as defined by the law of its organization.

The First District Court of New Orleans is one of the six district courts created by an Act of the Legislature, entitled "An Act to organize District Courts for the Parish and City of New Orleans," approved April 28th, 1853. Session Acts, p. 190.

The sixth section of that Act reads: "The First District Court of New Orleans shall have original and exclusive cognizance of, and shall hear and determine, according to law, all prosecutions upon all crimes, misdemeanors and offences whatever, which have been, or which shall be committed within the limits of the First Judicial District; except only such minor offences as shall by law be referred to the jurisdiction of the Recorders of the city, or other police tribunal that may be hereafter organized by law."

* *Kathman* v. *Watkins* was a case similar to this, and decided upon the same reasoning, in April, 1856.

And the 14th section: "All of the said district courts, organized under this Act, shall have and exercise concurrent jurisdiction of all civil cases whatever, which are not hereby specially referred to the particular jurisdiction of special courts, except the First District Court—the jurisdiction of which shall be confined exclusively to criminal cases."

In the general revision of the Statutes which took place in 1855, it was deemed necessary to reënact the Statute just referred to, which was done by an Act entitled "An Act relative to District Courts for the Parish and City of New Orleans," approved March 14th, 1855, in which Act the 6th and 14th sections of the Act of 1853, quoted above, are found, repeated verbatim in its 6th and 11th sections.

The provisions of these laws are free from all ambiguity. All cases are in terms excluded from the cognizance of the First District Court of New Orleans which do not come within the definition of criminal cases, as found in the 6th section of those two Acts—"Prosecutions for crimes, misdemeanors and offences committed within the limits of the First Judicial District." It is unnecessary, therefore, to follow the respondent into an investigation how far the contest of an election is to be viewed as a civil action. It is sufficient, upon this branch of respondent's answer, to say that such a proceeding is certainly not a "criminal case."

This brings us to the inquiry, whether the jurisdiction of the First District Court of New Orleans has been extended to such a case as this by the Act of 1855.

On this point the respondent relies upon sections 41 and 42 of the Statute. Session Acts of 1855, p. 415.

Section 41st directs petitions, contesting elections of Sheriff, Coroner or Clerk of the parish of Orleans, to be presented to the First District Court of New Orleans; and section 42 provides that "any candidate for either of the offices of Clerk of the District Court, Parish Recorder, Sheriff, Coroner, Justice of the Peace, and any other parish officer that may be elected by the people intending to contest an election, shall, within ten days after the election, file, in the district court for the parish in which the election may have been held, a petition," &c.

There are two features in this section which seem to indicate that it was intended for the country parishes, and not for New Orleans: First, it speaks of the election of Parish Recorder—an elective officer existing in every parish of the State, except New Orleans, in which parish the duties of that office are divided between two officers, the Recorder of Mortgages and Register of Conveyances, who are neither of them elected by the people; second, the section speaks of *the* district court for the parish—a form of expression which seems to suit only those parishes where there is but one district court.

It has also been made a matter of great debate whether the District Attorney be a *parish officer*, although the parish of Orleans be co-extensive with the First Judicial District.

But we regard these points as immaterial: for, granting that the 42d section applies to the parish of Orleans, and that the District Attorney in this district is a parish officer, yet the section does not give the First District Court of New Orleans—which is a court of a limited and exclusive jurisdiction—the right of entertaining the petitions to which it refers; and, as there are in that parish no less than five other district courts, of general jurisdiction, the section would be

satisfied, without conflicting with the previous statutes, by filing the petition contesting this election, in any of those courts. The respondent infers, from the fact that jurisdiction was expressly conferred upon his court, by the 41st section, to try contested elections of Sheriff, Coroner or Clerk; and from the other fact, that those officers are mentioned among others in the 42d section, that, therefore, the Legislature must be taken to have intended that contests of elections of all the offices mentioned in section 42, other than those also mentioned in section 41, should be tried (if in the parish of Orleans) in the First District Court of New Orleans. But the contrary would seem to be the logical inference, from that court being named in the 41st and not named in the 42d section. *Inclusio unius est exclusio alterius.* The court being, in its organization, a court of limited powers, any extension of its jurisdiction must be strictly construed, and should not be stretched by implication to cases not named.

STATE v. JUDGE 1st DIS. CT.

We apprehend no danger of a denial of justice, from the incapacity of the First District Court of New Orleans to entertain a petition contesting an election of District Attorney in this parish.

It is therefore adjudged and decreed that the writ of prohibition herein issued be made perpetual.

FARMERS' BANK OF KENTUCKY *v.* WILLIAM STEVENS et al.

The Act of 1827 has not disturbed the well-settled rules of commercial law on the subject of notice of protest. Its object was to provide a new and convenient mode of proof.

Nor is the form of notice material where the date, amount and names of the drawer and payee are mentioned.

It is sufficient if the party to whom notice is sent is enabled to ascertain therefrom the nature and extent of the obligation which has become the subject of protest.

As holders and absolute owners of a negotiable bill, the plaintiffs had a right, without qualification, to enforce payment from any of the parties to the instrument.

APPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Robertson*, J. *Lacy*, for plaintiffs and appellants. *Morgan* and *Dunn*, for defendants.

LEA, J. This is a suit, by the holder of a protested bill of exchange, against the drawer and acceptor, who, in addition to the general denial, specially plead a failure of the consideration of the bill—it having been given as the price of five slaves, sold by the payee to the acceptor, for whose accommodation the bill was drawn—three of which slaves were, as defendants allege, affected with redhibitory maladies at the time of the sale.

The defendant *Hickey*, moreover, denies the corporate existence of the plaintiffs, and avers his discharge from all liability upon the bill, on account of a want of proper presentment for payment, and of a failure to give due notice of protest, as required by law.

The evidence shows that the Farmers' Bank of Kentucky is a duly incorporated banking institution of that State; that the bank discounted the bill sued upon in due course of business, before maturity, without notice of the alleged equities between the other parties to the bill; that at maturity it was duly presented at the place designated in the body of the bill, and protested for non-payment—due notice of which was given to the drawer *Hickey*, by directing the

notice to him on the day of the protest, under cover to the cashier of the Farmers' Bank, the last endorser on the bill, who in his turn, on the same day on which he received notice of protest, mailed the notice intended for *Hickey* "to Baton Rouge, La.," the place where he receives his letters and papers. This mode of proceeding was strictly in accordance with commercial usage. "The Act of 1827 has not disturbed the well-settled rules of commercial law on this subject. Its object was to provide a new and convenient mode of proof." See *Carmena* v. *Bank of Louisiana*, 1st Ann., 371.

Nor is the form of the notice material where the date, amount and names of the drawer and payee are mentioned. "It is sufficient if the party to whom notice is sent is enabled to ascertain therefrom the nature and extent of the obligation which has become the subject of the protest." See *Mainer* v. *Spurlock*, 9th Rob., 161.

Assuming that there was a good defence upon the bill as against *Graves*, it is evident that as the transferee of negotiable paper, received in the usual course of business, the rights of the bank cannot be affected thereby; but there is no evidence in the record upon which, as between the parties to the sale of the slaves referred to in the answer of the defendants, we would feel justified, even if the pleadings permitted it, in entering up a judgment rescinding the sale, or decreeing a diminution of the price of said slaves.

As holders and absolute owners of the bill, the officers of the bank had a right, without qualification, to enforce payment from any of the parties to the instrument; and the court cannot control them in making a selection. We think there should be judgment for the plaintiffs.

It is ordered that the judgment appealed from be reversed, and that the plaintiffs, the President, Directors and Company of the Farmers' Bank of Kentucky, do have and recover of *Philip Hickey*, and of the succession of *William Stevens*, *in solido*, (the latter herein represented by *Mrs. Elvira Hackett*, widow of said *Stevens*, and natural tutrix of her minor children, *Philip* and *Elvira Ann Stevens*,) the sum of $4968, with interest thereon at the rate of five per centum per annum, from the 7th day of January, 1854, till paid, with costs of protest and costs of suit, together with the costs of this appeal. Said judgment, so far as it affects the succession of said *William Stevens*, to be paid in due course of administration, according to law.

CAROLINE E. WILCOX *v.* STEPHEN HENDERSON.

Suit to recover amount of certain notes obtained by defendant from plaintiff and paid by her, as alleged, for defendant's benefit. Plea, prescription of five and ten years. To meet this, the plaintiff urged that the Supreme Court had not decided until 1854, that she was not responsible for the debts of her former husband, and that, previous to that decision, she was not bound to bring this action. *By the Court:* The action of the court in that case did not have the effect of suspending the course of prescription against her.

APPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Robertson*, J. *Lacey*, for plaintiff and appellant. *J. M. & J. E. Elam*, for defendant.

VOORHIES, J. This is an action brought by the plaintiff for the repetition of the sum of $3,000, alleged to have been advanced by her at various times

to take up certain notes which the defendant had obtained from her for his own benefit and accomodation, and on account of which she had derived no benefit whatever, said notes having been given by her in error and at a time and under circumstances which relieved her from all liability.

The defendant pleaded as a bar to the action, the prescription of five and ten years; the one as to his liability as a party to the notes, and the other for the reimbursement of money paid on his account.

The plaintiff is appellant from a judgment sustaining the defendant's peremptory exception.

The facts on which her demand is founded may be succinctly stated as follows: In the month of March, 1842, as widow of the late *H. A. L. Mussenden*, she renewed a note of $1000, dated the 8th of April, 1840, and payable on the 1st of April, 1842, of which her husband was the maker and *P. A. Walker* the endorser, by giving in lieu thereof her own note for $800, and $265 cash. The Bank of Louisiana recovered a judgment against her for the amount of her note given in renewal. It is alleged that the note of $1000 was discounted by the Bank of Louisiana, and the proceeds placed to the credit of the defendant, on or about the 7th of July, 1841. On or about the 15th day of May, 1839, the defendant placed in the Bank of Louisiana *H. A. L. Mussenden's* note for $600, payable to the order of the defendant, and discounted for the benefit of the maker, which note she renewed on the 18th of May, 1840, by giving her own note for the sum of $480, endorsed by *J. Perkins*.

The present suit was instituted on the 29th of July, 1853, more than ten years after the alleged cause of action had arisen. There is nothing showing an interruption of prescription. The maxim of "*Contra non valentem agere, non currit prescriptio*," has been invoked by the appellant. It is urged by her that the Supreme Court of this State had not decided until June, 1854, that she was not responsible for the debts of her former husband, *H. A. L. Mussenden*, and that she was not bound, previous to that decision, to bring her action for the recovery of moneys paid by her in error. See 7 R. R., 341. The action in that case did not, in our opinion, have the effect of suspending the course of prescription against her.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

HYDE & GOODRICH *v.* THE CITY OF NEW ORLEANS.

Courts will not lend their aid to foster, circuitous, idle and wasteful litigation. The only real complaint plaintiffs have, is that they anticipated the payment of what afterwards became a debt. As the debt was due when they brought their suit, there was no equitable ground for repetition, in the fact that they paid it under a mistaken belief that they owed it before they really did.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Robert, for plaintiffs and appellants. *T. R. Wolfe*, for defendant.

SPOFFORD, J. The plaintiffs brought this suit in 1853, for the repetition of taxes upon capital alleged to have been paid by them in 1848 and 1849, for those years, in error of law, the Municipality No. 1 then having no power to tax capital whilst they supposed it had.

HYDE v. NEW ORLEANS.

But, on the 7th February, 1850, the Act "to authorize the several municipalities of the city of New Orleans to levy taxes upon capital," was approved, (Sess. Acts, p. 5,) by the second section of which, each of said municipalities was empowered to levy a tax on capital on the assessment roll for the years 1848 and 1849, not to exceed the amounts already imposed by existing ordinances of the said municipalities.

The Municipality No. 1 availed itself of this legislative grant of power, and in the case of *Wheeler & Blake* v. *Municipality No.* 1, 10 An., we affirmed the constitutionality of the law, and the binding force of the ordinance passed in pursuance thereof.

So that if the plaintiffs paid their taxes on capital before the Act of 7th February, 1850, and the ordinances pursuant thereto were passed, of which there is no proof in the record, still, when they brought this suit, they were legally liable to pay the defendants taxes to precisely the same amount and for the same years, under the last named ordinances.

Courts will not lend their aid to foster circuitous, idle and wasteful litigation. The only real complaint the plaintiffs have, is that they anticipated the payment of what afterwards became a debt. As the debt was due when they brought their suit, there was no equitable ground for repetition, in the fact that they paid it under a mistaken belief that they owed it before they really did.

Judgment affirmed.

THE STATE *v.* SLAVE BOB.

Objections to the admissibility of the prisoner's confession, and to the instructions of the court, must be taken by bill of exception, and not by assignment of error. And where the Justices who presided at the trial of slaves, were of opinion that they had no power to sign bills of exception, evidence of this should appear of record.

Assignment of error, "that the tribunal who convicted said slave were informally and illegally constituted." *By the Court:* This objection is entirely too vague, and has not been made more explicit by any specification, even in argument, in this court.

APPEAL from the Sixth Magistrate's Court of Madison.

Morse, Attorney General. *Hynes*, for appellant.

SPOFFORD, J. The slave *Bob* having been sentenced to death by a Jury empannelled under the law for the trial of slaves, has appealed.

We are unable to pass upon his case with nothing more than the present record before us. Our appellate jurisdiction in criminal cases is limited to questions of law. These questions must be presented by bills of exception or assignments of errors.

There is no bill of exceptions in the record. The counsel of appellant states in his printed brief, that the Justices presiding over the tribunal were of the erroneous opinion that they had no power to sign bills of exceptions. But there is no evidence of this in the record, nor any evidence that the objection to the admissibility of the prisoner's confession, was raised in time. Although the evidence itself was taken down by some one in writing, and comes up with the record, it does not belong to our province to examine it.

There has been no assignment of errors filed in this court. There is one in the record, which appears to have been filed in the inferior tribunal, after the appeal was granted.

The first point in this assignment refers to the admissibility of the prisoner's confession, which, as we have already stated, should have been presented by a bill of exceptions tendered at the time the evidence was admitted, or by something in the record equivalent to a bill of exceptions.

The second is as to an instruction of the presiding magistrates. This too should have been presented by a bill of exceptions seasonably taken, or it should appear of record in some mode. One of the Justices indeed certifies that they told the jury that if they found the prisoner guilty, (of administering poison,) the law affixed the penalty, and they could not commute the punishment; but it does not appear from the certificate that the prisoner's counsel objected or asked any different charge.

The third point assigned for error in the lower court, was "that the tribunal who convicted said slave were informally and illegally summoned and constituted." This objection is entirely too vague, and has not been made more explicit by any specification, even in argument, in this court.

It is, therefore, ordered that the appeal be dismissed at appellant's costs.

CITY OF NEW ORLEANS v. FRANÇOIS LACROIX.

In a suit for taxes, where the defendant, after setting up certain dilatory exceptions, added that should the exceptions be overruled, "the respondent pleads a general denial, and especially the ownership of the property taxed," defendant will not be permitted, under such an answer, to show that he had alienated the property previous to the assessment.

Defendant should have alleged specially what were the errors he complained of in the assessment roll, and that he had, without avail, resorted to the means afforded him by law to correct such errors, or at least allege a sufficient reason for having failed to do so.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Hiestand & Levy, for plaintiff. *Collins*, for defendant and appellant.

SPOFFORD, J. The case comes up on a bill of exceptions to the ruling of the court below. The Judge refused to receive evidence that the property described in the demand and assessment rolls, had been alienated by the defendant previous to the assessment.

Under the pleadings, the court did not err. The answer, after setting up various dilatory exceptions, merely stated that, should the exceptions be overruled, "the respondent pleads a general denial, and especially the ownership of the property taxed."

Such a vague and loose averment as this, did not authorize the admission of the evidence proposed. The defendant should have alleged specifically what were the errors he complained of in the assessment roll, and that he had, without avail, resorted to the means afforded him by law to correct such errors, or at least, allege a sufficient reason for having failed to do so.

Judgment affirmed.

Esther Klein *v.* Dewees & Ingalls.

Mortgage certificate of reinscription, as follows: "And the general one against R. M. W., in favor of *Thomas R. Ingalls*, resulting from a judgment rendered by same court as above, on the 9th December, 1839, for six thousand one hundred and six one dollars and sixty-nine cents, interest and costs, being the reinscription made in this office, on the 6th of August, 1849, of the same judgment recorded on the 13th December, 1839, in this office; *which original judgment was, on the 16th November, 1848, cancelled and annulled but so far only as it bears on and affect the three squares of ground above described, and no further.*" *By the Court:* It is not pretended but the original mortgage was properly cancelled by the Sheriff. What then was the effect of the reinscription? We think it was merely to continue in force the judicial mortgage, just as it existed previously. The mortgage had no greater force the day after its reinscription, than it had the day before. The reinscription informed *Ingalls*, as it did all the world besides, that the judicial mortgage as to these lots had been cancelled. We do not think *Ingalls* can now be permitted to gainsay this record, which he has caused to be made in the office of Recorder of Mortgages, where alone his judgment could acquire the force of a mortgage, even as against W.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Roselius, for plaintiff. *Strawbridge*, for defendants.

Merrick, C. J.* *Thomas P. Ingalls* having seized, under an execution issued against *R. M. Wellman*, three lots of ground in Greenville, in the parish of Jefferson, the plaintiff instituted the present action of injunction to restrain the sale of the property seized.

The material facts out of which this controversy arises, are these: *Ingalls* recovered judgment against *R. M. Wellman*, for $6,161 69, on the 10th day of December, A. D. 1839, which was recorded on the 13th of the same month in the mortgage office of the parish of Jefferson. *R. M. Wellman* appears to have been insolvent, and a fi. fa. issued on this judgment in 1841, was returned *nulla bona.*

In 1836, *James Ogelvie* sold to *Catharine J. Wellman*, the daughter of *R. M. Wellman*, the three squares of ground in controversy, reserving the vendor's privilege and a mortgage upon them to secure the price. *Catharine J. Wellman* having died, and *R. M. Wellman* having become her sole heir, *Ogelvie* instituted suit against *R. M. Wellman*, to recover the notes due as the remainder of the price, and on the 11th day of April, 1842, obtained judgment for six hundred and fifty dollars and interest, and his special mortgage to secure the same was recognized.

An execution issued on this judgment, and on the 22d of August, 1842, at the Sheriff's sale, the plaintiff purchased the three lots for nine hundred and thirty-six dollars cash. Her Sheriff's title was not recorded until after this litigation commenced. The Sheriff, it appears, released all the subsequent judicial mortgages upon the property.

After *Ogelvie's* mortgage had become extinguished, both by payment and prescription, *T. R. Ingalls* caused his judgment to be reinscribed against *R. M. Wellman*, in the office of the Recorder of Mortgages, and issued his execution and caused the property to be seized as belonging to him, *Wellman.* Since the seizure and institution of the suit, *Wellman* has died; the fi. fa. is returned, and the suit is now prosecuted as an hypothecary action on the reconventional demand of *Ingalls.*

It is contended in this court on his behalf that by the reinscription of his

* Lea, J., not having been present at the argument, took no part in this decision.

mortgage it operated as a general mortgage upon all property standing in *R. M. Wellman's* name; that inasmuch as the plaintiff's title was not recorded, by the words of the Act of 1813, the sale was "utterly null and void to all intents and purposes." Bullard & Curry's Dig., 596. The cases of *Perrou* v. *Maillan*, 11 L. R., 489, and *Lee* v. *Darramon*, 3 Rob., 161, are cited in support of this position.

We think the manner in which *Ingalls'* mortgage was reinscribed will prevent him from invoking the benefit of these authorities. The certificate of mortgages shows that the inscription was not absolute, but carried with it the former erasure or cancellation which had been made in favor of this purchaser.

The mortgage is embraced in the certificate of mortgages in these words:

"5th. And the general one against *R. M. Wellman*, in favor of *Thomas R. Ingalls*, resulting from a judgment rendered by same court as above, on the 9th December, 1839, for six thousand one hundred and six one 69-100 dollars, interests and costs, being the reinscription made in this office on the 6th of August, 1849, of the same judgment recorded on the 13th of December, 1839, in this office; *which original judgment was, on the 16th November, 1848, cancelled and annulled, but so far only as it bears on and affect the three squares of ground above described, and no further.*"

It is not pretended but the original mortgage was properly cancelled by the Sheriff. 1 An., 10. What then was the effect of the reinscription? We think it was merely to continue in force the judicial mortgage just as it existed previously. The mortgage had no greater force the day after its reinscription than it had the day before. The reinscription informed *Ingalls*, as it did all the world besides, that the judicial mortgage as to those lots had been cancelled. We do not think *Ingalls* can now be permitted to gainsay this record which he has caused to be made in the office of the Recorder of Mortgages, where alone his judgment could acquire the force of a mortgage, even as against *Wellman*. This view of the case renders it unnecessary to consider what would have been the effect of a judgment recorded under like circumstances, against *Wellman* generally.

The judgment of the lower court must, therefore, be affirmed.

Judgment affirmed.

CITY OF NEW ORLEANS *v.* ALFRED ROUSSEAU.

Although the assessment roll may be considered as not having the force and effect of a final judgment, yet a party will not be permitted in all cases to go behind it. On the contrary, he should not be permitted so to do, unless it be shown that the party had sought in vain, or was prevented by some valid cause from seeking the correction of the assessment roll in the manner pointed out by law.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Heistand & Levy, for plaintiffs. *Collins*, for defendant and appellant.

VOORHIES, J. We think the defendant's exception, that he has not been legally cited, is waived by his answer, in which he avers that the description of the lots is defective and the assessment thereof not made in accordance with the requirements of the law.

NEW ORLEANS v. ROUSSEAU.

The only question which remains to be determined, arises out of a bill of exceptions taken by the defendant on the trial below to the opinion of the Judge, in ruling out evidence for the purpose of showing, that White and other streets, which appear on the assessment roll, as bounding the lots and squares assessed, do not exist in the Second District of New Orleans, and that some of the streets which do exist, run so as not to cross each other, and do not form a square, as set forth in the assessment roll, and that the description in the roll does not and cannot therefore correspond with any property in the district.

We do not think the Judge erred in excluding the evidence, as it could not have changed the result. The Act of 1850 prescribed the mode in which all taxable property should be assessed. The board of assessors was bound to deliver, on or before the first Monday of October, to the Recorder of the Municipality in which the district assessed was situated, and for that part of the parish of Orleans, on the right bank of the river Mississippi, to the Justice of the Peace of that District, the assessment rolls, and to give immediate notice thereof, "in order that any person aggrieved by such assessment might appeal and have the same corrected, if found incorrect." The Recorder was authorized, on the appeal of the party aggrieved, made in writing, stating particularly the correction desired, and on proof of the fact, to correct such errors and to make the roll correspond thereto. After the expiration of the delay within which such corrections were allowed to be made, the Recorder was bound to issue one of the copies of the assessment rolls to the appropriate Tax Collector of the parish of Orleans. Session Acts of 1850.

It is clear, therefore, that if the defendant, who is appellant in this case, considered himself aggrieved by the defective description of his property, or of any other error committed to his prejudice, he should have taken an appeal to have such error corrected in the manner and within the delay prescribed by that Act. It is now too late for him to do so. Although such assessment roll may be considered as not having the force and effect of a final judgment, yet we are not prepared to say, that a party should be permitted in all cases to go behind it. On the contrary, we think it should not be done, unless it be shown by cogent reasons that the party had sought in vain, or was prevented by some valid cause from seeking the relief to which he was entitled under that Act; and which, in our opinion, affords ample protection to the citizen whose property may have been improperly assessed. It does not appear in this case, that the appellant had ever made any attempt to obtain such relief.

It is therefore ordered and decreed, that the judgment of the court below be affirmed, with costs.

Succession of Sarah A. Penny—Solomon Bloom, Appellant.

Action to remove administrators, domiciled in Mississippi.

Exception—that there had been no citation. *By the Court:* This objection may be considered not only as waived by the other reasons urged for the dismissal of the action, but by the appearance of the appellees, whereby it became unnecessary to make service on the curator *ad hoc*, on whom alone it could be made as the appellees were domiciled out of the State.

APPEAL from the District Court, Seventh District, parish of East Feliciana, *Duffel*, J., presiding. *Muse & Hardee*, and *McVea*, for appellant. *Sawyer*, for defendants in rule.

Voorhies, J.* *Solomon Bloom* is appellant from a judgment discharging a rule taken by him on *Ann L. Foster* and her husband, *James J. A. Foster*, domiciled in the State of Mississippi.

In a former suit between these parties, involving the right to the administration of the estate, there was a judgment rendered by this court in favor of the appellees. See 10 An.

The appellant, in his petition, alleges that the judgment thus rendered imposed on *Ann L. Foster*, the beneficiary heir, and her husband, the condition, that they should appear in person to take the necessary oath, give bond, and before their departure from the State, appoint an agent to represent them; that said *Ann L. Foster* was not in the State at the time of filing her application for letters of administration, nor since; that she has never taken any other oath than that which was taken by her before one *Edwards*, a justice of the peace in the parish of Concordia; that the only agent appointed by her and her husband, was *William B. Rouck*, of the parish of East Feliciana, by act executed in the State of Mississippi, on the 23d of April, 1855; that the letters of administration were not granted to them until the 27th of the same month, and on the 12th of the ensuing month, said *Rouck* executed an authentic act, whereby he refused to accept said agency; that said *Foster* and wife, having failed to comply with the requirements of the law within ten days from the filing of the decree in that case, have forfeited their claim to the administration, and the letters which have been granted to them, should therefore be cancelled and annulled; and that the succession is now wholly unrepresented by any one within the jurisdiction of the court where it is open, in order to enable the creditors to assert their claims. Whereupon he prays, that said *Ann L. Foster* and her husband, may be ruled to show cause why the letters of administration thus granted to them should not be cancelled, and that he be appointed in their stead; and that, as they are absentees, a curator *ad hoc* be appointed to represent them, and duly notified thereof, so that said letters may be cancelled and annulled contradictorily with him.

A curator *ad hoc* was appointed as prayed for, but it does not appear that he ever took any part in this action.

The defendants, by their attorney, filed an exception, claiming the dismissal of the application, on the following grounds, viz:

1st. "That they have never been legally cited or notified of said demand personally, nor has any one been so cited or notified, who is qualified to repre-

*Merrick, C. J., took no part in this decision.

Succession of Penny.

sent them; that no citation has been served upon them, or any one else, nor has any been prayed for as issued in said suit."

2d. "Proceedings to remove an administrator cannot be commenced by a rule to show cause, that no rule has been obtained by order of the court or served upon them, and they are in no manner bound to notice or answer said petition."

3d. "The said *Bloom* has made no showing that he is a creditor of said estate; that he cannot, on a naked allegation that he is a creditor, disturb the administration in which other creditors are interested; that he is not a creditor on the tableau of distribution and statement of debts, filed by them as administrators."

4th. "That the petition is informal and defective, in that it does not set out the place of residence of the petitioner, as the law requires."

The Judge *a quo* sustained the exception and dismissed the appellant's petition. We think he erred. The first objection urged in the exception is, that the appellees had never been legally cited or personally notified of the appellant's demand. It is clear that this could not tend to defeat, but only to retard the progress of the action, by requiring the service of a copy of the petition and citation to be made on them. But this objection, it appears to us, may be considered not only as waived by the other reasons urged for the dismissal of the action, but by the appearance of the appellees, whereby it became unnecessary to make such service on the curator *ad hoc*, on whom alone it could be made, if at all, as the appellees were domiciled out of the State.

The second ground of objection is untenable. The action was commenced by petition in the usual form, setting forth the grounds upon which the removal of the appellees as administrators was prayed for, and concluding with a prayer for the same to be done contradictorily with a curator *ad hoc*, as the appellees could not be cited.

The other objections appear to us to be equally untenable. The admission of the appellees in the record shows, that the appellant was a creditor of the succession.

Under the Act of 1847, (Session Acts of 1847, p. 115,) the appellees were bound to leave a general and special power of attorney with some person in the parish where the succession was opened, or the adjoining parish, to represent them in all necessary acts relative to the administration of the estate, and to deposit in the office of the recorder an authentic copy thereof. We are, therefore, of opinion, the Judge erred in sustaining the exception.

It is therefore ordered and decreed, that the judgment of the court below be avoided and reversed; that the exception be overruled and the case remanded, to be proceeded in according to law. And it is further ordered, that the costs of appeal be paid by the appellees.

Faucette, Davis & Co. v. City of New Orleans.

The depositary owes no interest for the money deposited, except from the day on which he became a defaulter by delaying to restore it. Code, 2919.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Beecher*, for plaintiffs. *Livingston*, City Attorney.

Spofford, J.* On the 27th of March, 1849, the sum of $899 69, was deposited with the Treasurer of the city of Lafayette, for the plaintiffs.

This money was used by the city of Lafayette, being paid out by the Treasurer, upon orders by the finance committee, for the necessities of the city.

When the plaintiffs applied for it, they were told that the city had expended it, and could not then restore it, being short of funds.

On the 23d of February, 1852, the city of Lafayette was incorporated with the city of New Orleans, and its debt assumed by the latter city. Acts 1852, pp. 55–6.

The Treasurer of New Orleans offered to pay the principal without any interest, provided the plaintiffs would give a receipt in full for their claim.

The plaintiffs declining this proposition, brought suit and recovered judgment for the sum of $917 84, with eight per cent. interest, from the 27th of March, 1849, and the city has appealed.

The depositary "owes no interest for the money deposited in his hands, except from the day on which he became a defaulter, by delaying to restore it." C. C. 2919.

The time is not fixed with precision by the evidence. The only thing certain is that the city of Lafayette, upon application, declined to refund the money at some time before the annexation to New Orleans, that is prior to the 23d of February, 1852. Interest should be allowed only from that date, as it was the plaintiffs' duty to show when the city was in default.

In the absence of a contract, or a special law, (neither of which is shown to have existed,) five per cent. per annum is the rate of interest in Louisiana.

It is therefore ordered, that the judgment appealed from be reversed; and, proceeding to render such judgment as should have been rendered, it is ordered and decreed, that the plaintiffs recover of the defendant, the sum of eight hundred and ninety-nine dollars and sixty-nine cents, with five per cent. interest thereon, from the 22d day of February, 1852, until paid, and the costs of the District Court. It is further ordered and decreed, that the costs of this appeal be paid by the plaintiffs and appellees.

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*Lea, J., not having been present at the argument, took no part in this decision.

Mrs. Nancy Fogle, wife of E. F. Fogle *v.* John T. Delmas.

Interest is due by a depositary only from the demand for restitution. Code, 2919.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Koonts* and *Grivot*, for plaintiff. *Goold & Stansbury*, for defendant and appellant.

Buchanan, J. (Merrick, C. J., absent.) The plaintiff sues for the restoration of money deposited. The judgment of the court below was in her favor; and we think that judgment is fully justified by the evidence.

There was error, however, in allowing interest from the date of the deposit. It was only due from the date of the demand for restitution. C. C. 2919.

It is therefore adjudged and decreed, that the judgment of the District Court be amended; that plaintiff recover of defendant, one thousand and ten dollars, with interest from judicial demand, (October 26th, 1853,) and costs of the District Court; those of appeal to be paid by plaintiff and appellee.

Julia Haughton *v.* B. F. Haughton, her Husband.

Defendant had summoned more than forty witnesses, and asked for attachments, which the court refused him without security for the costs of all the attachments exceeding six. *By the Court:* There is no averment that he expected to prove anything material by the absent witnesses, nor that he was unable to give the security required. Much discretion must be left to the judges of the first instance in such a matter as this, in order to prevent the abuse of the process of the court. C. P. 472.

Where the witness had lived several months in defendant's house, and defendant was present at the trial and cross examined witness, he cannot allege surprise, or claim a new trial, to inquire into the competency, or credibility of the witness.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J. *Olcott & Woodridge*, for plaintiff. *R. & H. Marr*, for defendant and appellant.

Spofford, J.* The defendant has appealed from a judgment of separation of bed and board, rendered against him in favor of the plaintiff, his wife, upon the allegation that his conduct, excesses and outrages towards her rendered their living together insupportable.

The appellant complains that the District Judge erred, in ruling upon the trial that he should give security for the costs to be incurred by the issuing of more than six attachments for his absent witnesses, under Art. 472 C. P.

There is no averment that he expected to prove anything material by the absent witnesses, nor that he was unable to give the security required. Much discretion must be left to the judge of the first instance in such a matter as this, in order to prevent the abuse of the process of the court. The District Judge states that the defendant had summoned more than forty witnesses, and that he had reason to believe that the object of asking attachments for so many was to increase the costs.

* Lea, J., took no part in this decision.

As much of the testimony of the ten witnesses who were examined for the defendant has no bearing in his favor, this opinion of the judge was probably not without foundation. At any rate, there is no such showing upon the record that the defendant has been illegally deprived of any substantial benefit as would authorize us to remand the cause.

He complains, secondly, that the court erred in overruling his motion for a new trial, on the ground that he had just discovered that the principal witness for the plaintiff—who had been examined without objection on his part—was incompetent, by reason of her age: she not being of the age of fourteen years complete. The affidavit upon this subject shows only that a single person had expressed an opinion to that effect, but that he declined to make affidavit that she was not fourteen years of age. This of itself would have been a sufficient reason for refusing the application. But in the argument filed on behalf of the appellant, it is stated that this witness was "a mere child, very small, *apparently* not more than twelve years old." She had, moreover, lived several months in the defendant's house; and as he was present on the trial and cross-examined her, we think he cannot allege surprise or claim a new trial to inquire into the competency or the credibility of this witness.

We do not think it necessary or desirable to enter into the details of a course of conduct, which, after but four years of married life, and while both parties are still young, has broken up a contract which nothing but death was intended to sever. A perusal of the evidence has impressed us with the conviction that it would be better for these people to live asunder, and that the law justifies the decree.

It is, therefore, affirmed, with costs.

SUCCESSION OF SARGENT PRATT.

On the trial of an application for letters of administration, it is competent for the opponent to show that she was publicly acknowledged and held out to the world as the wife of the deceased; that all the property belonging to the succession was community property; that the opponent was ready to give security for the payment of all the debts of the succession, and that the creditors were willing to accept such security.

It would be competent for the court to protect the heirs by requiring the opponent, as a pre-requisite to the exercise of her rights as usufructuary of the community property, either to advance a sufficient sum to pay the debts of the deceased, or produce the consent of the creditors to her assumption of the debts, and to her furnishing security for their payment; and such assumption should be accompanied by a release of the heirs from all liability.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Paxton and *Durant & Hornor*, for opponent and appellant. *Bonford*, for appellee.

LEA, J. (MERRICK, C. J., absent.) *Ann O'Brien*, who alleges that she is the widow of the deceased *Sargent Pratt*, is appellant from a judgment dismissing her opposition to an application for the administration of the succession of the deceased, and appointing one of the sisters of the deceased the administratrix of the same.

Pratt died in July, 1855. His sister, *Margaret Pratt*, wife of *Jeremiah Collins*, alleging that he had died intestate (having never been married), applied for and

obtained letters of administration upon his estate, which, as it appears from the inventory, exceeded in value the sum of $23,000. On the 1st of November, 1855, the appellant alleging that she was the widow of the deceased, that his estate was free from debt, and consisted exclusively of community property, claimed to be put in possession of the entire property, as owner of one-half, in virtue of her right as surviving partner in community, and as usufructuary of the other half, in accordance with the provisions of the Act of 1844, regulating the disposition of community property.

After this application had been made, and before it had been acted upon, the administratrix obtained an order of sale of a portion of the property to pay debts, amounting to about $3500.

Further proceedings were stayed by the death of the administratrix. On the 22d November, 1855, *Aphra Pratt*, another sister of the deceased, applied for letters of administration, and was opposed by the appellant, who, reiterating the statements and demands set forth in her first application, alleged that there was no necessity for an administration, the succession being free from debt, and that her rights as owner of one-half, and usufructuary of the other half of the estate, were such as to entitle her to the possession of the same upon complying with the requisites of the law. She moreover claimed a preference in the appointment of an administrator, should one be deemed necessary by the court.

On the trial of the issues thus presented, the appellant offered to introduce several witnesses, who are designated in the bill of exceptions for the purpose of proving that she had been publicly proclaimed and acknowledged, and held out to the world by the deceased as his wife; that all the property belonging to the succession was community property, having been acquired since the establishment of their matrimonial domicil in Louisiana; that she was ready to give security for the payment of *all the debts* of the succession, and that the creditors were willing to accept such security; but the testimony thus offered was rejected, "on the ground that the same could not be heard in a contest such as that presented on the trial."

It is evident that this testimony was of a character to support the allegations contained in the opposition—to wit, that the opponent was the widow of the deceased, and that the property was all community property; and furthermore to sustain the allegation, that she was ready to assume and give security for the payment of the debts of the deceased, and that the creditors were willing to accept of the security thus offered. Whether the testimony, if it had been received, would or would not have proved the allegations, as set forth in the bill of exceptions, is not the question: for the purpose of testing the correctness of the ruling of the court, we must assume that the witnesses might have made such proof.

Had such proof been actually made, we have no hesitation in saying that the prayer of the petition should be granted. The heirs could have had no interest in provoking an administration, or a sale and perhaps a sacrifice of a portion of the property, except for the purpose of protecting themselves against liability for the debts of the deceased, or an increase of the same by the accumulation of interest. The appellant has offered to relieve them of any such liability, by assuming the debts and furnishing security, which the creditors, as she alleges, are ready and willing to accept.

It would be competent for the court to protect the heirs by requiring, as a pre-requisite to the exercise of her rights as usufructuary, that she should either

advance a sufficient sum to pay the debts of the deceased, or that she should furnish, as she avers she can, the consent of the creditors that she shall assume and furnish security for the payment of the debts due to them; but this assumption should be accompanied with a release of the heirs from all liability.

It is ordered that the judgment appealed from be reversed, and that the case be remanded for further proceedings to be had herein, in accordance with the views expressed in this opinion, and that the costs of this appeal be paid by the appellee.

Y. QUADRAS & Co. *v.* STEAMSHIP DANIEL WEBSTER, CAPTAIN AND OWNERS.

The measure of the carriers' liability is the value at the port of destination, of similar goods, delivered in good order.

Where interrogatories are propounded to certain witnesses by name, "and others," and crossed without any objection reserved, the depositions of witnesses not named in the affidavit for commission, nor in the interrogatories, are admissable.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Collins, for plaintiff. *Hart & Clack*, for defendants and appellants.

BUCHANAN, J.* This is an action upon a contract of affreightment, for damage to twelve thousand cigars, on a voyage from New Orleans to San Juan de Nicaragua.

The measure of damage assumed by the plaintiffs and adopted by the judge *a quo*, is the invoice price, with ten per cent. added for charges and thirty per cent. for anticipated profits. We take the rule to be, that the value at the port of destination, of similar goods delivered in good order, is the measure of the carriers' liability. *Oakey* v. *Russell*, 6 N. S., 60; *Boyle* v. *Dickinson*, ibid, 102; *Porter* v. *Curry*, 7 L. R., 240; *Rathbone* v. *Neal*, 4 Ann., 563.

That value is proved, in the present case, to have been $600. Add $22 for costs of survey and certificate, and deduct the net proceeds of sales at auction, $188 72,—there remains a balance of $433 28, for which the ship is responsible.

There are several bills of exception in the record, of which only one requires notice.

The defendants excepted to the evidence of two witnesses, *Gilbert* and *Mancho*, examined at Greytown, because their names are not found in the affidavit for commission, nor in the interrogatories. The district court did not err in admitting these depositions. The interrogatories were propounded to several witnesses by name, "and others," and were crossed without any objection reserved. This case is covered by that of *Denton* v. *Murdock*, 5th Rob., 128.

The judgment of the district court is reversed; and it is adjudged and decreed that plaintiffs recover of defendants $433 28, with legal interest from October 21st, 1853, and privilege on the property sequestered, and costs of the district court; those of appeal to be paid by plaintiffs.

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* LEA, J., not being present at the argument, took no part in this decision.

JOHN CULBERTSON, Receiver, *v.* JOHN HALL.

Liability of maker of guarantee notes to the Merchants' and Planters' Mutual Insurance Company, fixed according to the principles laid down in the case of *McIntosh* and the same company.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Durant & Hornor*, for plaintiff. *Upton*, for defendant and appellant.

MERRICK, C. J. The defendant was one of the subscribers of the Merchants' and Planters' Insurance Company, now in liquidation, the plaintiff being receiver appointed by the court.

On the 1st of November, 1849, the defendant subscribed and delivered to the company (which was conducted on the principle of a mutual insurance company) his promissory note, payable twelve months after date, or sooner, if required to meet assessments made by the company, for the sum of $1000. The defendant having paid various sums to the company in premiums on insurances, the same were credited on the note, which reduced it to $165. The balance was then included in a larger note, to secure the same and certain premiums, and the original note delivered to the defendant. The company having been forced into liquidation, after having met with losses, suit has been brought by the receiver to collect of the defendant the amount of his original note to the company.

It is contended, on the part of the plaintiff, that the pretended payment of the notes, by the application to them of the premiums paid in, is not such a payment as will discharge the maker, especially as there are debts due by the company on account of losses, to secure the payment of which these notes were given.

According to the principles settled by this court in the case of *McIntosh* v. the same company, we think that the maker of the note is responsible upon it, notwithstanding its surrender, to meet any debts arising from losses during the year ensuing its date.

The tableau filed by the receiver shows that there are over $11,000 of debts of this class arising during this period.

The receiver is entitled, therefore, to recover on the note sued on for the amount for which judgment was rendered by the lower court—it being understood that if anything should remain after an application of the funds collected from the first class of debtors on the "guarantee" notes, in accordance with the principles settled in the case of *McIntosh* v. *The Merchants' and Planters' Insurance Company*, such debtor would be entitled to his proportion of the balance in the hands of the receiver.

We do not deem it important to notice the numerous objections made by the defendant's counsel.

It is sufficient to say that the proceedings in the forced surrender occasioned by the forfeit were properly offered in evidence against the defendant, who was one of the subscribers to the company. Being also one of the subscribers, he cannot be permitted to allege error as to the object for which the note was given, nor defeat the rights of creditors by the mistaken views of himself and the actuary.

Judgment affirmed.

A. G. Penn v. J. J. Watts and Wife.

The rule is well settled that where the maker of a promissory note cannot be found, payment must be demanded at his domicil, if within the State.

APPEAL from the District Court, Eighth District, Parish of Livingston, *Watterson*, J. *Martin*, for plaintiff. *Jones*, *Duncan* and *A. Hennen*, for defendants and appellants.

Voorhies, J. The defendants are appellants from a judgment rendered against them as endorsers of two promissory notes, of which they were the payees, dated the 3d of January, 1848—one of which, payable in two and the other in three years from date. There is no mention made in them of the place where made nor where payable.

The ground on which the appellants claim to be discharged is, that no demand of payment has been made upon *George W. Parker*, the maker, either personally or at his place of residence, when the notes matured. The notes were respectively protested at maturity in New Orleans, at the instance of the Union Bank of Louisiana, and, according to the certificate of the notary, the maker and endorsers were notified thereof through the mail, by letters severally addressed to them at Springfield, parish of Livingston, La. On the 12th of May, 1854, the plaintiff purchased the assets, debts and effects belonging to the branch of the Union Bank at Covington, then in the possession of *Mr. L. Spring*, in which the notes declared upon were comprised. It is under this conveyance that he holds. He alleges in his petition that the maker, at the date of the protest, had absented himself from the State, so that his domicil could not be found by the notary, after diligent search and inquiry, to make a formal demand upon him; that all was done which was within the power of the then holders of said notes to effect said demand. We infer from the evidence that these notes were taken and discounted by the Covington branch of the Union Bank, in the usual course of business; and it would be unreasonable to suppose that it was done without a knowledge of the parties and of their place of residence. The fact that the notices of protest were addressed to the maker and endorsers at Springfield would seem to imply such knowledge; it is corroborated, too, by the plaintiff's allegation, that the maker had absented himself from the State when the protests were made. Although such an allegation was made, yet no attempt appears to have been made to substantiate it on the trial below. On the contrary, the testimony of *Henry Kinchen, Jr.*, shows that the maker resided in the parish of Livingston, where he has resided ever since. Besides, the two notes were paraphed by "*Henry W. Warrell*, Recorder," then residing at Springfield.

We consider the rule to be well settled, that, where the maker of a promissory note cannot be found, payment must be demanded at his domicil, if within the State. (2 N. S. 511.) In the case at bar, we think it clear that the holders were bound to make a presentment, either to *Parker* personally or at his domicil in the parish of Livingston. See 6 Ann., 59.

The case of *White* v. *Wilkinson*, 10 Ann., on which the plaintiff relies to exempt him from the operation of the general rule, appears to us to be clearly distinguishable from the present. There, it appeared that the note was dated at New Orleans, and that the holder or notary did not know the domicil of the

PENN v. WATTS.

maker, and could not ascertain it after diligent inquiry. In such a case the presumption arises that the note is payable where it is dated. But here the notes, as we have seen, bear no internal evidence of the place where they were given. We are therefore of opinion that the judge *a quo* erred in holding the appellants liable as endorsers.

It is therefore ordered and decreed that the judgment of the court below be avoided and reversed, and that the appellee's demand against the appellants be rejected, with costs.

FREDERICK TRESCA *v.* JOSEPH H. MADDOX.

Action against the proprietor of a newspaper for damages for a libel.

In actions of this character malice is often implied. At common law, if the words spoken or published are themselves actionable, (as if they import an accusation of an indictable offence,) malicious intent is an inference of law, and therefore needs no proof. In this case malice does not mean a spite against the individual, but *malus animus*, a wanton disposition, grossly negligent of the rights of others.

The defendant had a right to report the fact that the plaintiff had been arrested and held for examination on a particular charge. But he had no right to go beyond this, and assume the guilt of the plaintiff upon an *ex parte* charge, heap accusations of other crimes upon his head without any foundation, and vilify his character, except upon the responsibility of proving the truth of his accusations when sued for libel, and that they were made with good motives and for justifiable ends.

The fact that defendant recanted the charges against the plaintiff the day after they were made was proper to be considered by the jury in estimating damages, but could not exonerate plaintiff entirely.

The satisfaction expressed by plaintiff at the apology and recantation made by defendant was not a waiver of his claim for damages, as it was consistent with a reservation of his right to sue, if he thought proper.

Although the libel was written by one of defendant's employees in the regular course of his employment, yet defendant was responsible, and though wholly without moral turpitude, yet damages could be recovered against him without special proof of the pecuniary amount actually suffered.

In all appealable cases the jury are judges both of the law and fact, but in all cases the Judge may be required by the counsel of either party to charge the jury in writing.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Rand & Bartlette, for plaintiff. *Durant & Hornor*, for defendant.

SPOFFORD, J. (MERRICK, C. J., absent.) The defendant has appealed from a judgment for $1000, rendered against him upon the verdict of a jury as damages for the publication of a libel against the plaintiff in the Crescent newspaper.

The plaintiff, captain of a schooner in the Tampa Bay trade, was arrested in New Orleans in July, 1852, and imprisoned upon an affidavit made by a policeman before one of the Recorders, to the effect that he had been informed, and verily believed that the plaintiff, and others on board his schooner, the George Lincoln, were guilty of robbing the dead bodies of certain persons who had been killed by an explosion upon the steamboat St. James, and had been found floating upon the lake.

The defendant, proprietor of the Crescent newspaper, was not the writer, and perhaps was absent at the time. But one of his regular employees, having learned of the arrest of the plaintiff, and read the affidavit made against him,

before any examination was had, wrote and caused to be published in the defendant's paper the exaggerated and inflammatory article which constitutes the libel in question.

This article assumes and proclaims the guilt of the plaintiff, and, going far beyond the affidavit really made, treats of his general character and history as that of a noted criminal. It speaks of his "suspicious-looking schooner known to be manned by some nurslings of crime long marked by the officers of the law," and of her owner, whom the Captain of Police "had known through long years for his piratical inclinings," and adds that "a land and water rat was this skipper of the schooner, and a pet of criminal justice during many a day." *Capt. Tresca* and his crew, described by name, are said to have come into port "flushed with successful booty, and bold through previous immunity," and to have been immediately arrested by the vigilant police; and *Tresca* especially is painted as "a brawny, thick-set, low-browed bandit, and to all appearances,

> 'As mild a mannered man
> As ever scuttled ship or cut a throat.'"

The article created a sensation, as it was probably intended to do. And although it shortly turned out to be wholly unjustifiable and mostly untrue, it is proved to have caused the plaintiff the loss of some freight the next trip of his schooner. Upon the preliminary examination, there appeared to be no evidence to criminate him, and his reputation as an honest and inoffensive citizen was vindicated by subsequent articles in the Crescent, written by the employee who had penned the libel.

The answer of the defendant admits that he published the article charged as a libel, and admits that it was false.

By way of defence, there is a denial of malice in the publication; an averment that the records of the Recorder's court, of which it is customary for newspapers to make notes, had misled the defendant; that on discovering the error he had instantly retracted it publicly in his newspaper, and that the petitioner had expressed and confessed himself satisfied with the *amende*.

The first point relied upon by the defendant is, that there was no malice in the publication. No express malice was proved. Indeed it may be assumed that the defendant, when he made the publication, did not know who *Captain Tresca* was, and therefore could have had no special malice against him. But in actions of this character malice is often implied. At common law, if the words spoken or published are in themselves actionable, (as if they import an accusation of an indictable offence,) malicious intent is an inference of law, and therefore needs no proof. 2 Green. Ev., § 418 (4). In this case malice does not mean a spite against the individual, but *malus animus*, a wanton disposition, grossly negligent of the rights of others. We think the jury might properly have inferred such malice under the circumstances of the case. *Cauchoix v. Dupuy et als.*, 3 L. 208.

As a chronicler of events that actually occurred, the defendant had a right to report the fact that the plaintiff had been arrested and held for examination on a particular charge. But he had no right to go beyond this, assume the guilt of the plaintiff upon an *ex parte* charge, heap accusations of other crimes upon his head without any foundation, and vilify his character before the public, except upon the responsibility of proving the truth of his accusations when sued for libel. The tenor of the article in this case was to charge the plaintiff with the high crime of piracy. The defendant has not shown that he had any

grounds to suppose such to have been, as charged, the occupation of the plaintiff, or that the charge was made with good motives and for justifiable ends.

The reparation made by recanting the charges the day after they were made, was proper to be considered by the jury in estimating the amount of damages, but could not, as the appellant contends, exonerate him entirely. The injury had been done. *Vox semel missa non revertit.* The slander, circulated by one issue of the paper, could not be wholly obliterated by the recantation in another. All who saw the first may not have seen the last. And it is difficult wholly to restore a reputation thus positively and publicly accused of the highest crimes known to the law.

It is urged that the plaintiff is debarred from a recovery by the expression of his satisfaction at the apology and retraction published by the defendant. This is something like the plea of accord and satisfaction of the common law. 3 Black. Com., p. 16. A bargain of this kind could be enforced under our law, as it is competent for the injured party to release his claim for damages. But it must appear that he has released it, or expressly agreed to waive his action for the consideration named. The proof here wholly fails to sustain the existence of such waiver on the part of the plaintiff, all his expressions being consistent with a reservation of his right to sue if he thought proper.

The defendant took a bill of exceptions to the refusal of the Judge to charge the jury as follows:

"First. If the jury think, from the evidence, that the publication was not made by *Maddox* maliciously, and with moral turpitude, then no verdict of damages can be given without special proof of the pecuniary amount suffered."

The court did not err, because *Maddox*, not making the publication personally, but through one of his employees in the regular course of his employment, for whose act he was legally responsible, might be and was wholly without moral turpitude in the affair, and yet damages could be given without special proof of the pecuniary amount suffered. In estimating damages for offences and *quasi* offences, much discretion is left to the jury.

The second instruction asked and refused was: "That in all cases where the law gives the individual an action of damages, he has the right to take in compensation such satisfaction as may be agreeable to himself, and not forbidden by law; and if the jury think, from the evidence, that the plaintiff, *Tresca*, expressed himself satisfied with the apology and public retraction of the charges made against him, then in law the plaintiff has had reparation for his injury, and is not afterwards entitled to an action of damages."

We think there was no error in refusing this charge, because a bare expression of satisfaction at the apology and recantation would not operate a release of the right of action. The expression might have been made without any intent or agreement of the parties to that effect, and then would not bar the action. We have clearly stated that we think it was made without any such intent or agreement.

The Judge, therefore, ruled correctly, although we think the reason given by him for his ruling was unsatisfactory. He stated that the Act of 29th January, 1847, (Acts, p. 28) declaring that the jury shall be the judge of the law and and the facts in all prosecutions for libel, dispensed him from charging the jury upon the law at all. If this statute refers to civil actions for libel, which seems doubtful, it does not exonerate the Judge from the duty of giving the jury a knowledge of the law applicable to the case. In all cases, civil as well as

criminal, the jury are judges both of the law and the facts. C. P. 520; *Bostwick* v. *Gasquet*, 10 Rob. 81; *The State* v. *Ballerio*, (ante. p. 81.)

But in all appealable cases the Judge may be required by the counsel of either party to charge the jury in writing. Acts 1855, p, 300; Bull. & Curry's Dig., p. 525.

In all cases it is his duty to give them a knowledge of the definitions and principles of law applicable to the case. They have the power to disregard his instructions, but in practice they seldom do. They are not presumed to know the law, or to be able to judge unaided between the conflicting doctrines invoked and advocated by counsel. The stability and uniformity of the administration of justice require that a learned and impartial Judge should enlighten jurors as to the rules of law which, in his view, are essential to a just decision of the cause before them.

The exceptions, however, were only taken to the refusal of the Judge to charge as requested. As we find no error in that refusal, it is unnecessary to remand the cause.

Complaint is made of the amount of the verdict. It was not made a ground of the motion for a new trial that the verdict was excessive. Considering the enormity of the libel, the absence of any reasonable justification for it, the excitement it created in the public mind against the plaintiff, the injury done to his feelings and his social position, we do not think we are justified by the precedents in disturbing the verdict. See *Daly* v. *Van Benthuysen*, 3 An. 69.

Judgment affirmed.

Susan McCall, Tutrix, *v.* Edward Henderson and Wm. C. Decamp.

Action of redhibition may be prosecuted against an absent defendant by attachment, where the plaintiff alleges that she made a tender of the slaves, and demanded a rescission. In such a proceeding the defendant is properly represented by a curator *ad hoc*, and service of citation is regularly made by posting on the door of the court house.

By the Court: The third objection is, that the person signing the attachment bond was not authorised to sign the same. We agree with the defendants' counsel that the filing of a power of attorney under private signature, at the trial of the exception, is not proof of its existence at the suing out of the attachment, though it purports to bear the same date. But we find that the party signing the bond was examined as a witness. The objection and testimony seem to have been submitted to the jury, and we cannot say they erred in their conclusion.

Where a bill of sale of slaves is dated in this State, a party will not be permitted to show that the sale was made in another State, in order to ingraft on it the laws of that State.

Where a sale of slaves is made to a minor, without the intervention of the tutrix, or a family meeting, the tutrix may sue for the price paid, upon a mere tender of the slaves at any time, whether they were subject to redhibitory vices or not.

APPEAL from the District Court, Tenth District, Parish of Tensas, *Snyder*, J. *Farrar*, for plaintiff. *Montgomery*, for defendants and appellants.

Merrick, C. J. This suit, which is an action of redhibition, was commenced by attachment. Various objections were made to the proceedings, which we will notice in the order presented by defendants' counsel.

1st. It is objected that this suit cannot be maintained, because the rescission of the sale of a slave is not a matter giving our courts jurisdiction over the absent owner, and nothing short of personal service, or the domicil of the party

in the State, will sustain an action of this kind. The case of *Stephens v. Graves*, 9 An. 239, is cited as supporting this position. The case before us differs from the case cited in this: this suit is commenced by attachment, and a debtor of the defendant, who is cited as garnishee, admits that he owes defendant a sum of money which he has in his hands; the case cited appears to have been commenced by a simple appointment of a curator *ad hoc;* the plaintiff in this case, before bringing her action, alleges that she made a tender of the slaves, and demanded a rescission of the sale; in that case the curator *ad hoc* appears to have been appointed for the purpose of representing the defendant in the demand for a rescission, the preliminary steps as well as the final judgment. We are of the opinion that defendant was properly represented in this case by a curator *ad hoc*, and the service of the citation was regularly made by posting on the door of the court house.

2d. It is further contended, that the action cannot be maintained because the attachment can only be resorted to where there is a *debt*, and that in the redhibitory action there cannot be any debt due the vendee until the sale has been rescinded. This reasoning would have great force in a case where there had been no tender and demand for a rescission, but as already been stated, in this case it is alleged that such demand has been made, and the defendant had been put in default. Damages, therefore, in the nature of a debt *ex contractu*, were due the plaintiff. The rescission of the sale, formally pronounced by the court, would only be for the benefit of the defendant. He having been put in default, the slaves were at his risk. This view of the case disposes also of the objection to the affidavit.

3d. The Third objection is, that the person signing the attachment bond was not authorized to sign the same. We agree with defendants' counsel that the filing of a power of attorney under private signature, at the trial of the exception, is not proof of its existence at the suing out of the attachment, though it purports to bear the same date. But we find that the party signing the bond was examined as a witness. The objection and testimony seem to have been submitted to the jury, and we cannot say that they erred in their conclusion.

4th. The objection to the sufficiency of the sureties on the attachment bond was not made with the other formal objections contained in the exceptions. As the District Judge was not called upon to pass upon this exception, we shall not disturb the finding of the jury on the same as a part of the merits.

5th. The fifth objection is as to the ruling of the Judge refusing to receive parol proof to show that the slaves were sold in the State of Mississippi, and the price paid some time previous to the date of the act of sale, and that said slaves were sold with the express understanding that they were not to be removed to the swamps of Louisiana; that the purchaser knew when he bought them that they were unsound, and that the contract was governed by the law of Mississippi. The ground of the refusal was, that the testimony would contradict the written bill of sale, and the Judge adds the further reason that *Edwin McCall* was no party to any of the transactions attempted to be proved.

The bill of sale, or receipt for the price in the nature of a bill of sale, bears date: "Tensas parish, La., February 18th, 1854." In it the defendant acknowledges to have received of *Edwin McCall*, the minor, eighteen hundred dollars, the price of the slaves, and binds himself to warrant said slaves to be sound in body and mind, and slaves for life. If it were conceded, as we infer from the bill of exceptions it was, that *Edwin McCall* was not a party to the

proceedings attempted to be proved, the ruling of the District Judge was unquestionably right. The bill of sale bears date in Louisiana, and we do not think the defendant should be permitted to show by parol that the sale was made in another State in order to ingraft on it the laws of that State. The sale having been made to the minor without the intervention of the tutrix, or a family meeting, we do not see what would prevent a suit by the tutrix for the price paid upon a mere tender of the slaves at any time, whether they were subject to redhibitory vices or not.

We will remark in conclusion, that although the foregoing objections have been urged with great ability in the brief filed by defendants' counsel, we are not satisfied that any error has been committed to the prejudice of the defendants. The finding of the jury will therefore remain undisturbed.

Plaintiff's counsel prays, in the answer to the appeal, that the judgment should be so amended as to allow the defendant interest from the judicial demand. We think the judgment should be amended in that particular.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be so amended as to allow the plaintiff interest at the rate of five per cent. per annum on the sum of nineteen hundred dollars from the seventh day of December, 1854, until paid, and it is further ordered that the judgment so amended be affirmed with costs.

THOMAS MEDLEY & CO. *v.* JNO. J. HUGHES.

Where, by the fault of the shipper, there was no bill of lading on board the vessel, so that the ship's agent did not know to whom to deliver the goods, and notice was published in a newspaper (taken by plaintiffs) that the ship was discharging, and subsequently the goods were stored with the ship's agent, where they were destroyed by fire, the ship will not be responsible.

APPEAL from the Fifth District Court of New Orleans, *Buchanan*, J.

L. Pierce, for plaintiffs and appellants. *Goold* and *Howard*, for defendant.

BUCHANAN, J. This is a suit upon a contract of affreightment for non-delivery of goods shipped per bark Catharine, from Philadelphia to New Orleans. The proof is that the goods were put on board of the vessel, but the bills of lading were only sent down by the shipper to be signed two days afterwards, at which time the vessel had sailed. The bills of lading were signed by the house which was the agent of the ship for procuring freight. Owing to this circumstance, the bark Catharine had no bill of lading on board for these goods, and her commander and agents in New Orleans were not aware that there were goods on board consigned to plaintiffs. *Mr. Fosdick*, the agent, proves that had he known this fact, he would have sent the goods from the vessel to plaintiff's store. As it was, notice was given to consignees by advertisement in the Commercial Bulletin (a newspaper taken by plaintiffs) that the ship was discharging. After this notice, the goods were discharged upon the levee, where they remained until the next day, when they were carted to the store of the agent of the ship. The night afterwards a fire broke out in the neighborhood, which spread to the store in question, and consumed it with its contents, including the goods of plaintiff.

We think the ship is not responsible for the loss. Everything was done that was practicable under the circumstances to fulfill the carrier's obligations.

This case is distinguished from that of *Kohn & Bordier* v. *Packard*, 3 L. R. 227, in this, that it is proved plaintiffs' took the newspaper in which the notice to consignees per this ship, to attend and receive their goods, was published. The want of a bill of lading on board the vessel was the fault of the shipper of the goods. The ship's agent acted properly in storing the goods after remaining on the levee a reasonable time without being called for by the consignees. And the destruction of the goods by fire was an accidental and uncontrollable event, for which the carrier is not responsible. C. C. 2725.

It is therefore adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

NEW ORLEANS AND CARROLLTON RAILROAD CO. *v.* THOMAS B. HARPER.

An admission of the execution of a note, accompanied by an assertion that it was not really due because it had been extinguished by compensation, is not such an acknowledgment as will interrupt prescription.

Depositaries holding by a precarious tenure cannot prescribe on the thing thus held. But the deposits made with plaintiff's bank were not real but irregular deposits; the ownership of the identical money deposited passed to the bank, and the relation of debtor and creditor in a cash account arose between the parties.

A corporation may plead prescription.

Code, 3424, 3476, 3486.

APPEAL from the District Court, Eighth District, Parish of St. Tammany, *Watterson*, J. *J. R. & J. D. Jones*, for plaintiff. *A. Hennen*, for defendant and appellant.

SPOFFORD, J. This is a suit on a negotiable promissory note, alleged to have been signed by *Harper & Merrick*, commercial partners, for $200, due January 12th, 1843.

The defendant, *Harper*, was cited on the 27th September, 1850.

In his answer he admitted the execution of the note, as alleged, but denied that he owed plaintiffs anything; he averred that, prior to the execution of the notes, *Harper & Merrick* had leased the New Orleans and Carrollton Railroad from the plaintiffs, and that there were mutual accounts between them growing out of said business connection, and that plaintiffs were indebted to *Harper & Merrick* in an amount near $1200, which more than compensated and had extinguished the note sued upon. The defendant prayed for judgment in reconvention, he being sued in a parish different from that which was the domicil of the plaintiffs.

In an amended answer the defendant increased his demand in reconvention to the sum of $4000.

To the demand in reconvention the plaintiffs pleaded the prescription of ten years.

There was judgment in favor of the plaintiffs for the amount of the note, with legal interest from judicial demand, and judgment against the defendant on his reconventional demand.

In this court the defendant has pleaded the prescription of five years to the plaintiffs' demand on the note.

The plaintiffs suggest that their demand is below our jurisdiction. There is a demand in the petition for seven per cent. interest since the maturity of the note, which brings the amount sued for within our jurisdiction. Although this interest was not allowed, and no amendment has been asked for in this court, we are not satisfied that the allegation was inserted in the petition in bad faith, with a view to make the case appealable. The note was payable to the bank of plaintiffs, an incorporated institution, with special privileges, and there may have been a convention between the parties as to interest, of which the evidence was not attainable.

The plea of prescription, filed by the defendants in this case, must prevail. The plaintiffs have not asked that the cause be remanded for a trial upon that plea, but have rested their case upon an alleged interruption of prescription, said to have taken place by the acknowledgments of the defendant made in 1847.

The statements of the defendant are proven by one witness, the secretary of the plaintiffs. Those statements should be considered together. So considered they do not amount to an "acknowledgment of the right" of the creditor in the sense of Article 3486 of the Code. The acknowledgments amounts only to an admission of the execution of the note, accompanied by an assertion that it was not really due because it had been extinguished by compensation. See *Lackey* v. *Macmurdo*, 9 An. 15; *Succession of Jewell*, ante. p. 83.

The reconventional demand is also barred by the prescription of ten years. It is a demand on an account simply, or a demand growing out of alleged errors in an old account.

The defendant and his partner *Merrick* leased the plaintiffs' railroad, with permission to throw up the lease on certain conditions, and to settle as stewards of the company. They availed themselves of this privilege, and the accounts sought to be reconsidered in this case, and which have made a voluminous record, are the debtor and creditor accounts between the company and its lessees and stewards, as far back as 1837 and 1838.

The defendant seeks to escape the plea of prescription by taking the position that the bank belonging to plaintiffs was the depositary of the funds paid in by the lessees, *Merrick & Harper*, and that prescription cannot be pleaded in case of a deposit. It is true that depositaries, holding by a precarious tenure, cannot prescribe on the thing thus held. C. C. 3476. But the deposits made in the plaintiffs' bank were not real but irregular deposits; the ownership of the identical money deposited passed to the bank. The relation of debtor and creditor in a cash account arose between the parties. The Article 3476 of the Civil Code speaks only of causes which present the prescription *acquirendi causa* from running. It is the prescription *liberandi causa* which is pleaded by the plaintiffs, and which is applicable to the reconventional demand of the defendant for alleged errors in stale accounts, although most of the credit items in those accounts consist of bank deposits.

But it is said the plaintiffs have tacitly renounced the right to plead prescription, first, by producing the accounts in answer to the defendant's prayer; second, by opposing the report of the creditors, and, third, by pleading payment and settlement of the accounts.

It is true that a renunciation of prescription may be inferred from every act or fact which manifests the will of the debtor to renounce, either expressly or by clear implication. C. C. 3424. We find no indication in the acts of the plaintiffs above referred to of any intention to renounce prescription.

Finally, it has been urged that inasmuch as a corporation has no soul, it cannot plead prescription. This would seem to be a better reason for holding that it can.

It is ordered and decreed, that the judgment of the District Court be avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiffs on the principal demand, and judgment against the defendant on his demand in reconvention; it is further ordered, that such of the costs in the District Court as grew out of the principal demand be borne by the plaintiffs, and such as were occasioned by the reconventional demand be paid by the defendant, and that the plaintiffs and appellees pay all the costs of this appeal.

HENRIETTE BONVOUS *v.* MARTHA BROWN.

The deed of the Tax Collector can have no effect without the production of the assessment roll which stands in the place of a judgment.

APPEAL from the District Court, Third District, Parish of Jefferson, *Burthe*, J. *Seghers*, for plaintiff. *Roselius*, for defendant and appellant.

MERRICK, C. J. This is an action of jactitation, accompanied by an injunction. Plaintiff alleges that she became the owner of the lot in controversy on the 5th day of January, 1830, and that she has been in the possession of it ever since. The defendant alleges that she became the owner of the lot by virtue of a purchase at a tax sale on the 1st day of November, 1851, the property having been assessed in the name of *Henriette Bonvous*, f. w. c.

The plaintiff exhibits a notarial act of sale to her, bearing the date alleged, and shows several years possession. The defendaet offers in evidence the deed of the Collector of Taxes. It recites that the taxes were due by *Annette Bauvais*. No other testimony was offered by the defendant. Plaintiff's counsel urges, among other objections, that the deed of the Tax Collector cannot have any effect without the production of the assessment roll, which stands in the place of a judgment. The authorities fully sustain this view. 4 A. 252, *Hughes* v. *Barrow;* 6 N. S. 348; 7 L. R. 50; 10 L. R. 283, *Reeves* v. *Towls*. It is unnecessary, therefore, to consider the other objections to the defendant's title.

Judgment affirmed.

Thomas R. Dixon and Eliza N. Dixon v. Reuben Chadwick.

Suit to rescind sale of slaves. Judgment for plaintiffs and damages allowed.

Want of tender under the circumstances of this case, is a fatal obstacle to plaintiffs' recovery. Slidell, J., dissenting.

The well established rule requiring a tender where the tender is not impossible, nor even inconvenient, results from the general doctrine of commutative contracts, and affords a salutary check against fraud, concealment, and the after thoughts of self-interest. The vendor, warned in time, may take back his property and by attention save it. The vendee, who, having discovered a redhibitory defect, neglects to notify the vendor by an offer to restore the thing, seems to take the risk of its perishing from that cause upon himself. Slidell, J., dissenting.

APPEAL from the District Court, Tenth District, parish of Tensas, *Snyder*, J.

Farrar, for plaintiffs.

Reeves & Biscoe, for defendant, cited, on the question of tender: *Janin* v. *Traullin*, 4 La. 198; *Barret* v. *Bullard*, 19 La. 281; *Fazende* v. *Hagan*, 9 Rob. 306; *Bach* v. *Barret*, 2 An. 955; *Fisk* v. *Proctor*, 4 An. 592.

Lea, J. This is a suit to recover the price of two slaves sold by the defendant to the plaintiffs, in the capacity in which they present themselves before the court, on the ground of alleged redhibitory defects existing at the time of the sale. The defendant admits the sale, but avers that the slaves were sold as unsound; that he made a full disclosure of the fact that they were diseased, before the sale, and that the plaintiffs took upon themselves the risk of their recovery.

Preëxisting redhibitory defects in both the slaves, being sufficiently established by the evidence, and admitted of record, it was incumbent upon the defendant to prove affirmatively, that he made a full disclosure with reference to their condition. It is shown that both of the slaves died of incurable maladies, although they received careful treatment under proper medical advice. No bill of exceptions was taken to the admission of any portion of the evidence offered on the trial, nor to the charge of the court under which the jury found a verdict for the plaintiffs. The evidence being conflicting and the solution of the issue between the parties being dependent exclusively upon the credibility of the witnesses, we do not feel at liberty to disturb the verdict of the jury, so far as it determines the question of fact upon which it is based; but that fact carries with it a liability for damages. The defendant admits that he knew of the unsound condition of the slaves at the time of the sale. He is therefore liable in damages caused by the trouble and expense, shown to have been incurred during the sickness of the deceased slaves.

The evidence does not enable us to arrive at any other than an approximative estimate of the value of these services. We think $100 will be a sufficient remuneration of all necessary charges incurred. Under the circumstances as disclosed by the evidence, we think a tender of the slaves to plaintiffs, was unnecessary, if not impracticable.

It is ordered, that the judgment appealed from be amended, so as to read as follows:

It is ordered, that the plaintiffs for themselves and for the use of their minor daughter, *Mary C. M. Dixon*, as set forth in their petition, do have and recover of the defendant, *Reuben Chadwick*, the sum of $900, with interest thereon,

DIXON v. CHADWICK.

at the rate of five per cent. per annum, from the 11th day of December, 1854, till paid, with costs of suit, together with the costs of this appeal.

SPOFFORD, J., dissenting. I think the plaintiffs should suffer a non-suit.

On the merits, the evidence is vague and obscure.

But the want of a tender, under the circumstances of this case, seems to me to be a fatal obstacle in the plaintiffs' way.

They alleged, in their petition, that they had demanded a rescission of the agreement to sell, tendered back the slaves, and asked for a return of the price, which the defendant had refused.

In his answer, the defendant averred that the plaintiffs kept the slaves until the day of their death, without ever offering to return them, or expressing the slightest dissatisfaction on account of their health.

The only evidence on the subject, thus distinctly put at issue by both parties, is that of a witness, who testifies that he heard the defendant offer "to back out of the trade, but *Mr. Dixon* (one of the plaintiffs) said he did not think he could do it." This conversation is said to have been held on the 20th of January, 1854, which was a month after the trade is alleged by plaintiffs to have been made, and the slaves delivered, and some days at least after the plaintiffs had been apprised by their physician of the maladies complained of.

There is nothing in the record from which I can infer that it was impossible or even inconsistent for the plaintiffs to offer to return the slaves, after discovering the redhibitory vices.

The well established rule, requiring a tender in such cases, results from the general doctrine of commutative contracts, and affords a salutary check against fraud, concealment, and the after thoughts of self-interest. The vendor, warned in time, may take back his property, and by attention, save it. The vendee, who, having discovered a redhibitory defect, neglects to notify the vendor by an offer to restore the thing, seems to take the risk of its perishing from that cause, upon himself.

SUCCESSION OF PIERRE COUSTEAUD.

A memorandum book, kept wholly in the handwriting of the deceased, is admissible in evidence to show his indebtedness to a surviving partner.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Grandmont, for curator, appellant. *Robert*, for opponent.

SPOFFORD, J. *Pierre Cousteaud* and *Jean Arnaud* were partners in the cooperage business. *Cousteaud* died, and *Arnaud* administered upon his succession.

Upon filing his account and statement of debts, *Arnaud* put himself down as a creditor of the partnership for the sum of $551 48, for moneys advanced by him during the partnership, as per the book kept by the deceased, and accounts annexed.

This item was opposed. *Arnaud*, to sustain it, offered the book of accounts, kept wholly in the handwriting of the deceased *Cousteaud*, on which the sums paid out and received by each partner appear to have been carefully entered.

Arnaud himself being unable to write, his counsel moved that auditors be appointed to examine the book, and report what balance, if any, was due *Arnaud*. The court refused, and a bill of exceptions was taken.

In this final judgment the court wholly rejected the claim of *Arnaud* against the partnership, on the ground, it is said, that the legal presumption was, that *Arnaud's* advances were made out of partnership funds.

An inspection of the memorandum book kept by *Cousteaud* himself, shows a *prima facie* case of indebtedness by the partnership to *Arnaud*. It is not rebutted by any counter evidence. We think the Judge erred in rejecting *Arnaud's* claim entirely, and shall therefore remand the cause. A report of auditor's would facilitate the court in coming to a correct result upon the accounts as they were kept by *Cousteaud*. Without evidence to show that the memorandum book was not correctly kept, or did not embrace all the accounts, there should be judgment in favor of *Arnaud* for whatever balance the book may show to be due him.

Judgment reversed, and cause remanded for a new trial as to the claim of *Arnaud*, the costs of the appeal to be borne by the opponents and appellees.

BRANDER, WILLIAMS & CO. *v.* ISAAC LUM.

Suit upon a factor's account.

Where the defendant had never acquiesced in the account as rendered, and there was no contract for interest, the plaintiffs can only recover legal interest.

The charge of forty-five cents per bale, made against defendant, for drayage, labor, storage, weighing, etc., of defendant's cotton, cannot be recovered, unless actually paid by plaintiff.

In reply to interrogatories, plaintiffs said that "they are in the habit of taking out open policies from the insurance offices against fire and river navigation, to cover shipments of all cotton that may be made to them, etc," and that "they pay the premiums of insurance, which they charge in the account of sales to the planter." This answer was made in reply to an interrogatory asking if the insurance was made in a mutual insurance company, "and what dividend or scrip plaintiffs had received." Answer held to be unsatisfactory. *By the Court:* As the defendant is charged with the premiums, it is but fair that he should be credited with, at least, the value of such amount of scrip as, under a fair apportionment, he would have been entitled to receive.

APPEAL from the District Court, Ninth District, Parish of Concordia, *Cooley*, J. *Farrar & York*, for plaintiffs and appellants. *Stacy & Sparrow*, for defendant.

LEA, J. This is a suit for a balance due by a planter upon a factor's account for advances, commissions, supplies furnished, etc.

The defendant, in addition to the general denial, pleads the illegality of certain items in the account, alleging that the same is made up of usurious charges of interest, commissions, and compound interest, and of incorrect charges for drayage, storage, labor, weighing and fire and river insurance.

As respects the interest account, the plaintiffs are placed in this dilemma. If the defendant has promised to pay the interest at 8 per cent., together with the commission of 2½ per cent. for advancing, as set forth in the account, the contract is clearly usurious, and the plaintiffs can recover nothing but the prin-

cipal sum advanced. If, however, there was no agreement with reference to the payment of interest, and the plaintiffs have merely claimed more than the law allows, the Act of 1844, imposing a forfeiture of the stipulated interest in usurious contracts, would not be applicable; but the plaintiffs, in such case, can recover only the legal interest to which they would be entitled upon advances made by them as factors. See *Lalande* v. *Breaux*, 5th An., 507; also *Barret* v. *Chaler*, 2d An., 876.

Upon a careful consideration of the evidence, we think the defendant did not, at any time, acquiesce unconditionally in the account as it is sued upon, and that, as there was no contract for usurious interest, the plaintiffs are entitled to recover legal interest upon their advances from the respective dates at which they were made.

With reference to the charges for drayage, storage, labor, weighing and insurance, the plaintiffs were interrogated under oath, whether they had paid those charges as detailed in the account, and if so, to whom. The answers to these interrogatories are unsatisfactory, at least so far as they relate to drayage, labor, storage, weighing, etc., for which a charge of 45 cents per bale is made in each of the accounts of sales rendered. The plaintiffs do not say unequivocally that they paid this amount. If they did not pay it, they have no right to claim it from the defendant; if they did, they should have said so in terms not open to misconstruction. Their answer to the interrogatory on this point is as follows: "We make a contract every year, for the entire year, with the cotton press, for the storage of all the cotton that may be forwarded to us, and we pay the cotton press therefor. The contract that we make with the cotton press, embraces drayage, labor and storage, and when we make up our account of sales against the planter, whose cotton has been shipped to us and stored at the cotton press, we charge him with the items of drayage, labor and storage. We paid the cotton press, according to the contract, the charges. This is the mode of transacting business in New Orleans, and in conformity with the mercantile custom and usages in such cases in this city."

Now, there is nothing in this answer from which any one would necessarily infer that the plaintiffs were subjected to an outlay of 45 cents per bale, for expenses incurred in the drayage, storage, weighing, etc., of the defendant's cotton, nor is the court informed by what process of calculation the plaintiffs considered themselves entitled to charge the defendant with the precise sum of 45 cents per bale, for drayage, storage, labor, etc. There is nothing reprehensible in such a contract as that detailed in the plaintiffs' answer, but, no matter how comprehensive the contract may be, there must be some means of arriving at the precise amount chargeable upon each bale of cotton which is the subject of the contract. The plaintiffs admit this conclusion by making a precise charge of 45 cents per bale. The defendant had a right to know how it was paid, and to whom. He was entitled to the benefit of any contract which his mandatary may have made on his behalf, and he was at least entitled to such an explanation of the terms of this contract as might satisfy him that the factor realized no profit by the arrangement, at his expense. We think the District Judge was right, under the circumstances, in rejecting the answer as not legally responsive to the question propounded. As respects the items charged for fire and river insurance, the answers of the plaintiffs are not such as to enable the court to ascertain or determine precisely the rights of the defendant. To the question whether they (the plaintiffs) had effected insurance

on the defendant's cotton, and if so, in what office, and if in a mutual insurance, what dividend in scrip or money they had received.

They answer (substantially) that "they are in the habit of taking out open policies from the insurance offices, against fire and river dangers, to cover the shipments of all cotton that may be made to them, except as to such as they are directed not to insure, and they pay the premium of insurance which they charge in the account of sales to the planter. This was done by them in this instance, and the insurance office was paid by them, and they charged and claimed the same from said *Lum*."

The defendant is not informed in what office his cotton was insured, nor what amount of dividend (if any) in scrip or money would have been due to him under a fair apportionment of the gross sum received by the plaintiffs. Whether the defendant would or would not have been entitled to any reimbursement under an equitable apportionment of the scrip or the proceeds realized therefrom, it is clear that a statement might have been made which would have enabled the defendant to ascertain, at least approximatively, what his rights were, and it is equally clear that no such statement has been made. The only difficulty in attaining such a result, must be one of calculation. As the defendant is charged with the premiums, it is but fair that he should be credited with, at least, the value of such amount of scrip as under a fair apportionment he would have been entitled to receive.

The answers of the plaintiffs on this point being unsatisfactory, the entire claim for insurance must be disallowed until it can be determined upon a proper examination of all the testimony necessary to its final adjustment.

Deducting from the charges against the defendant, those for drayage, labor, storage, weighing and insurance, the same not having been satisfactorily established by legal evidence, and reducing the charge for interest from eight to five per cent., and rejecting also the charge of $82 09 for advancing, we find that the plaintiffs would be entitled to an amendment of the judgment in their favor, by increasing the same from $1884 89 to $2650 50.

It is ordered, that the judgment appealed from be amended so as to read as follows:

It is ordered, that the plaintiffs, *Brander, Williams & Co.*, do have and recover of the defendant, *Isaac Lum*, the sum of $2650 50, with interest thereon at the rate of five per centum per annum, from the 17th day of December, 1852, till paid, with costs in both courts, and that upon the charges in the plaintiffs' account for drayage, storage, labor, weighing and insurance, there be judgment as in case of non suit.

James C. Yeatman *v.* James L. Crandall, Sheriff.

Article 127 of the Constitution of 1845, and 123 of the present Constitution, refer to State taxation in its proper sense, for general or State purposes. When it says that taxation shall be equal and uniform *throughout the State*, it points directly to its object, which is to regulate the mode of filling the State Treasury. It does not take away the power of making local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden.

The Act entitled "An Act forming a levee district, to be composed of the parishes of Carroll, Madison and Catahoula, for the better protection of the same from inundation," approved March 18, 1852, is constitutional.

That Act is not repealed, so as to exempt the plaintiff from paying the amount of his tax, by the Act "To reclaim and drain the swamp and overflowed lands donated to the State of Louisiana," &c., approved April 30, 1858.

APPEAL from the District Court, Tenth District, Parish of Madison, *Snyder*, J. *Hynes*, for plaintiff and appellant. *Short & Parham* and *Caldwell*, for defendants.

Spofford, J.* The plaintiff seeks to enjoin the collection of a levee tax, on the ground that the statute authorizing it is unconstitutional, null and void.

The Act referred to is the "Act forming a levee district, to be composed of the parishes of Carroll, Madison and Catahoula, for the better protection of the same from inundation," approved March 18th, 1852, (Sess. Acts, p. 234,) amended March 25th, 1853, (Sess. Acts, p. 44), and repealed as to Catahoula April 28th, 1853, (Sess. Acts, p. 203.)

The 2d section of this Act provided "that for the purpose of building or making and repairing all levees in said levee district, an annual *ad valorem* tax of one-and-a-half per cent. on all the alluvial lands in the parish of Carroll, between the foot of the Bayou Mason hills and the Mississippi river, and all the alluvial lands in the parish of Madison except Diamond Island Bend, and all alluvial lands in the parish of Catahoula, be and the same hereby is levied; the value of said lands to be assessed by the assessment-rolls of each of said parishes."

This Act is said to impugn the rules laid down in Article 127 of the Constitution of 1845, corresponding to Article 123 of the present Constitution. "Taxation shall be equal and uniform throughout the State. After the year 1846 all property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied; the Legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession."

This Article refers to State taxation, in its proper sense, for general or State purposes. When it says that taxation shall be equal and uniform *throughout the State*, it points directly to its object, which is to regulate the mode of filling the State Treasury. It does not take away the power of making local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden. It does not say that the State shall build all the parish jails and court-houses, erect all the levees, drain all the swamps, open all the streets, fill up all the urban lots, and make the nameless other improvements which particular localities demand, and pay for the sum out of one common fund, levied *ad valorem* upon all the property in the State.

* Buchanan, J., took no part in this decision.

It is notorious that an acre of land pays twice as great a tax for local purposes in one parish as an acre of equal value pays in another parish. Yet no one thinks the Constitution infringed by such a state of things.

It is enough that State taxes for State purposes are equal and uniform and *ad valorem;* for local improvements, each subdivision of the State may be required to pay in proportion to the cost or value of the improvements made for the benefit of the particular locality. Another interpretation of Article 127 would defeat its spirit and aim, by an application of its letter to matters which were not in the contemplation of its framers. It would be the height of inequality and injustice to make the prairies of Attakapas contribute *ad valorem* to the building of the levees of the Mississippi, without getting a contribution in return.

But this ground, which was mainly relied on in the printed argument of the appellant, was abandoned in the oral argument; and it was conceded that the Legislature might lawfully erect any portion of the State it saw fit into a district for special local improvements, and assess the cost of such improvements upon that district alone. But it was urged that in such case the whole district so parcelled out should be subjected to the rule of equality and uniformity by which the Legislature is bound to exercise the taxing power.

An assessment for levee purposes is not a tax, in the strict legal sense of the term, although it is true the Legislature has called it so in the Act whose constitutionality is attacked. See *Crowley* v. *Copley*, 2 Ann. 330; *State* v. *New Orleans Navigation Company*, 11 M. 324; *Worsley* v. *Second Municipality of New Orleans*, 9 Rob. 333; *Lafayette* v. *Orphan Asylum*, 4 Ann. 2, and cases there cited.

But a principle of equity, which exists independent of any constitutional recognition, would dictate that the assessment should be made upon the land of each proprietor, as nearly as practicable, in proportion to the benefit received.

To secure an exact equality, in this as in everything else dependent upon human government, is impossible. Perfection in legislation is the dream of visionary minds.

If the Act before us is not clearly obnoxious to that equitable principle which was sought to be embodied in Article 127 of the Constitution, it is our duty to maintain it, in view of the immense practical benefit it confers upon the region of country which it protects from inundation.

The objections are, that the hill lands of Carroll and the whole of Diamond Island Bend in Madison, embracing about 60,000 acres of alluvial land, are not assessed for the special tax, although they are nominally within the levee district pointed out in the title of the Act.

The answer is, that they receive no benefit from the levees, because the laws of nature protect the hills from overflow; and it is not yet necessary to protect Diamond Island Bend by a levee, which would have to extend fifteen miles along the bank of the Mississippi river, because only a few individuals live in the Bend, and they are employed in cutting cord-wood for steamboats.

We think the answer a satisfactory one. So far from violating the principle of equality, these exceptions were made to preserve it. The lands exempted get no benefit; they should not, then, bear any burden.

There are some minor objections urged in the brief, which seem to have been waived in the oral argument.

The fact that the Commissioners have neglected to obey an injunction of the

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law requiring them to have the levee built and repaired, by preference, from the Bayou Mason hills to the Mississippi, would be relevant if a mandamus were sought to compel them to execute this provision; but it is not perceived what connection it has with the constitutionality of the Act.

The fact that certain alluvial lands in parishes back of this levee district have been incidentally benefited by the levees, without contributing to their erection, is but an illustration of the difficulty of equalizing such burdens exactly. When the law was passed the levels were not, it is presumed, precisely known; and this incidental advantage to remote lands may not have been foreseen or could not then be measured, even by an approximate calculation. Experience may dictate more satisfactory legislation in future; but the vague admissions upon the record as to this point do not authorize us to annul the law from which the plaintiff has derived a conceded benefit.

We do not find that the Act of March 18th, 1852, forming the levee district was repealed so as to exempt the plaintiff from paying the amount of his tax, by the Act of 30th April, 1853, to reclaim and drain the swamp and overflowed lands donated to the State of Louisiana by the Congress of the United States. (Sess. Acts 1853, p. 289.) See the same Act, as amended March 16th, 1854, § 10, (Sess. Acts, p. 94.) The supposed clashing of the two levee systems was guarded against by a provision in the Act of March 18th, 1852, section 26, which declared that "all levees which may be erected, in whole or in part, under this Act, and which may be selected by the State as a part of the *general* levee system, shall be paid for out of the proceeds arising from the sale of the swamp and overflowed lands, on the warrant of the President of the Board of said Commissioners—which sum of money, when received by said Board of Commissioners, shall be distributed *pro rata* amongst those persons who may have paid their taxes levied under this Act." (Acts 1852, p. 237.) The Act of March 18th, 1854, (Sess. Acts, p. 156,) was passed in pursuance of the same idea.

The appellant insists that, as he cannot be said to have abused the equitable remedy of injunction, the District Judge erred in condemning him to pay ten per cent. upon the amount enjoined, as damages.

As the amount enjoined bears no interest, we should be obliged to award eight per cent., and the difference is too trifling to furnish a reason for reversal of the judgment.

No amendment has been prayed for by the appellee.

The judgment is therefore affirmed, with costs.

VOORHIES, J., (concurring.) I have been led to reconsider the opinion to which I assented in the Benton street case and the case of *Cumming* v. *The Police Jury of Rapides.*

The doctrine of those cases, so far as it makes Article 123 of our present Constitution apply to special assessments for local improvements, like streets in the city, levees, &c., in the country, it seems to me will lead to the inequality which it was the object of that Article to prevent. I yield my former impressions on this point to those of a majority of the court, the more readily, because the Supreme Court which sat under the Constitution of 1845, and five of the seven judges with whom I have sat upon this bench, have concurred in holding that the Article in question was not intended to apply to municipal or local taxation for local improvements.

I concur in the judgment in this case.

Alexander Brother, Syndic of the Creditors of Peter Conrey v. James Saul et al.

In May, 1850, C. deposited certain shares of bank stock with S., as collateral security for the payment of $10,000 due S. On the 10th of June, 1851, C. executed a power of attorney to S., authorizing him "to sell, transfer, and assign unto himself, or any other person or persons," the shares of bank stock. On the 29th of August following, under this power, an actual transfer of the stock was made to S. In the mean time, say about the 1st of July, 1851, C. came under protest—and, on the 7th of November of the same year, made a cession of his property. His syndic, the plaintiff, instituted this suit, alleging that C. was in insolvent circumstances on the 10th of June, 1851, as well as on 29th of August, and to the knowledge of defendant. He prays that the transfer be set aside, and that the stock be decreed to belong to him in his capacity as syndic.

By the court: We have here a pledge of the stock made in good faith, to secure a *bona fide* debt, at a time not suspicious, and by which no creditor was injured. The allegation of the petition, that *Conrey* was insolvent on the 10th of June, 1851, and that to the knowledge of *Saul*, is disproved by the evidence, and even by the admission of the plaintiff. Simultaneously with the pledge of the stock, the power of attorney was given, purporting to be *for value received* and *irrevocable*. Those clauses sufficiently indicate the interest of *Saul* in the object of the mandate—the stock. That interest was an interest of pledgee. As pledgee he had no power to sell the object pledged, unless by virtue of a judicial order; and the power to him to do so, was a nullity, even between the parties. C. C. 3132. It follows that the transfer which was made of the stock under this power, was also a nullity. But the nullity of the assignment of the ownership of the stock, leaves defendant's right as pledgee in full force.

As to any informality in the pledge, as for instance, the want of the act of pledge required by Article 3125 of the Code, the syndic of the pledgor cannot disturb the pledge on any such ground, when the contract was made in good faith, and no creditor was injured thereby.

The pretended pledge of the bank stock was void as to other, and even subsequent creditors of C., and it invested S. with no privilege upon the stock, under Articles 3124, 3125 of the Civil Code, which were in full force at the time. Spofford, J., with whom concurred Lea, J., dissenting.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Bradford and *Hunton*, for plaintiff. *Finney* and *Benjamin*, for defendant and appellant.

Buchanan, J. On the 10th of June, 1851, *Peter Conrey, Jr.*, being indebted to *James Saul*, the defendant, in the sum of ten thousand dollars, made his note, payable to the order of the latter, for that amount, with six per cent. interest from date; and, in case of default, interest at eight per cent. from demand.

On the same day, *Mr. Conrey* delivered to defendant two hundred shares of the capital stock of the Mechanics' and Traders' Bank, and executed his power of attorney in the following terms:

"Know all men by these presents, that I, the undersigned, for value received, do hereby irrevocably constitute and appoint *James Saul*, of New Orleans, to be my true and lawful attorney, for me, and in my name and behalf, to sell, assign, and transfer unto himself, or any other person or persons, two hundred shares in the capital stock of the Mechanics' and Traders' Bank of New Orleans; and further, one or more persons to substitute with like power. In witness whereof, I have hereunto set my hand, this 10th of June, 1851. Peter Conrey, Jr."

On the 20th of August, 1851, defendant, then being in New York, substituted, by letter, *Edward Rawle*, with special power to transfer to himself (defendant) the two hundred shares of bank stock in question.

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On the 29th of August, 1851, *Edward Rawle*, made a transfer of the said shares of stock on the transfer book of the bank, in the following words:

"For value received, I do hereby assign unto *James Saul*, all my right, title and interest, in two hundred shares of the capital stock of the Mechanics' and Traders' Bank of New Orleans, on which has been paid fifty dollars on each, being the same as described by a certificate issued to me, numbered 1047, dated 19th of April, 1850, which certificate is null and void.

PETER CONREY, by E. RAWLE, substituted by JAMES SAUL.

Of this transfer, witness,
P. ARNOUIL. EDWARD RAWLE."

Peter Conrey, Jr., made a cession of his property to his creditors, on the 7th of November, 1851; and this suit was brought by the syndic of his creditors, on the 9th of June, 1852, to make and annul the transfer of stock of the 29th of August preceding, as made in fraud of *Conrey's* creditors and to their injury.

The petition alleges, that *Conrey* was in insolvent circumstances on the 10th of June, 1851, as well as on the 29th August, 1851, and wholly unable to meet his liabilities, at both of those dates, to the knowledge of defendant. It concludes by a prayer, that the assignment and transfer of the aforesaid two hundred shares of stock, be declared null and void, and the same recognized and decreed to belong to petitioner, in his capacity of syndict, together with all dividends which have accrued, and may hereafter accrue thereon.

On the trial, it was admitted, that *Conrey*, was solvent and rich, until the news reached New Orleans, about the 1st of July, 1851, of the protest of his bills on *Samuel Jaudon*, of New York.

It was also admitted, that when *Saul* wrote to *Mr. Rawle*, authorizing him to transfer the stock, which was on the 20th of August, 1851, he was aware of the insolvency of *Jaudon* and the protest of *Conrey*.

It is proved, that the exchange operations of *Conrey* with *Jaudon*, were very extensive—the amount of the drafts of the former on the latter being about half a million—and that *Conrey's* credit was affected by the protest of those bills.

It is also proved, that *Conrey* and *Saul* both married sisters of *Jaudon*; and from this connection, it is argued, that defendant must have been intimately acquainted with their affairs.

Whether *Saul's* knowledge of *Jaudon's* insolvency, necessarily implied a knowledge of *Conrey's* insolvency at the date proved, or whether, in fact, the proof of *Conrey* being under protest on the 29th of August, 1851, is tantamount to proof of his being insolvent at that date, in the sense of Article 1980 of the Code, are questions which it is deemed unnecessary to decide, inasmuch as we consider the assignment of the stock by *Conrey*, represented by *Rawle* to *Saul*, to be void for an entirely different reason.

There is no doubt of *Saul's* being a *bona fide* creditor of *Conrey*, to the amount of ten thousand dollars, on the 10th of June, 1851. That debt was represented by a promissory note of that date, and was made up of a note of $8,500 of the 9th of August, 1850, and of $1,500 paid by *Saul* to *Conrey*, on the 10th of June, 1851. The note of $8,500 was itself a renewal of a note for a much larger amount ($12,000) given by *Conrey* to *Saul*, for money lent, on the 1st of December, 1849. The certificate for the two hundred shares of

Mechanics' Bank stock, had been deposited by *Conrey* in *Saul's* hands, as far back as May, 1850, as collateral security of the first of those notes; and the notes of $8,500 and $10,000, were intended to be secured by the said shares of stock. The certificate of said stock was placed in *Mr. Saul's* hands, with that view. We have here a pledge of the stock made in good faith, to secure a *bona fide* debt, at a time not suspicious, and by which no creditor was injured. The allegation of the petition that *Conrey* was insolvent on the 10th of June, 1851, and that to the knowledge of *Saul*, is disproved by the evidence and even by the admission of the plaintiff.

Simultaneously with the pledge of the stock, the power of attorney already mentioned was given, purporting to be *for value received* and *irrevocable*. Those clauses sufficiently indicate the interest of *Saul* in the object of the mandate—the stock. That interest, as we have seen, was an interest of pledgee. As pledgee, he had no power to sell the object pledged, unless by virtue of a judicial order; and the power to him to do so, was a nullity, even between the parties. C. C., Art. 3132. It follows that the transfer, which was made of the stock, under this power, was also a nullity.

But the nullity of the assignment of the ownership of the stock, leaves defendant's right as pledgee in full force. See *Partee's Syndic* v. *Corning*, 9 An. 539.

And as to any informality in the pledge, as for instance, the want of the act of pledge required by Article 3125 of the Code, it has been settled in the same case, that the syndic of the pledgor cannot disturb the pledge on any such ground, where the contract was made in good faith, and no creditor was injured thereby. In this case, the defendant had possession of the stock as a security for *Conrey's* indebtedness to him, from a period antecedent to the existence of any debt upon *Conrey's* schedule, which is in evidence.

It is therefore adjudged and decreed, that the judgment of the District Court be amended; that the transfer of two hundred shares of Mechanics' and Traders' Bank stock from *Peter Conrey, Jr.*, represented by *E. Rawle* to defendant, on the 29th of August, 1851, be declared null and void; that defendant be recognized as pledgee of the said two hundred shares of stock, for the security of a debt of ten thousand dollars, with interest at six per cent. from the 10th of June, 1851; that the injunction herein issued, be perpetuated, so far as it prohibits the transfer of said stock by defendant, and dissolved so far as it prohibits defendant from receiving the dividend or dividends upon the same; that said dividend or dividends heretofore declared, be credited upon the debt due defendant, as aforesaid; that the stock be sold by the Sheriff, for cash, to pay the said debt; and the surplus of proceeds of sale, if any, to be paid over to plaintiff. The costs of the District Court to be paid by defendant, and those of appeal by the appellee.

MERRICK, C. J., with whom concurred VOORHIES, J. I concur in the opinion of Mr. Justice BUCHANAN, because I consider the former decisions overruled by the recent decisions of this court in the cases of *Campbell* v. *Slidell*, 5 An. 274, and *Partee, Syndic*, v. *Corning & Co.* 9 An. 539. Moreover, these late authorities meet the equity of this case.

SPOFFORD, J., with whom concurred, LEA, J., dissenting. Upon the authority of the cases of *Saul* v. *His Creditors*, 5 N. S. 569; *Devlin* v. *His Creditors*, 2 La. 361; *Canizo's Syndic* v. *Cuadra*, 2 L. 459; and *Shaw, Syndic*, v.

Newton, 8 L. 528, I think the judgment appealed from in this case, should be affirmed.

The pretended pledge of the bank stock was void as to other and even subsequent creditors of *Conrey*, and it invested *Saul* with no privilege upon the stock, under the Articles 3124, 3125 of the Civil Code, which were in full force at the time.

There is certainly an equity in favor of the defendant, but no stronger equity than existed in favor of the pretended pledgees in the analogous cases cited above. So well settled was the judicial construction of Article 3124, that it was found necessary to change the law by the legislative enactment "concerning pledges," approved February 12th, 1852, (p. 15.) That Act would have been unnecessary, if the courts already had power to relieve creditors who had attempted to secure themselves by taken pawns, in disregard of the provisions of Article 3125.

As the Act of 1852 can have no retrospective operation, I think we are without power to relieve the defendant, notwithstanding the hardship of his case.

HEIRS OF DUPUY *v.* DUPONT and WIFE.

A simulated sale made by a father to a daughter and her husband, which is really a donation in disguise to the daughter, is without any more effect than if made to the daughter alone.

The rule that simulated contracts of a father when attacked by his forced heirs are only to be set aside in so far as they impair the *légitime* of the heirs, does not seem to apply to the case of a simulated sale of land or slaves to a favorite child. Code 2419, 1305-6-7-8-9-10, 1326, 1468.

The action *en declaration de simulation* may be instituted by the parties to the act, and their heirs and legal representatives, as well as by third persons, with this distinction, however, that the latter are allowed to have recourse to parol evidence to contradict the authentic act, whilst the former are precluded from the exercise of this right. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.)

Heirs, except when suing to recover their *légitime*, stand in the same situation and enjoy the same and no other rights than those which were held by their ancestor. But when they sue for the recovery of their *légitime*, they are considered as third persons, or creditors. This difference is the result of the recognized distinction between the general rights of heirs and their rights to the *légitime*, the one being derived from the ancestor, and the other from the law. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.)

The presumption of simulation established by Article 2456 of the Code is inoperative with respect to the parties to the act, and therefore to the heirs, in a case where the heirs derive their rights from the ancestor, a party to the act. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.)

An *indirect* donation is based upon a real contract, and is an advantage conferred upon the other contracting party under color of a real contract for the whole, whilst a *disguised* donation, whether it assumes the form of a direct sale to the party to be benefited, or of a sale to an interposed person, is wholly a simulation. The *indirect* donation is, therefore, a real contract, with the exception of the advantage indirectly conferred; but the *disguised* donation is a simulated contract. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.)

The indirect, or disguised donation, clothed with the form of a sale, if made to a stranger, would be good as a donation, if there were no prejudice to the *légitime*, but should the *légitime* be impaired, it would be subject to reduction. When such an advantage is conferred upon a co-heir, it is not only subject to reduction, but, in the cases pointed out by law, may be liable to collation. Where, however, such advantages are conferred upon incapable persons by a disguised donation, they are absolutely null, while, by an indirect donation, they are simply reducible. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.)

The allegation in plaintiff's petition, that the husband is an interposed person for the benefit of his wife, does not deserve serious consideration, because the act of sale was passed to both husband and wife. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.)

At the date of the sale to the death of the vendor the parties lived in the same house, from which it must be inferred that delivery accompanied the act of sale, for it is well settled, that where a vendor and vendee live in the same house, possession follows title. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.)

The relationship between the parties does not of itself constitute a badge of fraud or simulation. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.)

Code 20, 1378, 1747, 2417, 2454, 2455, 2456, 1275, 1305, 1329, 1334, 1335.

APPEAL from the District Court, Fourth District, *Duffel*, J.

Berault, for plaintiffs. *Roselius* and *Filleul*, for defendants and appellants.

SPOFFORD, J. This suit appears to have been properly brought by virtue of an express provision of the Civil Code.

"The sales of immovable property or slaves, made by parents to their children, may be attacked by the forced heirs, as containing a donation in disguise, if the latter can prove that no price has been paid, or that the price was below one-fourth of the real value of the immovables or slaves sold, at the time of the sale." C. C. 2419.

The views we may happen to entertain of the policy of laws cannot control, or in any way affect the legal rights of parties which may be submitted to us for adjudication; we are not permitted to distinguish between odious laws and laws entitled to favor. C. C. 20.

The District Judge, after hearing the witnesses, came to the conclusion that the sale in question contained a donation in disguise, and that no price was paid by the vendees; and he has given his reasons for judgment in a learned and elaborate opinion.

After a careful scrutiny of the evidence, a majority of this court are unable to dissent from his conclusions.

The plaintiffs are forced heirs of the deceased vendor, *Antoine Dupuy*, being his children by his first marriage.

The defendants, his vendees, are his daughter by a second marriage, and her husband, *Dupont*.

The sale was made to the defendants jointly, and produces in substance the same effect as if made to the wife alone, for in that case the property would have vested in the community if it passed at all. The petition expressly put at issue the verity of the sale; but the vendees have made no attempt to prove that a price was paid, except by showing that *Dupont* was an industrious man, and had money.

On the other hand, the negative is supported by strong circumstantial evidence, the only evidence of which the nature of the case seems to admit.

The sale purports to have been made about six years before the death of *Dupuy*. It comprised half his land and all his slaves. But no change of possession followed the deed. The defendants exercised no act of ownership until *Dupuy* died. For nearly six years, and up to the moment of his death, the pretended vendor, although his vendees lived in his house, continued to control the property exclusively, as owner, cultivating the soil and working the slaves, calling them his land and his slaves, and giving them in to the Parish Assessor as his own.

On one occasion, long after the pretended sale, he made oath before the As-

sessor that the land and slaves in question were his, in the presence of *Dupont*, one of his vendees, and without contradiction from him.

Under these circumstances, it is difficult to suppose that the parties regarded the sale as a reality.

The only reasonable hypothesis is, that it was resorted to as a device, to take effect only after the death of the vendor, by shifting the regular course of descent in favor of his child by the last marriage.

That no price was paid, may be inferred not only from the circumstance that the parties never, during the partnership, treated the sale as a contract having a real existence, but from the facts that *Dupuy* never acquired any other property after the sale, and that no money was found in his succession at his death. He continued actively engaged in planting after the sale as before, and nothing is suggested to render it probable that he spent more than he made.

Dupont had some money, it is true, but he bought slaves from other persons, paid for them, and took possession.

We find in the record no legal evidence that he paid a dollar to *Dupuy*, and sufficient presumptive evidence that he did not.

With the District Judge we think he should derive no benefit from his own extra-judicial statements, made after the controversy arose.

The rule that simulated contracts of a father, when attacked by his forced heirs are only to be set aside in so far as they impair the *légitime* of the heirs, does not seem to apply to the case of a simulated sale of land or slaves to a favorite child. C. C. 2419, 1305-6-7-8-9-10, 1326, 1488.

The District Judge decreed that the sale should be set aside, and the property declared to belong to the succession of *Antoine Dupuy*. It would have been more formal to have declared the sale a disguised donation to the daughter, and decreed that she should collate the property in a partition to be made hereafter among the heirs of *Dupuy*. "The advantage which a father bestows upon his son, though in any other manner than by donation or legacy, is likewise subject to collation. Thus, where a father has sold a thing to his son at a very low price, or has paid for him the price of some purchase, or has spent money to improve his son's estate, all that is subject to collation." C. C. 1326.

As there is enough in the record to show that the decree, as rendered by the District Judge, will produce substantially the same result as a more formal judgment it need not be disturbed.

Judgment affirmed, with costs.

VOORHIES, J., (with whom concurred BUCHANAN, J.,) dissenting. The plaintiffs, who are the forced heirs of *Antoine Dupuy*, deceased, demand the nullity of an act of sale from their ancestor to *Jacques N. Dupont* and his wife, *Irma Dupuy*, their co-heir, on the ground, as alleged in their petition, "that the said sale was simulated and merely intended to favor, contrary to law, the said *Irma Dupuy*, to the detriment of your petitioners, the said sale being fraudulent, as never having been accompanied by possession, or even assessed in the name of the said *Dupont* and wife, he, the said *Dupont*, being interposed for the benefit of his wife."

By giving to the above allegations the utmost latitude of construction, it will appear that the plaintiffs base their action on the following grounds:

1st. That the act of sale, being a simulation, is an absolute nullity, the estate of *Antoine Dupuy* deceased being still the real owner of the property in controversy.

3d. That the sale is a disguised, or an indirect donation to their co-heir, *Irma Dupuy*, through the interposition of her husband, to their detriment as co-heirs, and in violation of their rights to the *légitime*.

Their action has a three-fold character, being, firstly, an action "*en declaration de simulation;*" secondly, an action to set aside a disguised, or indirect donation in violation of their *légitime;* and thirdly, an action to set aside a sale, containing an advantage or extra portion in favor of *Irma Dupuy*.

I. The action *en declaration de simulation* may be instituted by the parties to the act, and their heirs and legal representatives, as well as by third persons, with this distinction, however, that the latter are allowed to have recourse to parol evidence to contradict the authentic act, whilst the former are precluded from the exercise of this right. Heirs, except when suing to recover their *légitime*, stand in the same situation, and enjoy the same and no other rights than those which are held by their ancestor. But when they sue for the recovery of their *légitime*, they are considered as third persons or creditors. This difference is the result of the recognized distinction in our jurisprudence between the general rights of heirs and their rights to the *légitime*, the one being derived from the ancestor and the other from the law. In the case of *Rachel* v. *Rachel*, 4th Ann., 501, the court said: "The action of forced heirs, in which the sale from a parent to his children is attacked as a disguised donation, is not derived from the *ancestor*, but from the *law*. So far as their *légitime* is concerned, they are not heirs but creditors." Hence, in the action "*en declaration de simulation*," independently of their rights to the *légitime*, the rights of heirs must be regulated by the rules which would have applied to a similar action on the part of the ancestor. The act of sale from *Antoine Dupuy*, deceased, to the defendants stands unimpeached by any counter-letter, and the plaintiffs have not thought proper to probe the conscience of the defendants; but they urge that the sale, never having been accompanied by possession or delivery, is presumed by law to be simulated. C. C. 2456. The presumption of simulation established by this Article of the Code, is inoperative with respect to the parties to the act, for the Article provides: "In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and, *with respect to third persons*, the parties must produce proof that they are acting in good faith, and establish the reality of the sale." Inasmuch, therefore, as the plaintiffs claim as heirs from their ancestors in this branch of the case, so far they cannot be viewed as third persons, and benefit by this presumption of law so as to throw the burden of proof on the vendees. The balance of the evidence being parol is unavailable to the plaintiffs to establish the alleged simulation, in so far as their legal rights as forced heirs are not concerned.

II. The second ground of nullity is, that the sale covers a disguised or indirect donation to *Irma Dupuy*, through the interposition of her husband, to the detriment of the plaintiff's *légitime*. It is important not to lose sight of the distinction which exists between a *disguised* donation and an *indirect* donation. The latter is one which is based upon a real contract, and is an advantage conferred upon the other contracting party, under color of a real contract for the whole; whilst a disguised donation, whether it assumes the form of a direct sale to the party to be benefited, or of a sale to an interposed person, is wholly a simulation. The indirect donation is, therefore, a real contract, with the ex-

ception of the advantage indirectly conferred; but the disguised donation is a simulated contract. 6 An. 673. Let us consider what would be the effect of an indirect or disguised donation to a stranger. Should such an advantage be extended to any person but a co-heir, without prejudice to the *légitime*, the act, though clothed with the form of a sale, would, however, be valid as a donation. But should the *légitime* be impaired by such a disposition of his property by the ancestor, then the donation, whether disguised or indirect, would be subject to reduction. Whenever such an advantage is conferred upon a co-heir, besides the right of reduction, the other co-heirs are entitled, in the cases pointed out by law, to demand its collation, but this will be considered in its place. There being no law prohibiting a parent from donating property to one of his children, or even a stranger, apart from the *légitime*, it follows that a disguised, or indirect donation in such cases cannot be considered as void, but merely reducible according to circumstances. However, in cases where such advantages are made to incapable persons, another distinction prevails: the disguised donation is affected with absolute nullity, and the indirect donation is simply reducible. In the case of *Thibodaux*, 6 An. 673, the court observed that Art. 1747 of the Civil Code contains two separate dispositions: one by which the spouses are incapacitated from giving to each other more than the law permits, in which case the excessive donation is reducible: and the other declaring null and void all donations disguised or made to persons interposed. This distinction of reducible donations between husband and wife, and donations which are null and void on the ground of interposition or disguise, came to us from the Roman law. See Digest, book 24, title 1, law 5, paragraph 5; Pothier, Donations entre Mari et Femme, No. 78.

It was recognized by the late Supreme Court in the case of *Casanova's heirs* v. *Acosta et al.*, 1 L. R. 185. It was also recognized by the French Commentators under a similar disposition of the Code of France. 5 Toullier, Nos. 76, 83, 901, 902.

The allegation in the plaintiff's petition that *Dupont* is an interposed person for the benefit of his wife, does not deserve serious consideration, because the act of sale was passed to both the husband and wife. On the hypothesis that the sale is a disguised donation to the prejudice of the plaintiffs' *légitime*, it appears to me that the proper remedy would be for them to sue for a reduction, instead of the nullity of the sale, in the absence of any legal objection to the vendor's right to make a donation to the defendants. But has it been shown that the act of sale was a simulation, covering a disguised or indirect donation to the defendants in violation of the plaintiffs' rights as forced heirs?

On the 9th December, 1844, *Antoine Dupuy* conveyed to the defendants, by authentic act, a small tract of land of three-fourths of an arpent in front by forty in depth, with the double concession, described to be bounded above by the land which he then owned and occupied, and also a negro woman and her five children, for the price of $2000 cash. There were no improvements on this land, on which *Dupont* has, since the death of *Dupuy*, constructed fences and a levee. The vendor died in 1850. Thus the land in dispute and the lands owned and occupied by *Antoine Dupuy*, originally formed but one tract, which was assessed in the name of the latter, and, it appears, continued to be so assessed until the year 1851, and in 1845 it was assessed at $1500. The slaves were also assessed in the name of *Antoine Dupuy*. From 1845 to 1850 there was only one slave, and in 1850 three slaves, assessed in the name of *Dupont*,

and in 1851 the land and eleven slaves were assessed in his name, the land at $2000 and the slaves at $6500. One of the plaintiffs' witnesses testifies that *Antoine Dupuy*, in 1846, gave in, under oath, the land and slaves in question to be assessed as his property, in the presence and within the hearing of *Dupont*. Another witness testifies that *Antoine Dupuy*, in speaking of the property, always said my land, my negroes, and whenever *Dupont* loaned anything from the plantation it made the old man angry, and *Dupont* knew it. Here it is proper to notice that none of the implements of husbandry, or things attached to the land on which the parties resided, constituted any part of the property conveyed to the defendants. One of the witnesses testifies that the land in question was worth from $2000 to $2500; another witness, that it was worth $3000, and both concur in their testimony that the slaves were worth $1500. It is admitted that the land on which *Antoine Dupuy* resided constituted the only property which he owned at the time of his death.

On the other hand, it is shown that *Dupont* was an industrious mechanic, and remarkably economical. In October, 1843, it appears he had in deposit upwards of $2000, wages which he had earned. He was married about this time, and lived with his wife in the same house with his father-in-law, until the period of the latter's death. One of the plaintiffs' witnesses also testifies that *Dupont*, in conversation with him, expressed the pain he felt on account of the bad terms on which he was with the heirs of *Antoine Dupuy* in relation to his purchase of the property in dispute, on account of which, *Dupont* said, he had only paid $1400, leaving a balance of $600 still due by him; and that if the heirs would reimburse him the amount he had thus paid, as he thought an injustice had been done to them, he would be willing to annul the sale.

This constitutes the substance of the evidence on which the plaintiffs rest their claim for redress against an act which they allege to be in fraud of their rights as forced heirs. In this respect they have been allowed the benefit of resorting to parol evidence for the purpose of impugning a solemn act of sale from their father. In this they have not succeeded. However, before dismissing this subject, it is proper to notice more specially the evidence in relation to the question of simulation. At the date of the act of sale, and up to the time of the death of *Antoine Dupuy*, the parties lived together in the same house. From this it must be inferred that the tradition or delivery of the property accompanied the act of sale, (C. C., Art. 2454, 2455,) for it is well settled that where the vendor and vendee live in the same house, possession follows title. 3 N. S. 337; 19 L. R. 349; 1 R. R. 41; 11 ibid, 533. The fact of the relationship between the parties does not of itself constitute a badge of fraud or simulation, (9 M. R. 649; 1 N. S. 335; 19 L. R. 600; 6 N. S, 643,) nor does the fact that the property continued to be assessed in the vendor's name, and the other circumstances of the case, afford sufficient ground to establish the alleged simulation.

III. The third objection which the plaintiffs raise to the validity of the act of sale is, that it contains an advantage or extra-portion in favor of *Irma Dupuy*, or, in other words, such a donation as she is bound in law to collate. It is hardly necessary to state that collation is due only by heirs to their co-heirs, and not by strangers. The sale, so far as *Dupont*, the husband, is concerned, could not in any event be subject to the provisions of the Code regulating the mode of making collation; and, as regards the vendee, *Irma Dupuy*, who is the plaintiffs' co-heir, the form of the present action is radically defective. Collation is an incident of the action of partition, and the party who

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is subject to this demand has certain rights to exercise in complying with it, such as to make the collation in kind or by taking less, etc. See C. C., Art. 1275, 1305, 1329, 1334, 1335.

I am, therefore, of opinion that the judgment of the District Court, ought to be reversed, and rendered in favor of the defendants, reserving, however, the plaintiffs's right to any claim for collation which they may have against the said *Irma Dupuy*.

A rehearing was applied for, when the following order was made:

SPOFFORD, J. Ordered that a rehearing be granted only as to the propriety of amending the decree so as to order the collation of the property in controversy, a majority of the court being of opinion that the rehearing should be restricted to that question.

Upon a rehearing:

SPOFFORD, J. It is ordered that the decree heretofore rendered in this cause remain undisturbed.

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An infant, or minor born out of wedlock, son of a resident of Arkansas, was, by an Act of the Legislature of Arkansas, legitimated, or put upon the same footing, as if his parents had been married at the time of his birth. The question was, whether he could inherit, as a legitimate child, property in Louisiana.

The heritable quality of legitimacy which W E. had received from the Legislature of the State of his residence, accompanied him when he changed his domicil.

A general law of the place of domicil, changing the *status* of its citizens according to circumstances, is a personal statute, accompanying the party to every other country; provided the circumstances which operate such change, have occurred before the change of domicil. So, a special law, removing a disability from a particular citizen by name is such a personal statute.

The Legislature of Arkansas gave to W. E. the *status* of a legitimate son of S. E., and this *status* accompanied W. E. into whatever country he might go.—SPOFFORD, J

W. E came hither with his *status*. He inherited, *by our law*, from his father S. E., because he was, to all intents and purposes, a legitimate son, having become so by the law of the domicil of his origin, and not in fraud of our law, nor in violation of its policy.—SPOFFORD, J.

The statute of Arkansas must have as much effect, and no more, as a general law of that State would have, wherein it should be declared that all natural children born, or resident in the State of Arkansas, should be considered as legitimate and inherit from their fathers the same as if born in wedlock. Were such an Act allowed to have any extra territorial effect, another State would be permitted to provide a new class of heirs for immovables and successions in Louisiana.—MERRICK, C. J., dissenting.

Foreign jurists class statutes in regard to legitimacy or illegitimacy, as personal. But, in principle, such statutes should have effect only where they cure some want of formality in regard to the marriage of persons who have really lived together as husband and wife, and not where at most they create a purely fictitious *status*.—MERRICK, C. J., dissenting.

Conceding the statute of Arkansas to be a personal statute, it is against the policy of our laws to enforce it to the exclusion of the heirs at law, as regulated by the Civil Code.—MERRICK, C. J., dissenting.

There can be no safe rule except to consider those only as legitimate children whose parents have at some time lived together as man and wife. *Hæres et filius est quem nuptiæ demonstrant.* The Civil Code designates what persons shall inherit, and when a person presents himself, who has not the qualities required by our law, except in an absolute fiction created by the statute of another State, the real facts of the case should be looked at, and the inheritance given to those entitled under our own laws.—MERRICK, C. J., dissenting.

Code, 219, 224, 882, 910.

APPEAL from the District Court, Tenth District, parish of Carroll, *Snyder*, J. *Short & Parham* and *Goodrich & De France*, for plaintiffs. *Selby*, for defendants and appellants.

The counsel for plaintiffs made the following points:

Did *William Estill* have any heritable right in the estate of *Samuel Estill*?

In order to arrive at a proper solution of this question, it becomes necessary to consider the force and effect of the statute of legitimation passed by the General Assembly of the Territory of Arkansas, by which, to use the language of that Act, *William Estill* "was made the legal heir and representative of *Samuel Estill* in as full and ample a manner as though he had been such from his birth, and as capable of inheriting the estate of the said *Samuel* as though said *Samuel* had been married to his mother at the time of his birth, and thereafter to be known and called by the name of *William Estill*."

Is this a real, a personal, or a mixed statute?

We will examine it under each of these aspects, and under whichever it may be placed, it will unquestionably appear that *Wm. Estill* was without any right or capacity of heirship to the estate of his father, and that the plaintiffs in this case, the brothers and sisters of *Samuel Estill*, and their descendants, will be declared to be his true heirs. Fortunately for our investigations, the principles and distinctions involved in this abstruse, intricate branch of jurisprudence, have been elaborated with great learning, and adjudicated with great ability by this tribunal—the earliest and leading case being that of *Saul* v. *His Creditors*, 5 N. S., 569.

I. Then, let us suppose this to be a real statute, which is defined to be one, which regulates property within the limits of the State where it is in force. If it be, then it can have no extra territorial effect on the account of *Sam. Estill's* succession when opened in this State. *Brosnaham* v. *Turner*, 16 L., 433.

II. Suppose it to be a personal statute. This court has adopted, in the case of *Saul* v. *His Creditors*, the definition of Chancellor D'Augusseau who considers a personal statute to be "where all the attention of the law is directed towards the person, to provide in general for his qualification, or his general and absolute capacity: as when it relates to the qualities of major or minor, father or son, legitimate or illegitimate," &c., p. 594. It would then be controlled—

1st. By the law of legitimation in our State, viewing it also in the light of a personal statute; for, upon the same authority, a personal statute here controls a conflicting personal statute of another State which seeks to enforce a right here, p. 590, 597. This operates as well whether the organic or statutory law operates. Con. of Laws, p. 11, § 10. 3 An., 426. (Bottom,) but—

2d. The real statutes of the situation must prevail over the personal statutes of the domicil, p. 586. It would be idle to assert that *Samuel* and *William Estill* could import into the State of Louisiana a statute of Arkansas, passed for their benefit there, which conflicts with one of her real statutes, and changes the line of inheritance established by her laws. The property of a succession within the State must be distributed by the laws of the State. 11 M., 26; 3 N. S., 1; 7 N. S., 44; 5 An., 158.

Judge Story, in his Conflict of Laws, after reviewing all the principles governing this branch, arrives at the conclusion "that the heir, whether by testamentary, or by intertacy of immovable property, can take only according to the lex loci rei sitæ, or, in other words, he is not admissible as heir unless he is duly qualified according to the principles, rules and forms of the local law." Con. of Laws, p. 419, § 509.

It cannot be pretended, in this case, that *Wm. Estill* was ever so qualified. Again: The descent and heirship of real estate is exclusively governed by the law of the country within which it is actually situated. Con. of Laws, p. 404, § 483. The utmost that could be claimed for *Wm. Estill* would be that of a natural child. C. C. The utmost he could claim from his father's succession would be alimony. C. C., 227, 914. The only heir he would take precedence over, would be the State. C. C., 913, 914; 2 An., 98; 6 An., 156. And even all this on the hypothesis that the requirements of the local law had been complied with. An acknowledgment of an illegitimate child has, under our law, a peculiar formality. C. C., 217. This does not appear ever to have been complied with. A mere verbal or general acknowledgment or recognition, does not meet the case, and an admission to that effect amounts to nothing. It does not appear, from the Record, that the mother of *Wm. Estill* was ever in the State of Louisiana. The conclusion to which we must irresistibly arrive, under

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this division of the case, considering the statute as a personal one, is, that its effect and operation are controlled by one law; and that *Wm. Estill* could take nothing to the exclusion of those recognized by our laws as the proper heirs of *Samuel Estill*. But—

3. Let us suppose the Arkansas statute to be a mixed statute, which is defined to be "one which concerns, at once, persons and property." This would seem to be really the character of the statute of legitimation, but Merlin, after giving the foregoing definition, discards such a classification as unnecessary, or as comprehended in the other two. Story's Con. of Laws, p. 12. If such a classification is admitted, we have only to add, that if, neither as a real or personal statute, it can bestow on *Wm. Estill* the estate of his father, it cannot do so as a mixed statute, as it could acquire no additional virtue or efficacy from the combination.

Thus, we think that we have established the proposition with which we set out, that under neither of these categories can *Wm. Estill's* heirs, his natural half-brothers and sisters, claim the estate of *Sam. Estill*, and are enabled to regard this Arkansas statute in its true light.

It cannot be denied that within the limits of the State of Arkansas, its operation was absolute and complete; but the moment *Sam. Estill* and *Wm. Estill* ceased to be citizens of that State, and moved beyond its limits, that moment they renounced and forfeited all the benefits and advantages it was intended to secure to them. The point relied on by defendant's counsel, in the previous argument of this case, as to the right of States to pass such Acts, does not meet the question. It presents an issue only when such Acts are sought to be made operative elsewhere, and then they are regulated alone by the comity of States. "It is plain," says Judge Story, "that the laws of one country can have no intrinsic force, proprio vigore, except within the territorial limits and jurisdiction of that country. They can only bind its own subjects and those who remain within its jurisdictional limits. No other nation or its subjects are bound to yield the slightest obedience to those laws. Whatever extra-territorial force they are to have, is the result not of any original power to extend them abroad, but of that respect, which, from motives of public policy, other nations are disposed to yield, giving them effect with a wise and liberal regard to the common convenience and mutual benefits and necessities." Con. of Laws, p. 757. Again, he says, p. 32: "It is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations or to those of their subjects." So, also, this court has decided, that while contracts may be governed by the laws of the country where they are made, they cannot be enforced to the injury of a State whose aid is required to carry them into effect. *Saul* v. *His Creditors*. Thus—

4th. We arrive at the conclusion that this Arkansas statute has only such force and vitality as our jurisprudence will give it, with due regard, and without prejudice to the rights of our citizens. Should the natural half-brothers and sisters of *Wm. Estill* be declared the heirs to the property in controversy, we submit that it would exceed the comity which regulates it, and be extremely prejudicial in its operation.

The principles which should govern in determining the legitimacy or status of *Wm. Estill*, must be distinguished from those which usually prevail in such cases. The general rule is, that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicil of origin. And the governing maxim Pater est, quem justiæ nuptæ demonstrant legitimacy, established by the subsequent marriage of the parents, is admitted everywhere, and this for the reason that the institution of marriage is recognized jure gentium. It is very different, both from principle and policy, when a statute assumes the functions of a natural relation, demanded for the good of society, by the requirements both of the civil and divine law. Judge Story in his learned and elaborate discussion of this branch of jurisprudence, contemplates only the legitimacy that results from intermarriage between the parents, never regarding such a thing as statutory legitimation; and after giving even the former its utmost scope, quotes from the decision of the King's Bench this conclusion: "The very rule, that a personal status accompanies a man everywhere, is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced." Con. of Laws, p. 87, 91. So that we conclude—

5th. The Arkansas statute did not bestow such a status or legitimacy on *Wm. Estill* as to make him legitimate elsewhere than at the domicil, being exceptional and different from that legitimacy flowing from marriage, which is recognized jure gentium.

From an examination of the phraseology of that statute, it will be seen that *Wm. Estill* is described as the infant son of *Sam. Estill*, and not of him and *Mary Coleman*, the mother. And the Judge a quo was of the opinion, conceding that *William* could have been maintained in the possession of the property during his life, at his death it must pass to the heirs of *Sam. Estill*, the father, who, by the terms of the statute, had made the only public acknowledgment of him. C. C., 913, 916; *Succession of Briscoe*, 2 An., 268.

In conclusion we have only to add, that in addition to the above, the whole current of principles in the learned commentary of Judge Story on Conflict of Laws, and the whole reasoning of this tribunal in the case of *Saul* v. *His Creditors*, which, by the way, is the fruitful source to which Judge Story is indebted for his leading principles and data, all sustain the decision of both the Judges a quo; an affirmance of which is respectfully asked.

Selby, for defendants:

Samuel Estill and his infant son, *William Estill*, in 1835, living in and being citizens of Arkansas, where they had been, before and afterwards, by a law of Arkansas, were made heirs to one another.

It is contended that *William Estill*, being once the heir of *Samuel*, in Arkansas, was always his heir, till his death; and that the removal from Arkansas to Louisiana, did not deprive him of the heirship.

It is only by the statutes, the written laws of the State, that legitimate children inherit to the exclusion of others. L. C., 882 et seq.; idem, 898 et seq. Were all the statutes upon this subject repealed, the distinction between legitimate and illegitimate children would be gone. Legitimate children succeed to the property of their parents only by virtue of written laws, and perhaps not always to those who beget them: for children conceived during marriage, and those whose parents intermarry at any length of time after their birth, inherit. L. C., 203 and 217.

It is contended that Arkansas as well as Louisiana, can repeal or alter her laws on this, or any other subject, not prohibited by the United States Constitution or Laws, generally or specially, as in the case of *Samuel* and *William Estill*, father and son. Throughout the United States we have numerous instances of special laws making even strangers heirs to each other, dispensing with the usual age of majority, and changing the names of persons. Such laws in Louisiana are very numerous. Acts of 1852, pp. 214, 199, 177, 175, 161, 152, 151, 148, 147.

Louisiana sustains such special laws passed by her own Legislature, and Arkansas within her territory would sustain this law in favor of the *Estills*. "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." U. S. Const., Art. VI, Sec. 1., and a fortiori, the laws of another State will be sustained; for the laws of a State are its most public acts.

The argument of plaintiffs' counsel, that the statute is real, and that to give it effect here, would be to admit Arkansas to change the laws of descent of real property in Louisiana, to me, is not obvious. As I understand the books, no part of the statute is real, and if it were, I do not perceive its application to the case at bar.

A will made in, according to the laws of another State, although not having the requisitions prescribed by the laws of Louisiana, may pass lands here. 3 A. R., 579; 6 A. R., 522. This would appear as much changing the laws of descent as would the statute making *William* the heir of *Samuel Estill*.

By the laws of Louisiana, the marriage of the father and mother at any time after its birth, makes the child legitimate. L. C., 217. In Arkansas it is not so. In such a case, were the parents and child, after the marriage, to remove from Louisiana to Arkansas, would the child again become illegitimate? When the name of a citizen of Louisiana has been changed by her Legislature, must he take his original name again by removing to another State? Were a widow to marry in Mississippi, where there is no prohibition against it, before her first husband had been ten months dead—L. C., 134—and after having raised a family from the marriage, come with it to Louisiana, would her marriage be-

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come illegal, her children illegitimate, and her collaterals take her property upon her death from her children? These are a few of the many examples which may be put.

Our statute books are full of special laws dispensing with the age of majority, changing names, and making those heirs who, by the general laws, were not so. It would seem to be as immoral in Louisiana to do so as in Arkansas—if there is any immorality in so doing. And it is only by the written, the statute law, that the legitimate child is preferred to the illegitimate. By nature it is not so; and there is no natural reason why it should be.

Buchanan, J. This cause has already been before this court, and was remanded to make proper parties defendant. See 9 An. 218.

Plaintiffs are the surviving brother and sisters of *Samuel Estill*, deceased, and the children of a deceased brother of said *Samuel*. They claim to be heirs at law of *Samuel Estill*. The defendants are the curator, and the half-brothers and sisters, heirs of one *William Estill*, who was a natural son of *Samuel Estill*, but legitimated by a statute of the State (then territory) of Arkansas, of which *Samuel* and *William Estill* were at the time residents, passed October 27th, 1835, and entitled "an Act to legitimatize the son of *Samuel Estill*." For a copy of the said statute in full, see the report of this case in 9th Annual.

The question now presented for our decision is, whether the statute in question had an extra territorial effect, and enabled *William Estill* to inherit, as the legitimate son of *Samuel Estill*, the property left by the latter in Louisiana. The solution of this question appertains to a distinction (which has been recognized by various decisions of the Supreme Court of Louisiana) of statutes real and statutes personal. The leading case on this subject is *Saul* v. *His Creditors*, 5 N. S., in which it was decided, that the general law of Virginia, which renders property acquired during marriage, the property of the husband, is a real statute, which did not follow a couple, who had contracted marriage in Virginia, into the State of Louisiana, where they resided many years, and where the wife died; but that property acquired in Louisiana after their removal thither, entered into the matrimonial partnership of our law, and on the dissolution of the marriage, belonged one-half to the wife's heirs. And in the case of *Banna* v. *Alpuente*, 6 N. S. (the same Judge, Porter, who had, in the case of *Saul*, reviewed all the authorities, being the organ of the court,) it was decided that the laws of the domicil of origin, govern the state and condition, into whatever country the party removes; in other words, that such laws are personal statutes. And those two decisions are in harmony with the definition by Chief Justice Eustis, of the real and personal statute, in the case of the *Augusta Insurance Company* v. *Morton*, in 3 An. 426: "Those laws are real," says the learned Judge, "in contradistinction to personal statutes, which regulate directly property, without reference to the condition or capacity of its possessor." There are some expressions of Judge Strawbridge, in the case of *Brosnaham* v. *Turner*, 16 L. R. 439, which are relied upon by plaintiffs' counsel, and which are scarcely consistent with this definition. But the decision in *Brosnaham* v. *Turner*, turned upon a totally different point, the validity of a Sheriff's sale. The remarks in *Brosnaham* v. *Turner*, as to the incapacity of the testamentary heirs of *Villarude* to inherit in Louisiana, under a will probated under the authority of a statute of Florida, are at best but *obiter dicta*, and besides refer to a very different state of facts from that presented in this case. Here, an infant, or minor, son of a

resident of Arkansas, born out of wedlock, was, by an Act of the Legislature of the country of his domicil, legitimated, or put upon the same footing as if his parents had been married at the time of his birth.

It is admitted of record, that *William Estill*, then a small child, October 27, 1835, resided with his natural father, *Samuel Estill*, in Arkansas, who was then a citizen of Arkansas, and resided in Arkansas, and that both of them resided therein for several years before 1835, and also continued to reside in Arkansas until some time between 1837 and 1841." Arkansas was then the *bona fide* domicil of the *Estills*, at the time of the passage of the Act of the Legislature in question. *William* was, by law, the legitimate son of *Samuel* in Arkansas. Can it be said, that he lost his *status* by crossing the State line into the frontier parish of Carroll, some years afterwards? We think not. The heritable quality of legitimacy which he had received from the Legislature of the State of his residence, accompanied him, when he changed his domicil.

The error of the judgment appealed from, consists in regarding *William Estill* as illegitimate, at the time of his father's death. But he was not so. The original taint of illegitimacy had been removed by the Act of the Legislature. Legitimacy and illegitimacy are the result of positive laws, which differ very materially in different countries. To illustrate this idea, suppose *William Estill* had been born in Louisiana, and, that after his birth, his father and mother had got married in Louisiana, and subsequently to their marriage, removed with their child to Arkansas. Their marriage after his birth, would have legitimated their offspring by the law of their domicil; yet, by the law of Arkansas, a subsequent marriage would not have produced that effect. Nevertheless, the *status* of legitimacy being acquired in Louisiana, would have accompanied him into Arkansas. There are many precedents, in the legislation of various States of this Union, of legitimation by Act of the Legislature, and particularly in Louisiana. This seems identical with the legitimation *per rescriptum principis* of the Roman law.

Voet, Commentarius ad Pandectas, lib. 25, tit. 7, sections 4 and 13.

If it be true that a general law of the place of domicil, changing the *status* of its citizens according to circumstances, is a personal statute, accompanying the party to every other country, provided the circumstances which operate such change, have occurred before the change of domicil, which we consider to be the doctrine settled in Louisiana; *a fortiori*, is a special law, removing a disability from a particular citizen by name, such a statute? The constitutional power of the Legislature to enact such exceptional enabling statutes, was drawn directly in question, and ruled affirmatively, in the case of *Pritchard* v. *Citizens Bank*, 8 L. R. 133. The maxim cited by Story, Conflict of Laws, § 51, from Boullenois, "Habilis vel inhabilis in loco domicilii, est habilis vel inhabilis in omni loco," must therefore be deemed law in Louisiana.

And it is not correct to say, that the statute of Arkansas, to legitimate *William Estill*, (which is a personal statute) conflicted with the statute of distributions of Louisiana (which is a real statute); and consequently, as was held in *Saul's* case, is overruled by the latter statute. By the Louisiana statute of distributions, the legitimate son inherits in preference to the brothers and sisters of the deceased. By the effect of the statute of Arkansas, *William Estill* was the legitimate son of *Samuel Estill*. Upon the demise of *Samuel Estill* in Louisiana, in 1849, fourteen years after that statute, *William Estill*, as his legitimate son, was his heir, by the law of Louisiana.

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In confirmation of this view of the subject, we may quote the language of the High Court of Errors and Appeals of Mississippi, in the case of *Smith v. Kelly*, 23 Mississippi Reports, 170: "It is a well settled principle, that the *status* or condition, as to the legitimacy, must be determined by reference to the law of the country where such *status* or condition had its origin."

Judgment of the District Court reversed; and judgment for defendants, with costs in both courts.

Spofford, J. It was competent for the Legislature of Arkansas, the domicil of his origin, to fix the *status* of *William Estill*.

In substance and effect, that Legislature gave him the *status* of a legitimate son of *Samuel Estill*.

The Arkansas statute, legitimating *William Estill*, was a personal statute.

Therefore, the *status* of a legitimate son of *Samuel Estill*, would accompany *William Estill* into whatever country he might go.

He came hither with the *status*. He inherited, by our law, from his father, *Samuel Estill*, because he was to all intents and purposes, a legitimate son, having become so by the law of the domicil of his origin, and not in fraud of our law, nor in violation of its policy.

I, therefore, concur in the opinion and judgment of Mr. Justice Buchanan.

Merrick, C. J., dissenting. I find myself unable to concur in the opinion of the majority of the court.

The difficulty in my mind, arises from the facts admitted by the parties, by which it appears that *Samuel Estill* was never married to *Mary Coleman*, the mother of *William Estill;* that she had been previously married to one *Richard Burnett*, by whom she had two children; that after the death of *Burnett*, she conceived and gave birth to *William Estill;* and that after the birth of *William Estill*, she married *Edward House*, by whom she had six children, the defendants in this suit.

It does not appear whether the Act of the Legislature of Arkansas was passed before or after the marriage of *Mary Coleman* with *Edward House*. The term infant used in the statute, means one under the age of twenty-one years. The Legislature of that State, without doubt, had power to enable *William Estill* to inherit from his acknowleged father, all effects situated within its boundaries.

The statute must have as much effect, and no more, as a general law of that State would have, wherein it should be declared that all natural children born or resident in the State of Arkansas, should be considered legitimate and inherit from their fathers, the same as if born in wedlock. Were we to allow such an act to have any extra-territorial effect, we should allow another State to provide a new class of heirs for immovables and successions in Louisiana.

It is true, that foreign jurists class statutes in regard to legitimacy or illegitimacy, as personal. But on principle, it seems to me, that such statutes should have effect only when they cure some want of formality in regard to the marriage of persons who have really lived together as husband and wife, and not where, at most, they create a purely fictitious *status*.

And the law in regard to legitimacy, does not appear to be extended by civilians, to any case except where there has been a marriage. The maxim is, *Pater est quem justæ nuptiæ demonstrant*. Story says, that this maxim is true only in a limited sense in the civil law. In applying it, he says: "They, the

civilians, therefore hold, that if by the law of a country, (as Scotland,) a man born a bastard becomes legitimate by a subsequent marriage of his parents, he ought to be deemed legitimate everywhere." Story, § 93, 94 and 105. SCOTT v. KEY.

But in England, a contrary doctrine prevails, and it has been held, that "A child born in Scotland, of unmarried parents, domiciled in that country, and who afterwards intermarry there, is not by such marriage rendered capable of inheriting lands in England." *Doe* v. *Vardeli*, 5 Barnwell & Cress., 11 Com. Law Rep. 266.

The doctrine of the civil law ought to be enforced doubtless, in those cases where our own statute recognizes a mode of legitimation by acknowledgment by notarial act and subsequent marriage, (C. C. 219, Art. 1831, p. 86,) although the form in which it has been done in another State differs from our own.

In the case of *Smith* v. *Kelly's Heirs*, 1 Cushman Mississippi Rep., 170, it was held by the very able bench which then presided in the Supreme Court of that State, that a child, illegitimate by the laws of South Carolina, where born and where his parents were subsequently married, could not inherit in Mississippi, although the child would have been legitimate in Mississippi, had he been born and the subsequent marriage of his parents taken place in that State.

In the case just cited, the maxim of the civil law was invoked, not to admit, but to *exclude*, the child from the inheritance, and as there was a marriage of the parents of the child, at most it only proves that the principle of the civil law is admitted in Mississippi, to apply to those cases where there has been a marriage recognized by the laws of another State.

But it seems to me, (conceding the statute to be personal,) it is against the policy of our law to enforce it to the exclusion of the heirs at law as regulated by the Civil Code. C. C. 882, 910, 224. Story Conflict Laws, 258. *Saul* v. *His Creditors*, 5 N. S. 597. The right of declaring who shall inherit immovables, has always been considered as belonging to the State where they are situated, and I question much if the comity of nations has yet been carried to the extent proposed in this case.

The Supreme Court of the United States says: "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." *McCormick* v. *Sullivant*, 10 Wheaton, 192. See also 2 Burrows, 1079; 2 Peere Williams, 291; *Marcenaro* v. *Mordella*, 10 An.

Savigny, one of the most liberal writers of the present day, and one who has carried the law of the domicil to a greater length than any other writer with whom I am acquainted, finds it necessary to place a limit to its application. In substance, he says, in order that a personal statute should be enforced in another country, there should be something in common in the jurisprudence of the two countries in respect to the statute so sought to be enforced.

He says, and I make a translation, though rough, yet nearly literal: "If a law relative to the personal condition (legal capacity) belongs to the absolute laws which, on account of their anomalous nature, lie outside of the common legal principles (Rechtsgemeinshaft) of independant States, the Judge does not apply the law of the domicil of the party, but the local law of the country to which he belongs.

Scott v. Key.

"Where polygamy is allowed by law, he who is already married, has a capacity to take a second and a greater number of wives. The Judge of a Christian State would afford him no protection for this. In reference to this kind of legal capacity, the law of the former and not the law of the domicil will be applied.

"Where he to whom the law of his home denies a legal capacity as being a heretic, wishes to acquire rights and undertake business in a country where such a law in regard to heretics is rejected as immoral, and where perhaps the religion is the same as that of the so called heretic, the Judge should follow the law of his own country, and not that of the domicil of the person.

"If the law of one country declares Jews incapable of acquiring real estate, it binds foreign as well as resident Jews. The resident Jews, however, are not prevented thereby from acquiring land in another country which has no such law. In both these cases the law of the domicil of the person does not apply.

"The same may be said of the civil death of the French and Russian law. The magistrate of a State where the institution of the civil death is not adopted, will not make any application of it, nor observe the law of the domicil.

"The like rule prevails where the status of a negro slave is questioned in a country where the institution of slavery is not recognized." Savigny, German Ed., Berlin, 8 vol., Sec. 365, Art. 1, 2, 4, 6 and 7, p. 160, 165.

The principle recognized by Savigny, that personal statutes are only enforced where there is something found in common with them in the general laws of the country where they are sought to be enforced, has occurred to Mr. Parsons in his works on contracts. He says: "In regard to the first class, it is true that wherever the incapacitated person goes, he carries his incapacity with him: but this is perhaps not because his incapacity was created by a law of the home from which he came, for it was only recognized by that law; and being recognized by every other law, he finds himself under the same incapacity in every State, because he finds a similar law everywhere in force. For this law may well be called a law of nature; that is a law created by the Supreme Creator of, and law-giver for human nature, and as wide in its scope and operation as that nature." 2 Parsons on Contracts, 85.

A brief analysis of the statute in question, I think, will render it very far from clear that it is not a real instead of personal statute. The title of the act in common law countries, as I understand, is no part of the Act. 1 Wm. Black R., 95. We must therefore look to the body of the Act to see what it means.

It enacts that *William Estill*, the infant son of *Samuel Estill*, be made his legal heir and representive in as complete a manner as though he had been such from his birth. The maxim of the common law is *Nemo est haeres viventis*. Hence the Legislature of Arkansas did not intend to perform a legal impossibility when it declared that *William Estill* was the heir and representative of *Samuel Estill*, then living; it rather looked to his estate and provided a person who should inherit after his death his lands as heir, and succeed to his personal effects as his legal representative, than attempted to create a present personal relationship between the two.

In this view, the statute further provides that, "He (said *William*) shall be capable of inheriting the *estate* of said *Samuel Estill*, in as full and complete a manner as though said *Samuel Estill* had been married to his mother at the time of his birth; and the said *William* shall be known and called by the name of *William Estill*."

The second section provides that the Act shall take effect from its passage.

The Act confers upon *William* the right of inheriting from *Samuel Estill* as fully as he would have done if *Samuel* had been married to his mother, but it does not, I think, necessarily place *William* under the power and authority of *Samuel*, or create any personal relationship between them.

If the principle contended for in this case be once admitted, it is difficult to foresee where it will end.

I think because the statute of Arkansas has given *William Estill* the *status* of heir of *Samuel Estill*, we are obliged to declare him such in Louisiana, by the same reason we should have been obliged to recognize him as heir, if the Legislature of Arkansas had declared him heir to the exclusion of the legitimate children of *Samuel Estill*, and he had had legitimate children, for he would have had the so called *status* of heir which would have been wanting in the legitimate children. If the Legislature of Arkansas should designate a class of third persons or strangers to be the legitimate heirs of certain persons, would it not, by the same reasoning, be a personal statute, and would not the person declared heir have the *status*, and should we not be obliged to enforce it? If the statute of Arkansas should authorize one person to adopt as his heirs such persons as he pleased, and provide that the persons so adopted should be considered the heirs as fully as if born in wedlock, would it not also be as much a personal statute as the one before us? Would we enforce it to the exclusion of the heirs under our own law?

Suppose *Samuel Estill* had had three illegitimate children by different mothers, and two legitimate children, and the Legislature of Arkansas had declared the three illegitimate children should be considered heirs, how would this effect the legitime in Louisiana of the two legitimate children?

The child of the fourth wife of the Mohamedan, and the child perhaps of the thirtieth wife of the Mormon, have the *status* of legitimacy in their own countries; would our courts give effect to that *status* should such heirs present themselves here? These questions (arising from extreme cases it is true) show the difficulties which environ the application of the principle to the extent admitted by the majority of the court.

And I can see no safe rule except to consider those only as legitimate children, whose parents have at some time lived together as husband and wife. *Haeres et filius est quem nuptiæ demonstrant.* The Civil Code designated what persons shall inherit, and when a person presents himself who has not the qualities required by our law, except in an absolute fiction created by the statute of another State, my present impression is, that we should look at the *real facts* of the case, and give the inheritance to those entitled under our own laws.

GODFREY RUDOLPHE, Captain of Ship Blanche, *v.* THE CITY OF NEW ORLEANS.

Action to recover damages from defendant for alleged illegal conduct of the Board of Health, in ordering the ship to Fort Jackson, after her arrival in the city. *By the Court:* We think that the fault lies with the captain of the ship in proceeding to the city without first having been visited by a health officer, and that he thereby took upon himself the risk of being compelled to return to Fort Jackson, particularly as the cholera had so recently shown itself on his ship, and there was a case of ship fever among the emigrants.

It will not be presumed on slight testimony that sworn officers have violated their duty in matters of discretion confided to them. Those who allege an illegal exercise of that discretion should be held to establish such allegation by conclusive proof.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J. *Goold & Stansbury*, for plaintiff. *Livingston*, City Attorney, for appellant.

MERRICK, C. J. This suit is brought to recover the sum of five thousand dollars damages, alleged to have been occasioned by the illegal order of the Board of Health of the city in ordering the British ship Blanche to return with its freight and passengers from Slaughter House Point, near the city, to Fort Jackson, before being permitted to land at the city.

It appears that the ship had a very large number of emigrants on board; that nine had died, five of cholera, as was supposed, one after having crossed the bar at the mouth of the Mississippi, and that there were two sick persons on board, one with the ship fever.

The ship arrived at the South-West Pass the 18th of November, 1853, and proceeded up the river to Fort Jackson, where she lay twenty-four hours, and no health officer making his appearance, came up to Slaughter House Point. *Dr. Hester*, the boarding physician, with a scretary, *Mr. Beecher*, boarded the ship, and finding that five deaths of cholera were reported on the log, and that the vessel was in a filthy condition, communicated the facts to the Board of Health, and the following order was made, to wit:

"*Resolved*, That *Capt. Rudolphe*, of the ship Blanche, be notified that under no pretext whatever will the said vessel, or her passengers, be allowed to land at any points within the limits of the city, but that he be ordered to return with his ship and passengers to either Fort St. Phillip or Jackson and fumigate the vessel, and on proper representations from the officers of this Board, at the Quarantine grounds, at the above named Fort, he will be allowed to proceed to this city."

In pursuance of this order the captain proceeded with the ship to Fort Jackson, and twelve or fifteen days were lost by this order before the ship commenced unloading.

The Judge of the District Court gave judgment in favor of the plaintiff for $1023, cost of towage and hands, and the defendant appealed. The plaintiff has not presented us with any written or oral argument.* But the charge contained in the petition is that the acts, above mentioned, of the Board of Health,

* The Reporter has been requested by the Chief Justice to state that after the opinion had been prepared in this case, a brief was filed by plaintiff's counsel. It failed to change the conclusions to which the court arrived, and the decision, as prepared, remained unchanged. Through inadvertence the above expression was suffered to remain. Justice to plaintiff's counsel requires that this explanation should accompany the report of the case.

in relation to the ship Blanche were "oppressive, illegal and unnecessary." Plaintiff alleges "that the Board of Health was organized by an ordinance of the City Council of New Orleans; that the Mayor of said city was the President of said Board, and that to the Board of Health was delegated the supervision of vessels arriving at the said city, and other sanitary matters, and that the Mayor, Aldermen and inhabitants are responsible for the acts of said Board of Health."

It does not appear that any effort was used by the officers of the ship to procure the attendance of a health officer whilst the ship was lying at Fort Jackson, either by a communication on shore or with the agent of the ship at this city. It is proven that the ship lay at Fort Jackson twenty-four hours, and not having been boarded by a health officer, she was towed up to Slaughter House Point.

We think that the fault lies with the captain of the ship in proceeding to the city without first having been visited by a health officer, and that he thereby took upon himself the risk of being compelled to return to Fort Jackson, particularly as the cholera had so recently shown itself on his ship, and there was a case of ship fever among the emigrants. *Dr. Hester*, the boarding physician, had the reputation of being an able physician, and he was under the apprehension that one of the cases of sickness on board would terminate in cholera. He was acting officially, and we do not think the uncertain testimony of two or three inexperienced men should be sufficient to invalidate his official acts. We have repeatedly said that we will not presume upon slight testimony that sworn officers have violated their duty in matters of discretion confided to them, and that those who allege an illegal exercise of that discretion should be held to establish such allegation by conclusive proof. *Dubose* v. *Levee Commissioners of Carroll*, 11 An. 165; ——— v. *Police Jury of West Baton Rouge*, ibid.

Although it is shown that there was considerable excitement in the city, arising from the arrival of this ship with sickness on board, we see nothing to induce us to suppose that the order of the Board of Health, in reference to the Blanche, was not justified by the facts, and that they did not, as prudent guardians of the health, and having also in view the rights of the emigrants and the owners of the ship, exercise wisely the discretion vested in them by the ordinances of the city of New Orleans.

This view of the case renders it unnecessary to examine the question whether the city can be rendered responsible for the illegal acts of the Board of Health.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff, and in favor of the defendant, and that the plaintiff pay the costs of both courts.

City of New Orleans *v.* The Wardens of the Church of St. Louis.

A cemetery is an indispensable part of every city, or town, and wherever situated, must be in the neighborhood of private property. Such cemetry is not a nuisance because it depreciates the marketable value of the property in its neighborhood.

The doctrine that the city of New Orleans has a right to violate a contract, and redress is to be had only in damages against the city, is as unsound as it is novel. The violation of a contract may be, and very often is, the ground of an action sounding in damages against the party who has violated the contract. But the claim in such a case is for the reparation of a wrong, and the very opposite of a recognition of a right to violate a contract.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Livingston*, City Attorney. *Preaux*, for defendants and appellants.

Buchanan, J. (Merrick, C. J., absent.) The Legislature of the State, by an Act approved the 16th March, 1848, (Session Acts, p. 81,) authorized the defendants, a religious corporation, to establish within the limits of the city of New Orleans, a cemetery for the burial of Roman Catholics; provided, says the act, said cemetery be established at a distance of at least one mile from the bank of the river Mississippi, and provided the consent of the municipality, in which the same may be located, be first obtained.

Under the authority given them by this Act of the Legislature, the defendants purchased a piece of ground, measuring two arpents front, on the Bayou St. John, by a depth of fourteen or sixteen arpents, the same being more than a mile distant from the bank of the Mississippi; and on the 18th of November, 1850, the council of Municipalty No. Three, within which the ground is situated, gave its consent, by resolution, to the establishment of a cemetery by defendants, upon certain conditions therein expressed, on the said piece of ground; and by another resolution, authorized the Mayor to sign all notarial acts that the defendants might require, in order to carry into effect the resolutions of the council.

On the 6th of December, 1850, a contract was passed by notarial act between *A. D. Crossman*, Mayor of the city of New Orleans, and *F. Labatut*, President of the Board of Wardens of the Church of St. Louis, reciting the above mentioned resolutions of the Council of Municipality No. Three, and containing reciprocal stipulations on the part of the two contracting parties, in conformity therewith.

The present suit is brought by the city of New Orleans, a corporation, which by the Consolidation Act of 1852, has succeeded to the Municipality No Three, to enjoin the defendants from making use, as a cemetery, of the piece of ground on the Bayou St. John, acquired by them as aforesaid, under authority from the Legislature, and mentioned in the resolutions and notarial contract of Municipality No. Three.

The reason alleged for the injunction prayed for, is that the present municipal corporation has repealed, by resolution adopted the 4th December, 1854, the ordinance passed by Municipality No. Three, on the 18th of November, 1850, granting permission to the Church of St. Louis, to establish a cemetery on the land purchased by them near the Bayou St. John. The petition alleges, moreover, that said cemetery is, and will become a nuisance, and detrimental to the health of the city.

The defendants answer: 1st. That they derive their authority to have and use the land in question for a cemetery, from a statute of the State, which cannot be invalidated or rendered inoperative by a city ordinance. 2d, That the cemetry is not a nuisance. And, 3d, That by the contract with the late Third Municipality, the defendants have a vested right, of which plaintiffs, as the other party to that contract, cannot deprive them without their consent.

On the trial of the cause, there was not a syllable of evidence to show that the cemetery in question is a nuisance. The only parol evidence offered by plaintiffs, is that of real estate brokers, who give their opinions as to the influence of a cemetery in depreciating the value of property belonging to certain proprietors in the neighborhood, being the same individuals who heretofore sued out an injunction, which was dissolved by judgment of this court last year. See the case of *Musgrove et al.* v. *Catholic Church of St. Louis*, 10 An. 481.

We cannot perceive that the fact of *Mr. Ramos'* or *Mr. Blanc's* property being depreciated in a speculative point of view, by the neighborhood of a cemetery, affords a good reason for the city to prohibit the cemetery. It is very evident that, wherever located, the cemetery must be in the vicinity of private property, belonging to persons, who might be able to prove that the marketable value of their property is injuriously affected by such vicinity.

But we deem it unnecessary to maintain by argument, that a cemetery is an indispensable part of every city or town. The case of the *Brick Presbyterian Church* v. *The Mayor*, 5 Cowan, where the corporation of New York shut up a grave yard, after it had been in use for sixty years, which had been originally opened with their permission, is no precedent at all for this proceeding, when, at most, only one or two interments have been made, since the permission of the municipality was given. The other cases cited by plaintiffs' counsel, are cases of an abatement of flagrant nuisances, proved to be such, by acts of the municipal authorities, often very summary, but justified by the police powers vested in those authorities, for the protection of the public health and the safety of life and property. The existence of very extensive powers for such purposes in municipal corporations, has been too often recognized, to be now the subject of dispute.

But the counsel of the city takes much higher ground for his client. He holds, that if the repeal of the ordinance of 18th of November, 1850, be not justified by the facts, and if it be even a manifest violation of a contract on the part of the city, yet the latter has the power to violate its contracts, and the defendants have no redress, except in an action for damages. The following is the language of the learned counsel:

"The municipal corporation, acting within its corporate powers, can, as an individual, make and break contracts. If there is no justification under the powers conferred, then it can be made liable to pay such damages as would naturally flow from the breach of the contract. But the breach of the contract would put an end to the cemetery proposed to be established, and the Wardens would be compensated in the damages proved and awarded."

This is a doctrine as unsound as it is novel. The violation of a contract may be, and very often is, the ground of an action sounding in damages, against the party who has violated the contract. But the claim in such a case is for the reparation of a wrong; and the very opposite of a recognition of a right, to violate the contract.

NEW ORLEANS v. ST. LOUIS CHURCH

This is believed to be the first case of the violation of a contract being made a ground of action on the part of him who has violated it.

Judgment reversed; and injunction dissolved, at costs of the plaintiff and appellee.

THOMAS J. GOODMAN & SON *v.* WM. ALLEN at al.—JOHN CARROLL *v.* T. J. GOODMAN & SON et al.—LEXINGTON LIFE, FIRE AND MARINE INSURANCE COMPANY *v.* WM. ALLEN et al.—JOHN CARROLL *v.* LEXINGTON LIFE, FIRE AND MARINE INSURANCE COMPANY—MOSES GREENWOOD, Surety and Intervenor.—Consolidated Cases.

The validity of an attachment cannot be drawn in question collaterally, except in cases where there is an entire want of citation.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Edwards and *Bonford*, for *Greenwood*, surety, intervenor and appellant.

Mott & Fraser, for appellees.

VOORHIES, J. (MERRICK, C. J., absent.) This is the sequel of the consolidated cases decided in 6 and 8 An. 371 and 381.

The object of the present suit is to determine the question in relation to the ownership of the property in controversy between the plaintiffs and *George W. Hynson*, as curator of the succession of the late *John Carroll*.

The curator in his answer avers, in addition to his former averments, that the steamboat New Hampshire never came into his possession; that he does not know where she is, but believes that she has been lost, worn out or destroyed, and that he has no means of producing said boat.

Moses Greenwood intervened, and joined the curator in resisting the plaintiffs' demand. He alleges that *Carroll* was the true owner of the boat, and that the attachments were wrongfully sued out against *Allen et als.*, inasmuch as the same were based on claims for damages. To this the plaintiffs answered, that it was true *Greenwood* was interested in the event of the present suit, and that they had no objection to his intervention; but denied specially that *Carroll* ever was the owner of the steamer, and that whatever title he held was fictitious and fraudulent, and made for the purpose of cheating and defrauding the plaintiffs; and that the intervenor had no right to question the validity of their judgment against *Allen et al.*

The decision in *Gibson* v. *Foster*, 2 An., 507, is conclusive that the validity of an attachment cannot be drawn into question collaterally, except in cases where there is an entire want of citation. This view of the law we think is a sufficient answer to the intervenor's objection to the Judge's charge to the jury that the nullity or illegality of the attachment could not avail him in this case to defeat the plaintiffs' recovery on the bond.

On the merits, the only question presented is one of fact. After a careful consideration of all the circumstances disclosed by the record, we are not prepared to say that there is any error in the verdict rendered by the jury, to whom the cause was submitted. Our conviction is, that the pretended judicial sale of the steamer to satisfy the pretended claims of *Carroll* and others, was

a mere device for the purpose of screening the property from the pursuit of the creditors of the two *Allens*, the defendants in the original suits. It does not appear to have effected any change in the relation which had previously existed between all the parties, who continued to remain on the boat. The liability of *Greenwood*, as surety of *Carroll's* bond, clearly resulted from the fact that the plaintiffs had sought in vain the satisfaction of their judgment by execution against the two *Allens*, their debtors, and the failure of the curator of *Carroll's* estate to surrender the steamer.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

DAVID P. WILLIAMS *v.* STEPHANIE CHOTARD AND HUSBAND.

The whole system of administration of minors' estates in Louisiana is opposed to an anticipation of the means of the minor by purchasing property on credit for his account.

Article 334 of the Code, which authorizes, under certain circumstances, the mortgage of a minor's property, has reference to property which belongs to the minor at the time of the application of the tutor, and the convening of the family meeting; but a prospective mortgage of property which it is proposed to acquire, is not authorized by the Article.

The tutor of the minor, defendant, had filed a petition, proposing an investment of funds of his ward, to the amount of three thousand five hundred dollars cash, and the advice of the family meeting and judgment of the court followed that proposition. But the tutor only invested one thousand dollars in cash, and created a debt for the remainder. *By the Court:* This variance would release the defendant from the obligation of paying the price of this purchase, even were it such as would have been legally binding on her, if made in accordance with the terms fixed by the family meeting.

Code 341, 343, 348.

APPEAL from the District Court, Ninth District, Parish of Concordia, *Cooley*, J.

Stacy & Sparrow, for plaintiff. *Shaw*, for defendants and appellants.

BUCHANAN, J. In order to determine what limits, if any, exist to the authority of a tutor of a minor to purchase real estate for his ward, we must take all the provisions of the Code into consideration in a connected view.

The Article 348 authorizes such purchase to be made by the tutor, upon an order of court, rendered on the advice of a family meeting. But the Article 343 requires the tutor not to encroach upon the capital of his ward, except in one case, which is, the insufficiency of the minor's revenue to procure him subsistence. Again, the Article 341 requires the tutor to make investments for his ward in one case, namely, where the revenues of the minor exceed his expenses. Under the second paragraph of that Article, if the tutor make such investment in the form of a loan, secured by mortgage, it seems that he can do so, without consulting a family meeting, or obtaining an order of court. But if the tutor should judge it more advisable, in the interest of his ward, to invest in the form of a purchase of real estate, rather than in that of a loan upon mortgage, the subsequent Article 348 seems to authorize him to do so, but under restrictions, which are evidently intended as safeguards against an injudicious investment in this form. In one word, the whole system of administration of minor's estates in Louisiana, is opposed to an anticipation of the means of the minor by purchasing property on credit for his account. *Hall* v. *Woods*, 4 An. 86; *Darce* v. *Leaumont*, 5 Rob. 286.

The Article 334 of the Code prohibits the alienation or mortgage of the im-

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movable estate of a minor, unless (on the representation of the tutor that it is for the interest of the minor that a sale or mortgage of that kind should be made) a meeting of the family, duly assembled, shall declare that the sale or mortgage is of absolute necessity, or of evident advantage to the minor. We hold that this Article has reference to the property which already belongs to the minor at the time of the application of the tutor and the convening of the family meeting, and that a prospective mortgage of property, which it is proposed to acquire for the minor, is not authorized by the Article.

In the case at bar, real estate has been purchased for minors on a credit, at a price which the evidence clearly demonstrates to have been exorbitant, or to say the least, speculative. A prospective mortgage has been created, in the contract of sale, for the security of the payment of the price. And in addition, what seems entirely without warrant of law, and is not sanctioned by the family meeting, the same contract makes the minors partners with a third party, their vendor, in the cultivation of a cotton plantation. The defendant, who was one of the minors in whose name this threefold contract of purchase, mortgage and partnership has been made, is not bound by it. Apart from its manifold illegalities, it was most evidently injurious as to her.

The evidence shows that the tutor of defendant had under his administration, for many years before this purchase, a cotton plantation, inherited by defendant from her father, which yielded an average crop of eight hundred bales of cotton annually, that her tutor has never rendered her any account. Under this evidence, the tutor should have had in hand, belonging to the defendant, at the time of this purchase, in 1848, a sum very largely exceeding the whole price of the undivided half of the plaintiff's plantation thus purchased. It was the tutor's duty to have invested this fund for defendant, instead of involving her in debt; and it was the duty of the under tutor, and of the family meeting, to have required him to do so.

Thus far we have examined the binding effect of this purchase upon the defendant, with reference to the general authority of the tutor and family meeting under Article 348 of the Civil Code. We have done so because of the importance, as precedents, of all decisions of this court upon the form and effect of acts done in the administration of minors' estates. But in strictness we were not required to go into the general question upon this occasion. For the evidence shows the purchase of real estate, made by *E. G. Howell*, as tutor of defendant, from the plaintiff, on the 9th September, 1848, was not made upon the terms and conditions authorized by the Judge, on the advice of the family meeting.

In his petition presented to the District Court, and filed the 9th September, 1848, the tutor represents that his wards are in the receipt of a considerable sum of yearly income from their estates in the parish of Concordia; that *David P. Williams* has a cotton plantation in said parish, of which he is willing to sell the undivided half, at the rate of thirty dollars per acre, upon the following terms: $3500 cash, of which $1000 to be paid to the vendor, and $2500 to be paid the Mechanics' and Traders' Bank, upon a mortgage held by said bank, etc. That petitioner believes it to be for the interest and evident advantage of the minor to purchase of *Mr. Williams* the half of his plantation on the terms specified, but as petitioner is not permitted to invest the funds of his wards without the advice of a family meeting, he prays that a family meeting be convened to give their advice, and that he be authorized to make said purchase in behalf of said minors, upon the terms and conditions herein set forth.

On the same day, 9th September, 1848, the Clerk of the District Court orders a family meeting to be convened, touching the matters contained in the petition.

On the same day the family meeting is held before the Parish Recorder, and "having carefully deliberated upon the propositions contained in said petition, advise that said tutor make the purchase, as prayed for in his said petition."

On the same day, the proceedings of the family meeting are homologated by the Clerk of the court, and the tutor authorized to make the purchase upon the terms and conditions set forth in the petition.

And finally, on the same day, 9th September, 1848, the plaintiff, by act passed before the Parish Recorder, sells to the minors, *Stephanie Minor* and *Lucy Howell*, represented by their tutor, the undivided half of his plantation, on the following terms and conditions: one thousand dollars in cash, six thousand five hundred and sixty-seven dollars and eleven cents in the assumption of a mortgage debt due by the vendor, to the Mechanics' and Traders' Bank, which the said *Howell*, tutor, binds himself to pay and discharge whenever thereto required by said Bank, etc.

From this recapitulation of the proceedings, it is very evident that the tutor's petition to the court proposed an investment of funds of his wards in hand to the amount of three thousand five hundred dollars cash, and that the advice of the family meeting and the judgment of court followed that proposition. Yet the whole amount of funds of the minors invested was only one thousand dollars, and a debt was created for the remainder.

This variance would release the defendant from the obligation of paying the price of this purchase, even were it such as would have been legally binding upon her, if made in accordance with the terms fixed by the family meeting.

The evidence shows that four thousand one hundred and ninety-two dollars were paid by the minors, or for them, on account of the price of this illegal purchase; one-half of which by defendant. We are of opinion that her claim in reconvention for a restitution of this price from plaintiff is well founded.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, that there be judgment against plaintiff, annulling, so far as the defendant is concerned, the sale of real estate of the 9th September, 1848, by plaintiff to the minors *Stephanie Minor* and *Lucy Howell*, by act before *A. C. Hunter*, Recorder of the parish of Concordia; and that defendant recover of plaintiff two thousand and ninety-six dollars, with interest from the 1st May, 1854, until paid, and costs of both courts.

W. E. & J. C. Delavigne *v.* F. A. Williamson.

The digging of ditches for the purpose of draining water from an adjoining property, the felling of trees, and the occasional cutting of wood on uncultivated land, are acts which do not necessarily partake of the character of detention, or intended occupancy.

The possession of a front tract of land held under a different title, as a distinct and separate property, cannot be considered as extending to a tract claimed under an alleged title from the United States, and subject to a reservation in favor of a third person.

APPEAL from the District Court, Fifth Judicial District, parish of Assumption, *Cole*, J. *Roman*, for plaintiffs. *J. C. & A. Beatty*, for defendant and appellant.

Lea, J. These suits which have been consolidated as involving the same issue, are in the nature of possessory actions, accompanied by claims for damages for trespass.

Notwithstanding the verdicts of two juries in favor of plaintiffs, we find the testimony in support of the plaintiffs' claims, assuming it to be true, wholly insufficient to support a possessory action. The acts of possession relied upon by the plaintiffs, cannot be considered as amounting to such a corporeal detention of the property claimed, as might serve as a basis of a subsequent civil possession. The digging of ditches for the purpose of draining the water from an adjoining property, the felling of trees, and the occasional cutting of wood on uncultivated land, are acts which do not necessarily partake of the character of detention, or of intended occupation. The only acts of this character disclosed by the evidence, are such as were exercised by the defendant himself, such as clearing a portion of the ground from which his employee appears to have been driven by acts which were sufficiently menacing to put him in bodily fear, and to effect, at least a temporary dispossession of the defendant. Moreover, the petitions do not allege, nor does the evidence disclose, the extent of the alleged usurpation by the defendant, so as to enable the court or jury to determine the limits of the property claimed by plaintiffs. As in the case of *Kitridge* v. *Hebert*, we think there was no actual possession by the plaintiffs of the portion claimed as forming a part of the back concession, and that the possession of the front tract, held under a different title as a distinct and separate property, cannot be considered as "extending to a tract claimed under an alleged title from the United States, and held subject to the reservation in favor of *De Deva's* claim." See Civil Code, Article 3400. *Kitridge* v. *Hebert*, 9 An. 154. 5 An. 594. 12 Martin, 17.

It is ordered, that the judgments appealed from be reversed; and that in the consolidated cases of *W. E. Delavigne* v. *F. A. Williamson*, and *J. C. Delavigne* v. *F. A. Williamson*, there be judgment for defendants; the plaintiffs and appellees paying costs in both courts.

City of New Orleans v. Mrs. A. Lesseps.

Although the Act of the Legislature has not declared that the delivery of the tax roll should have the force and effect of a final judgment, yet a party who has not made an effort to have the errors corrected, in the manner indicated by the Act, and seeks to go behind the assessment roll, should show some valid reason why he did not make an attempt to have it corrected, while it was subject to correction; and, moreover, not only show that there has been an error made to his prejudice, but also show the precise amount he is entitled to have deducted on account of such error.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Heistand & Levy, for plaintiffs. *Seghers*, for defendant and appellant.

Merrick, C. J.* If it be admitted that a party who has made no objection to the assessment roll, previous to its homologation, can show gross error in it, when sued for his taxes, it by no means follows that the tax roll should not have the same force against him as any other obligation, and that when he alleges errors, he should be held to show those of a grave character, and establish them by conclusive proof.

In this case, there is no proof that the sixteen negroes which were removed from the city, are the only ones belonging to the defendant; neither is there any testimony to show the amount that the assessment should be reduced, where the property is alleged to be rural. The assessment roll is, by law, delivered on the first Monday of October of each year, by the Board of Assessors, to the Recorder of the district in which the property is situated. Due publication is then made of this fact, and for thirty days thereafter any person aggrieved by the assessment may make an appeal in writing, stating particularly the correction desired. The Recorder, Justice or Parish Recorder thereupon, has the power to correct any errors and reduce the amount of the assessment, upon notifying and conferring with the Assessor. Acts 1850, p. 136. Acts 1855, pp. 511, 510. After the expiration of the thirty days publication, the assessment roll is delivered, and it is no longer in the power of the tax payers to cause corrections to be made. Besides the privilege of giving in the property under oath, the Legislature has, therefore, provided for the tax payer, a ready and convenient mode for the correction of errors in the assessment of taxes, and if parties, who have property within the district where the assessment is made, do not choose to attend at the proper office, in order to have the errors corrected, they can hardly expect the courts to be more vigilant to protect their rights, than they have shown themselves.

Vigillantibus et non dormientibus jura subveniunt.

Although the Act of the Legislature has not declared that the delivery of the tax roll shall have the force and effect of a final judgment, yet, we think, that a party, who has not made an effort to have the errors corrected before the Recorder, and who would go behind the assessment roll, should show some valid reason why he did not make an attempt to have it corrected, while it was subject to correction; and, moreover, not only show that there has been an error made to his prejudice, but also show the precise amount he is entitled to have deducted on account of such error. Where tax payers are unwilling

*In the *City of New Orleans* v. *Pouts*, the same questions were involved and decided as in this case, in April, 1856.

and neglect to attend to the correction of the tax roll in the districts where they hold property in the city, the presumption is, that they are indifferent to the valuation of their property, as well as to the quantity which may be assessed in such district in their names. *Prima facie*, it is an assent to, and acquiescence in the tax roll as delivered.

The defendant, in this case, has failed to show that she made any effort through her husband, or otherwise to have the tax roll corrected; that she had not sixteen other negroes, besides those sent to *Mr. Soulé's* plantation, and has failed to prove the amount which should be deducted on account of the alleged rural property; she is, therefore, without defence to this action.

Judgment affirmed.

Charles H. Webb *v.* Temple S. Coons.

Sale under *fi. fa.* set aside for want of valid writ and notice.

It is where the purchaser is evicted on the ground that the thing adjudged to him belongs to another person than the party in whose hands it was taken, that he is left to his recourse for reimbursement against the seized debtor and seizing creditor. But where the seized debtor himself seeks to rescind the sale on account of informality, equity requires that he should make the *bona fide* purchaser whole before he evicts him.

C. P. 711.

APPEAL from the District Court, Tenth District, parish of Madison, *Farrar*, J. *Wallace*, for plaintiff and appellant. *Harrison* and *Dubose*, for defendant.

Voorhies, J. The defendant is appellant from a judgment setting aside as informal, the sale of a tract of land alleged to have been made to him by the Sheriff, under writs of *fieri facias* against the plaintiff.

The following facts are disclosed by the record: The firms of *Peet & Sims* and *A. F. Dunbar & Co.*, recovered, respectively, judgments against *Webb*, the appellee, on which writs of *fieri facias* were issued on the 19th of January, 1849. The writs thus issued, were returned by the Sheriff on the 16th of March, 1849, and on the next day, alias writs were issued. On the 23d of March, a notice of seizure, dated the 14th of the same month, was served by the Sheriff on the appellee. On the 28th of April following, *Eliza Jane Webb*, the appellee's wife, instituted an action against the seizing creditors to set aside the seizure, on the ground that the property belonged to her and not to the seized debtor; and also claimed the sum of $200 as damages. Thereupon, she prayed for judgment in her favor against them, and that the Sheriff should be notified of her demand. Although she did not pray for an injunction, and none was granted for aught that appears to the contrary, yet the execution of the writs, it would seem, was suspended until the final termination of her suit, which resulted in a judgment rendered by our predecessors, against her. See 7 An. 92. On the 8th of June, 1852, the Sheriff returned the writs. His return shows, that the property was advertised for sale by him pursuant to a notice of seizure, which he certifies to have been given to the appellee by his predecessor, on the 23d of November, 1849. The only return on either of the writs, which may be ascribed to the former Sheriff, is

as follows, viz: "Received on the 17th day of March, 1849." The next sentence is in these words: "On the 24th of March, 1852, I advertised all of the property described in the within notice of seizure." The property was adjudicated to the appellant on the first Saturday in June, 1852, at twelve months' credit, for the price of $200."

It is urged by the appellant, that the date of the notice of seizure is erroneously set forth in the Sheriff's return; that instead of the 23d of November, it should have been the 23d of March, 1849. We consider this objection inadmissible, inasmuch as it was competent for the Sheriff to amend his return, at any time, so as to make it conformable to truth. Had he been required by the appellant, we have no reason to doubt, that such an amendment would have been made by him. But, be this as it may, the amendment appears to us to be immaterial, as the notice of seizure of the 23d of March, could only apply to the first writs which had been issued in those cases; so that it would seem there was was neither seizure, nor notice of seizure, under a valid writ. For this reason, we do not think the District Judge erred in setting aside the sale. Nor do we think he erred in requiring the plaintiff to repay the purchase money advanced by *Coons*, and which went to pay his debts. It is where the purchaser is evicted on the ground, that the thing adjudged to him belongs to another person than the party in whose hands it was taken, that he is left to his recourse for reimbursement against the seized debtor and the seized creditor. C. P. 711. Where the seized debtor himself seeks to rescind the sale on account of informality, equity requires that he should make the *bona fide* purchaser whole, before he evicts him. 6 An. 581. The judgment requires amendment in this respect.

It is therefore ordered and decreed, that the judgment of the District Court be so amended, as that no writ of possession or execution shall issue in favor of the plaintiff, and the said judgment shall be without effect until the plaintiff shall tender to the defendant, or deposit in court for him, the sum of two hundred dollars, with five per cent. interest from the date of its payment by defendant. It is further ordered, that in other respects, the judgment be affirmed; the costs of appeal to be paid by the plaintiff and appellee.

PONTCHARTRAIN RAILROAD COMPANY *v.* THE NEW ORLEANS AND CARROLLTON RAILROAD COMPANY AND LAKE PONTCHARTRAIN RAILWAY COMPANY.

The Pontchartrain Railroad Company was incorporated in 1830, with the exclusive privilege of "constructing and using a railroad, or railway, leading to and from the city of New Orleans, its faubourgs, and the incorporated limits thereof, to and from Lake Pontchartrain," etc. In 1833 the New Orleans and Carrollton Railroad Company was incorporated for the construction of a railroad from New Orleans to Carrollton. In 1840 the Jefferson and Lake Pontchartrain Railway Company was incorporated for the construction of a railroad from Carrollton to Lake Pontchartrain. The two last named companies entered into an arrangement by which "through" trains were run from New Orleans to the Lake. The first named company (the plaintiffs) sued out an injunction against the defendants, and asked for damages, because of the alleged violation of the exclusive privilege granted to plaintiffs. *By the Court:* A railroad from New Orleans direct to the terminus of the Jefferson and Lake Pontchartrain Railroad at the Lake would have been an infringement of the privileges granted to the plainfiffs by the act of incorporation. Does the connection of the two points, by means of the union of two roads by a circuitous route, change

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the character of the Act. Here we think a distinction must be taken. If the object of the two companies was, in good faith, to accommodate different lines of travel and trade, and not to engross the same travel and trade which would naturally pass over plaintiff's road, it would doubtless be lawful, although occasionally a person might use first one road and then the other to arrive at the lake or city. For it is not so much the motives of the traveling public with which we have to do as it is the motives of the two companies. But if the union of the two roads was made for the purpose of transporting freight or passengers to and from the prohibited points, it is difficult to see on what ground the Act can be maintained. The Legislature could no more grant this power to two or more companies than it could grant the same to one.

Neither of the Acts incorporating defendants is unconstitutional in itself, because their roads were not within the prohibited points. But the moment they, by their union, connect these points by railroad, their act becomes unconstitutional (so far as it concerns the direct travel between the two points) as much so as would have been a single Act of incorporation and railroad for the like purpose.

APPEAL from the Second District Court of New Orleans, *Lea*, J. *Eustis* and *Goold & Stansbury*, for plaintiffs. *Benjamin, Bradford & Finney*, for defendants and appellants.

MERRICK, C. J. The Pontchartrain Railroad Company was incorporated by an Act of the Legislature, approved January 30th, 1830. It was, therefore, one of the earliest of the railroad experiments, which have since contributed so largely to develop the resources and increase the wealth of the United States.

The fifth section of the Act is in these words, viz:

"Be it further enacted, that the said corporation is hereby invested with all the rights and powers necessary for the construction and repair of a railroad from the city of New Orleans to some suitable point on Lake Pontchartrain, or bayou or other stream leading to said lake, not exceeding ninety feet wide, with as many sets of tracks as said company may deem proper; and they and their agents may enter upon, use and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other works necessary or useful to said road, or for any other purpose necessary or useful in the construction or repair of said road or its works. And it is stipulated and agreed, that for and during twenty-five years from the passage of this Act the said corporation shall have the exclusive right and privilege of constructing and using a railroad or railway leading to and from the city of New Orleans, its faubourgs, and the incorporated limits thereof, to and from the Lake Pontchartrain; and during that period no other body corporate, or person or persons, shall make any similar road for the transportation of property between said city, its faubourgs, and the incorporated limits thereof, and said lake, or be invested with any similar privileges. And it shall and may be lawful for the said corporation to continue and extend the said railroad to any point within the said city of New Orleans, with the like rights and privileges; provided always, that said railroad be so constructed and made as not to prevent the use of or travelling in the streets; and provided also, that the said railroad shall not pass through any of the streets of said city without the consent of the Mayor, Aldermen and inhabitants of the city of New Orleans being first had and obtained. And if the said railroad shall not be commenced in two years from the passage of this Act, and shall not be finished in five years therefrom, then this Act shall be null and void."

The phraseology of this section is somewhat remarkable. The Legislature assumes at once the character of a contracting party as well as a lawgiver. It says: "And it is *stipulated and agreed* (not enacted) that for and during the

space of twenty-five years from the passage of this Act said corporation shall have the exclusive right and privilege of constructing and using a railroad or railway leading to and from the city of New Orleans, its faubourgs, and the incorporated limits thereof, to and from Lake Pontchartrain." POYDRAS'S R.R. v. CARROLLTON R. R.

In 1833 the New Orleans and Carrollton Railroad Company was incorporated with "all the powers necessary for the construction and repair of a railroad from some point in the suburb St. Mary, through Nayades street to its termination in Livaudais, and from thence to a street named First street, on a plan made of the plantation formerly belonging to *Barthelmy Macarty*, and which plan is deposited in the office of *Greenbury R. Stringer*, and thence through said street to the river Mississippi." Hence it is seen that the termini of this road were one within the city, the other on the Mississippi river at Carrollton. No one pretends that this road in any manner interfered with the exclusive franchise previously granted to the plaintiff.

In 1840 the Legislature incorporated the Jefferson and Lake Pontchartrain Railway Company, with power to construct a railroad from Carrollton to some suitable point on Lake Pontchartrain, or bayou or other stream leading to the lake, with as many sets of tracks as might be deemed proper by the company.

It must be conceded that this second road connecting the Mississippi river and the town of Carrollton with the lake is no violation of the charter of the plaintiffs. It had its termination on the river, some miles above New Orleans, and the termination on the lake was, we suppose, about three miles from that of the plaintiffs' road.

The Jefferson and Lake Pontchartrain Railway was not completed until the 14th day of April, 1853, when the company commenced running the cars. The stock of this company is principally owned by the New Orleans and Carrollton Railroad Company, and the road was built with money furnished by the latter. Indeed the several directors of the Jefferson and Lake Pontchartrain Railway Company are also directors of the New Orleans and Carrollton Railroad Company, and the principal officers of the two companies, viz: the President, Secretary and Chief Engineer, are the same; the other engineers and subordinate officers being different in the two companies, and the books of account and pay-rolls of the two companies are kept distinct.

We attach, however, no importance to the fact that the companies have the same officers and directors, and sustain the relationship which they do to each other. We shall treat them, for the purpose of this controversy, as two distinct bodies.

On the 29th day of March, 1853, the two companies entered into an arrangement, by which they contracted with each other for the privilege of running "through" trains over both railroads, and regulating the amount to be paid by each company therefor.

On the 29th of June, 1853, the wharf at the lake-end of the Jefferson and Lake Pontchartrain Railroad having been completed, a tariff of charges for the transportation of passengers and freight to and from Tivoli Circle, in the city of New Orleans, and Lake Pontchartrain, was adopted for both companies and published. Notice was likewise given of the manner by which a connection was formed with the coast steamers, Creole and California, for the transportation of passengers across the lake and to and from the coast, and the public were informed that the boats would leave on the arrival of the trains one hour in advance of the usual hours of the Pontchartrain Railroad, from which point the same boats would leave as heretofore.

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The present action was instituted on the 4th of June, 1853, to restrain the defendants from transporting passengers and property to and from the lake, and to recover five thousand dollars for each month until the termination of this suit.

The judgment of the lower court decreed the injunction prayed for, and awarded to the plaintiff $12,000 damages.

The defendants appealed.

The difficulty of the case lies in the fact that the New Orleans and Carrollton Railroad Company and the Jefferson and Lake Pontchartrain Railroad Company, as separately incorporated, have the right generally to transport freight and passengers to and from their respective termini, and such transportation cannot be considered an infringement of the franchises of the plaintiffs. And the question arises, if the New Orleans and Carrollton Railroad Company have the right to transport freight and passengers to and from Carrollton and New Orleans, and if the Jefferson and Lake Pontchartrain Railway Company have the like right to transport freight and passengers to and from Carrollton and the lake, why may not the two combine, and forward freight and passengers by one continuous line of railroad directly from the city to the lake, or from the lake to the city?

The answer to this question decides the case.

Tivoli Circle is within the limits of New Orleans, as incorporated prior to 1830. A railroad from New Orleans direct to the termination of the Jefferson and Lake Pontchartrain Railroad on the lake would have been an infringement of the privileges granted to the plaintiff by the Act of incorporation, according to the decisions in the cases of *Pontchartrain Railroad Company* v. *The Lafayette and Pontchartrain Railroad Company*, 10 An.; *Same* v. *Ranney*, 15 L. R., 404. Does the connection of the two points by means of the union of two roads, by a circuitous route, change the character of the Act?

Here, we think, a distinction must be taken. If the object of the two companies was in good faith to accommodate different lines of travel and trade, and not to engross the same travel and trade which would naturally pass over plaintiffs' road, the union of the roads would doubtless be lawful, although occasionally a person might use first one road and then the other to arrive at the lake or city. For it is not so much the motives of the traveling public with which we have to do as it is the motives of the two companies.

But if the union of the two roads was made for the purpose of transporting freight or passengers to and from the prohibited points, it is difficult to see on what ground the Act can be maintained. The Legislature could no more grant this power to two or more companies than it could grant the same to one. If the Legislature could not have chartered a company, with power to build a railroad from Tivoli Circle, in New Orleans, by way of Carrollton, to the present terminus of defendants' road on the lake, for the purpose of transporting freight and passengers from those two points, it must follow that the two companies cannot lawfully unite for that purpose, for the privileges delegated cannot be greater than the right of the party delegating. If the Legislature had not the power to grant, the defendants cannot take the privileges claimed for them.

A careful examination of the second section of the Act of incorporation of the Pontchartrain Railroad Company, we think, can leave no reasonable doubt that the Legislature could not have granted this privilege claimed by defen-

dants to one or more companies. The Legislature had not only expressly covenanted and *agreed* affirmatively that the Pontchartrain Railroad Company should have the *exclusive* right and privilege to construct and use a railroad to and from the city of New Orleans, its faubourgs, and the incorporated limits thereof, to and from the Lake Pontchartrain, for the period of twenty-five years, but also it assured the company that no other body corporate, person or persons, should make any similar road for the transportation of passengers or property to or from the city, its faubourgs, and the incorporated limits thereof, and said lake, or be invested with any similar privileges.

This language is free from all ambiguity, and placed it out of the power of the Legislature, during the twenty-five years, directly or indirectly to grant to any other company or persons the right of transporting persons and property from the city to the lake by railroad.

The reason why the two Acts of incorporation of the defendants are not unconstitutional in themselves is because neither of them had within its object the two prohibited points of termination. The moment they, by their union, connect those points by railroad their act becomes unconstitutional, as much so (so far as it concerns the direct travel between the two points) as would have been a single Act of incorporation and railroad for the like purpose.

It is no answer to this reasoning to say that the Pontchartrain Railroad Company could not have built their road over the same line. For, without stopping to inquire whether such a deviation from the direct line would or would not be within the spirit of plaintiffs' charter, it is a sufficient reply to say that the Legislature could not do indirectly what it could not do directly. It could not grant a similar franchise to another company by adding thereto some other privilege or imposing some further burden, which it had withheld from the Pontchartrain Railroad Company. Subterfuge and evasion do not become the character of a sovereign State, and it is not to be presumed for a moment that the Legislature intended to allow the union of the two railroads to the prejudice of the privileges conferred upon the Pontchartrain Railroad Company. This, we think, answers the principal objections of defendants.

But it is further objected that "the inhabitants of Jefferson have a right to go on the Carrollton road, and thence to the lake by railroad, because the charter of the Pontchartrain Railroad Company does not by its terms affect travel from Jefferson to the lake, but only from New Orleans to the lake. The court cannot, therefore, order a break without infringing on the right of the people of that parish."

All this may be conceded. If the New Orleans and Carrollton Railroad Company should choose to establish their depot and run their cars from a point in the parish of Jefferson to the lake, for the purpose of accommodating in good faith the trade of that particular locality, and not the city of New Orleans, there would be no question of their right so to do. The fallacy of the argument consists in the attempt to couple that which is unlawful with that which is lawful, and while the defendants had the right to run a continuous train for the accommodation of the parish of Jefferson and the lake, it had not the like right between the city of New Orleans and the same point.

It is said "the true test of the question is whether the plaintiffs and defendants are serving the public for the same line of travel. If the line of travel is entirely different, there is no interference, although passengers and freight

may thereby obtain a choice of routes." It is further said that "when a person desires to go to the lake shore of the parish of Jefferson, the plaintiffs cannot carry him there, do not offer to do so, nor can they be compelled to do so by their charter. Their privileges and duties are co-extensive. They cannot prevent a traveler from going there on defendants' line, at the same time that they refuse to take him there themselves."

When the Legislature granted to the Pontchartrain Railroad Company its charter, it knew that its terminations would be a single point upon the lake and a like point in the city of New Orleans, and that when these points were once connected by the contemplated railroad, that the company would be unable to transport passengers to any other points upon the lake or in the city. With this knowledge, the Legislature provided that no other body corporate, or person or persons, should establish a similar road between the city and the lake. Whilst, therefore, the Pontchartrain Railroad Company is bound to carry freight and passengers from a single point in the city to a like point on the lake, it has the right to prevent any other company from carrying freight and passengers between other points on the lake and the city by the express provisions of its charter.

This view which we have taken of the case is supported by the decision in the case of *The Boston and Lowell Railroad Corporation* v. *The Salem and Lowell Railroad Company et al.*, decided by the Supreme Court of Massachusetts.

The next question to be considered is that of damages.

On the one side it is contended that there is no sufficient evidence in the record to justify the conclusion of the lower court; on the other it is said that the plaintiffs have notified the defendants that they will claim of them the sum of five thousand dollars damages per month, so long as they violate their rights; that the violation of plaintiffs' rights by the defendant is voluntary, and that so long as they choose to continue the wrong, they ought to pay the estimate the plaintiffs have put upon their own property. The reasoning of the plaintiffs may be applicable in cases of express contracts, but it does not apply to quasi offences or torts. The rule of damages is the amount of injury sustained by the plaintiffs according to the usual standard of estimation, and not according to the arbitrary estimate placed upon it by the plaintiffs. *Yarborough* v. *Nettles*, 7 An. 117.

Were this the only controversy between the parties, we might be disposed to suffer the liberal award of damages by the lower court to stand as a vindication of property. But as we are informed that other suits are pending for other portions of the time, and as this suit is not the only one for the so called vindication of property, we think that we ought to ascertain as nearly as practicable the real injury the plaintiffs have suffered by the wrongful acts of the defendants, particularly as the exclusive privilege granted the Pontchartrain Railroad Company seems to have expired by limitation on the 26th day of January, 1855, and an estimate of damages in the several suits, from the commencement of the running of the cars until the expiration of the exclusive privilege, will make good to the plaintiffs all losses it has sustained. The twenty-five years of the charter having expired, there is no future to be protected. This suit covers the period from the commencement of the running of the cars, April 14th, 1853, to the rendition of judgment, July 1st, 1854.

An accurate estimate of the damages is impossible. It was in the power of the defendants alone to have furnished us with more satisfactory proof. The defendants, having invaded the rights of the plaintiffs, and failing to furnish us with any statement of the travel through between the city and the lake, must be content with the conclusions to which we are able to arrive from such evidence as has been produced.

We find that the profit of the Pontchartrain Railroad Company increased notwithstanding the violation of their franchise by the defendants. We find further that notwithstanding all of this alleged diverted travel and trade must have passed over the Jefferson and Pontchartrain Railroad, that the road did not pay expenses.

The gross receipts of this last mentioned railroad for ten months were $17,833 45. We do not find that any tariff of charges through was adopted until 29th of June, 1853, about one year previous to the judgment in this case. The first publication in the Picayune, in evidence, bears the same date. We will assume that the previous period was equal to one entire month afterwards. This would make the total gross receipts during thirteen full months $22,291 54. But the thickly-settled country above the city, the town of Carrollton, and some travel from the Mississippi river, were also accommodated. In the absence of any other data, we must divide the sum to ascertain the travel through from New Orleans. We have $11,145 77 gross receipts. But, as already said, we find the profits of the Pontchartrain Company did not fall off in the mean time; we conclude, therefore, that the novelty and convenience of the road induced many persons to travel upon it who would not have traversed the city to travel upon the Pontchartrain Railroad.

If we again divide the above sum by two, we have $5572 88, which we may suppose was diverted from the Pontchartrain Railroad Company. The Jefferson and Pontchartrain Railroad Company received only two-fifths of the proceeds of this trade and travel: the whole sum therefore received by the two companies was $13,932 20. But it must have cost the Pontchartrain Railroad Company something to transport the passengers and freight in addition to the cost of running their locomotive: we will suppose one-third. We have an approximate loss of $9,288 sustained by the plaintiffs. A judgment for nine thousand dollars, we think, will do justice as near as practicable between these parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be amended so as to read "nine thousand dollars as damages," instead of "twelve thousand dollars as damages," and that the judgment so amended be affirmed, the plaintiffs to pay the cost of the appeal.

SPOFFORD, J., dissenting. I concur in the affirmance of the decree so far as it maintains the injunction, but I am unable to agree in the estimate of damages.

Under the circumstances, I do not think anything beyond the actual damages should be awarded. The plaintiffs should have produced more complete data to enable us to fix these damages with a reasonable degree of certainty. In the absence of such data, I am unwilling to resort to conjecture, and therefore think the damages should be nominal.

Rehearing refused.

William Pratt *v.* James A. McHatton et al.

Action for the liquidation of partnership affairs.

It is well settled that partnership books are evidence for and against the partners, in controversies arising among themselves, but only the books, and entries contained in them, at the time of the dissolution of the partnership. The entries made after this time by one of the partners, who has possession and care of the books, cannot bind the other partners, unless he has also had the books in his possession, examined the entries, and, when he had the means of ascertaining their correctness, made no objection, or in some similar manner acquiesced in or approved of the books.

By the contract of partnership, two of the partners (defendants) were required to transact the outdoor business, and superintend the sales. *Held:* They could not be expected to attend at remote places, nor await the slow process of sales at the principal points where goods were in store for the purpose of being offered for sale; and they are entitled to a credit for commissions for sales actually paid by them in good faith.

In order to hold one of the partners liable for losses on the sales of goods, it should be shown that he violated the obligations imposed upon him by the contract of partnership; and that the partners objected to his acts as soon as advised of them, or within a reasonable time after the entries in regard to such sales had been made upon the books of the firm. It is not enough to await the result of the sales to ascertain whether the same have been fortunate, or unfortunate, before objecting.

Defendants, who assumed the collection of outstanding debts, assumed, as *negotiorum gestores*, the obligation of using due diligence.

The appointment of a liquidator for the settlement of partnership affairs rests, in a great measure, in the sound discretion of the court.

Accounts due a partnership in liquidation should not be sold, unless the trouble, expense and delay of collecting, will render them less productive to the firm than their immediate sale; or unless they are desperate, or of little value, and the delay in regard to their collection, prevents a final decree of partition within a reasonable time. These and like reasons, render a sale proper.

Charges for interest made since the dissolution of the partnership, must be confined to such sums as the respective partners had promised to bring into the partnership, or for funds withdrawn by them, and in the absence of any agreement in writing, the rate must be five per cent.

The lessees of the penitentiary have no right to make any contract for the use, or hire of the negro convicts, except in the employments required by law, and any items for such services made by one of the partners, must be disallowed.

A several judgment against one, in favor of the other individual partners, should not be rendered where there are available partnership assets by which the amounts received by the partners can be readily equalized

Code 2244, 2245, 2994, 9829.

APPEAL from the District Court, Sixth District, parish of East Baton Rouge, *Robertson*, J. *Dunn*, and *J. M. & J. E. Elam*, for plaintiff and appellant. *Lacy*, *Avery*, *Davidson*, and *McHatton*, for defendants.

Merrick, C. J. This suit is brought for the liquidation of a partnership, which continued from 1844, until October, 1849. The object of the partnership is explained in the original agreement, which is as follows, viz:

"This agreement, made and entered into this 22d day of June, 1844, between *James A. McHatton*, *Wm. Pratt*, *Chas. G. McHatton*, and *George W. Ward*, all of the State of Kentucky, except *George W. Ward*, who is of the State of Louisiana, witnesseth,

That the said *James A. McHatton* and *William Pratt* have, by contract, dated the —— day of ——, 1844, leased of the State of Louisiana, through the Governor thereof, the Penitentiary of said State, for the term of five years, commencing at the date of said contract, to which reference is had, and made part of the agreement.

Now, the lessess, *McHatton & Pratt*, agree to form an equal partnership in said lease with *C. G. McHatton* and *G. W. Ward*, the four to own one-fourth interest, such to be equally bound for all the requisitions of said lease, and for all the debts that may be contracted by said institution during the continuance of the lease, and to divide all profits equally. That the said parties are to furnish the sum of five thousand dollars as capital stock to carry on the business of the institution, or so much thereof as may be deemed necessary by a majority of them.

The said *William Pratt* and *C. G. McHatton*, agree to reside permanently at Baton Rouge, and devote their whole time to the superintendence of the business of said penitentiary, without charges for their services.

The purchase of materials and supplies are to be made by *James A. McHatton* and *George W. Ward*, and also all out of door business is to be transacted by them. They are also to make all settlements of the concern with the State or individuals. The said *George W. Ward* is to superintend the sales of all articles manufactured in the penitentiary, the sales to be made for cash, or with the guarantee of some responsible commission house, if on time, which superintendence he is to give free of charge. The articles to be manufactured to be divided by a majority of the partners; no piece goods to be cut, but all sales are to be made by the piece, or to make the clause more explicit, no retail sales are to be made. This agreement to take effect so soon as the aforesaid lease is signed by the Governor of the State of Louisiana, *James A. McHatton* and *William Pratt;* this 22d day of June, 1844, in presence of the subscribing trustees.

(Signed,) GEORGE W. WARD,
JAS. A. MCHATTON,
C. G. MCHATTON,
WM. PRATT."

The defendants, *James A. McHatton*, *Charles G. McHatton*, and *George W. Ward*, in their answer, allege an indebtedness on the part of the plaintiff to the firm, and pray that they be considered plaintiffs in reconvention, and the debts due by the firm, be paid out of the assets; that the residue on hand, and the accounts, be sold at public auction, and that the defendants be paid a sum to render the amount received by them equal to that received by plaintiff; that proceeds of the sale be divided between the plaintiff and respondents; that plaintiff be condemned to pay the costs, and for general relief.

The defendants annex to their answer, a statement of the respective accounts of the parties with the firm, showing that the plaintiff had received $14,531 12; *James McHatton*, $13,518 90; *Charles G. McHatton*, 13,419 87; *George W. Ward*, $13,593 90.

They also annex a list of the outstanding liabilities, and the accounts and claims due the firm, together with a balance sheet, showing the state of the affairs of the firm to the 21st day of May, 1852.

Auditors were appointed, who stated an account between the parties, taken from the books alone. The Judge of the District Court ordered the accounts due the firm to be sold, by a receiver, at public auction, to pay the debts and be distributed among the partners, and gave an individual judgment against *Pratt*, in favor of each of the defendants, viz: in favor of *James A. McHatton*, for $300 21½; in favor of *Charles G. McHatton*, for $220 27½; and in

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favor of *George W. Ward*, for $208 36½; and decreed the costs to be equally borne by all the parties.

The style of the firm was *McHatton, Pratt & Co.* The amount of the business transacted was very large; counsel state over four millions of dollars.

After the dissolution of the firm by its limitation, the defendants alone became the lessees of the penitentiary, and conducted their business under the name and style of *McHatton, Ward & Co.*

They received the assets and books of *McHatton, Pratt & Co*, and made collections and disbursements on account of that firm. They appear to have made use of the books of the old firm for the purpose of making the entries in relation to that business. The balance sheet annexed to defendants' answer, shows the receipt of $89,619 88, and the disbursement of the same, with the exception of a balance of $494 09.

The plaintiff and appellant has raised numerous objections to the proceedings and judgment of the lower court, and we will proceed to notice them as briefly as possible.

It is objected, that the Judge of the lower court erred in admitting in evidence against the plaintiff, the books of the firm, so far as it respects the entries made in them by *McHatton, Ward & Co.*, after the dissolution of the partnership of *McHatton, Pratt & Co.*

The testimony shows, that after the dissolution, the entries were made in the books by *McHatton, Ward & Co.*, or by persons in their employ. It is not shown that a single entry was made by *Pratt*, or that he had any control over the entries, or even that he ever examined the books in reference to those entries made by defendants. A witness, *Hubbs*, the clerk of the State, says, however, that *Pratt* had access to the books as much as defendants, while he had them in possession, but that he, the witness, never had any of the receipts or vouchers in his possession. It was *Hubbs'* duty to keep the books of the State, distinct from those of *McHatton, Ward & Co.*, and what control he had over the books of *McHatton, Pratt & Co.*, after the dissolution of the partnership, is not shown. It is well settled, that partnership books are evidence for and against the partners in controversies arising among themselves, but only the books and the entries contained in them at the time of the dissolution of partnership. The entries made after this time by one of the partners, who has possession and care of the books, cannot bind the other partner, unless he has also had the book in his possession, examined the entries, and, where he had the means of ascertaining their correctness, made no objection, or in some similar manner, acquiesced in or approved the books; otherwise, they must be held, as to these entries, the books of the individual partners who made them. Such books, the Civil Code expressly excludes from being used as evidence in their favor. C. C. 2244 and 2245.

We think, therefore, the District Judge erred in allowing the entries in these books, made after the dissolution of the partnership, to be used as evidence against the plaintiff, and in relieving the defendants from the necessity of producing the obligations taken up by them, which are the best evidence of the payment and extinguishment of the debts and of the disbursements for which they claim credit. The Auditor's report, which is but a mere compilation from the entries in these books, and which was made without any examination of the vouchers, for the same reason conclude nothing, and must be disregarded.

This view of the case will require it to be remanded, in order that the defendants may have an opportunity of offering legal testimony in support of their claims. Various questions are presented by the record, which we are requested by counsel to pass upon, in order that the case may be finally disposed of in the lower court, without another appeal. We do so, under the hope that it will enable the parties to close a controversy which probably has grown out of the multiplicity of the transactions involved, rather than any want of fidelity on the part of the partners.

The following points are made by plaintiff's counsel, which we will endeavor to dispose of in the order presented, viz:

1. It is maintained by the plaintiff that the contract made by the parties, is a law unto themselves, and therefore *James A. McHatton* and *George W. Ward*, had no authority to employ any persons either to buy or sell materials or goods, at the expense of the firm.

2. That *George W. Ward* had no authority to sell any goods otherwise than for cash, or if on credit, guaranteed, and that he is responsible for all losses that may accrue on account of any sales made otherwise than as stipulated in the contract.

3. That the defendants, having assumed the collections of the outstanding debts and disbursement of the same, were bound to use diligence, and if they have neglected to do so, by a resort to legal process, they are responsible to the plaintiff for any loss he may have sustained.

4. That the Judge *a quo* erred in ordering a liquidator to be appointed, and a sale at auction of the assets. That rights and credits are not to be sold, unless proved desperate; and then only for the benefit of those in fault.

5. That between the years 1844 and 1849, there was no law that authorized interest to be charged on open accounts or "yearly balances," and since the law has been changed, interest can only be charged at five per cent.

6. That convict negroes, being sentenced to hard labor, no action can be maintained by a lessee or other person to recover hire for the use of them. The private use or hire of convicts cannot become legally the subject of a contract either express or implied, and lessees were bound, as officers of the State, to carry out the object of the law, and inflict punishment at hard labor, and will not be heard to the contrary.

I. Under the first point, it is urged, that items amounting to $10,510 95, charged as commissions paid to sundry persons for sales of manufactured articles, ought not to be charged to the firm, because *George W. Ward*, by the contract of copartnership, was bound to superintend the sales of the manufactured goods. In regard to this objection, we are of the opinion, that the items for commissions upon sales which were paid and entered on the books of the firm during the existence of the partnership, as a charge against the firm generally, must be held by the court to be binding upon the respective partners. It was the construction which the parties placed upon the contract themselves. See Story on Partnership, sec. 191.

By the contract of co-partnership it was made the duty of *James A. McHatton* and *George W. Ward* to transact the out-door business and superintend the sales. If they gave their personal attention to this, and attended to their duties faithfully, it was all that was required or could be expected. It was not in the power of *George W. Ward* to attend the sales of manufactured articles in remote places, nor await the slow process of sales at the principal points

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where goods were in store for the purpose of being offered for sale. We see no objection, therefore, to the allowance of such charges for commission as were regularly entered upon the books during the partnership, unless such entries are shown to be made in error or fraud. If *James A. McHatton* or *George W. Ward* neglected the duties imposed upon them by their agreement, besides being alleged, the negligence and consequent damage ought to be proved by those making the complaint.

II. In order to hold *George W. Ward* liable for losses on the sales of merchandize, it should be shown that he violated the obligations imposed upon him by the contract of partnership, and that the parties objected to his acts as soon as advised of them, or within a reasonable time after the entries in regard to such sales had been made upon the books of the firm. It is not enough to await the result of the sales, and ascertain whether the same have been fortunate or unfortunate before objecting.

III. It is clear that the defendants have assumed as *negotiorem gestores*, in regard to the books and accounts, the obligation of using due diligence to collect the debts due to the firm. C. C. 2274.

IV. There is no error in appointing a liquidator or receiver. It is one of those matters which must be left in a great measure to the sound discretion of the court. Whether the accounts should be sold depends upon their character. They should not be sold unless it should be shown that the trouble and expense and delay of collecting would render them less productive to the firm than their immediate sale, or that they are desperate or of little value, and that the delay in regard to their collection will prevent a final decree of partition within a reasonable period. These and the like reasons may be sufficient to justify the sale of rights and credits, but as a general rule they should not be sold except upon cause shown.

V. Between the years 1844 and 1849 the law did not allow, as a general rule, interest upon accounts except after a party had been put in default. The exception was where one person stood in the relation of agent or mandatary for another, (C. C. 2994,) or where a partner promised to bring into the partnership a sum of money, or had taken out the funds of the partnership. C. C. 2829. We think the entries regularly made on the books of the partnership during its continuance are *prima facie* binding upon the partners, though the rate of interest should have been calculated at eight per cent. instead of five, as allowed by the Code. The entry so made in the books of the firm is presumed to have been made with the assent and approbation of all the partners, and it is as binding upon each partner as though made by himself. *Jordan v. White*, 4 N. S. 339.

The charges of interest, however, made since the dissolution of the partnership, must be confined to such sums as the respective partners had promised to bring into the concern, or funds withdrawn by them, and in absence of any other agreement in writing to the contrary, the rate must be five per cent.

VI. The partners had no right to make any contract for the use or hire of the negro convicts, except in the employments required by law. Any contract, either express or implied, for any other use, is against the public policy, and cannot be enforced, and all items for such services should be struck from the account. The appellees complain that there was error in the judgment of the lower court in decreeing the costs to be borne by the partners equally. The action of partition is one in which all are plaintiffs and all are defendants, and

where the decree orders the distribution or division of anything between the partners, we think the costs may be decreed against all.

We will also remark that a several judgment against one, in favor of the other individual partners, should not be rendered where there are available partnership assets, by which the amounts received by the partners can be readily equalized.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this cause be remanded to the lower court for a new trial, with instructions to the court not to suffer the defendants to offer in evidence the entries made in the partnership books since the dissolution of the partnership, unless an authorization or ratification of the entries by the plaintiff be shown, and to reject the report of the auditors, and in other respects to proceed in conformity to the views herein expressed, and in conformity to law. And it is further ordered, that the appellees pay the costs of appeal.

JANE C. DUNN and HUSBAND *v.* MARGARET E. WOODWARD et al.

Where the husband joins the wife in the suit, and the petition alleges that the wife is herein authorised and assisted by her husband, it is a sufficient authorization for the wife to sue.

A suit to set aside a conveyance from the husband to the wife, on the ground of fraud and simulation, is not a revocatory action, but in effect an action *en declaration de simulation*.

Acknowledgments of the receipt of money by the husband from the wife are not evidence against third persons not parties to them, and the judgment rendered against the husband in favor of the wife can have no more effect against third persons than the acknowledgments themselves.

The prescription established by Article 1989 of the Code does not apply to simulated sales.

APPEAL from the District Court, Seventh District, Parish of West Feliciana, *Duffel*, J., presiding. *Brewer & Collins*, for plaintiffs. *Roselius* and *Ratliff*, for defendants and appellants.

VOORHIES, J.* The object of this suit is to have a sale from *Abisha Woodward* to his wife, *Margaret E. Woodward*, declared to be simulated and fraudulent.

The facts pertinent to the matter in hand are in substance as follows. On the 15th of March, 1841, *Abisha Woodward* purchased certain slaves at the judicial sale of the succession of *John M. Dunn*, deceased, for the price of $7395, payable one-half on the 15th of March, 1842, and the other half on the 15th of March, 1843, with ten per cent. per annum interest thereon from maturity until paid; and to secure the payment thereof, besides the special mortgage, vendor's privilege reserved on the property, *Franklin Hardesty* became the surety of the purchaser.

On the 4th of January, 1844, *Franklin Hardesty*, as curator of *John M. Dunn's* succession, sued out an order of seizure and sale against *Abisha Woodward*, under which the property thus mortgaged was seized and advertised to be sold by the Sheriff. An injunction sued out by *Woodward*, arresting the sale, was perpetuated in regard to some of the slaves seized, but dissolved as to the others specially mortgaged to the seizing creditor. The sale was effected

*MERRICK, C. J., having been of counsel, took no part in this decision.

by the Sheriff on the 6th of July, 1844. As the proceeds thereof proved to be insufficient to satisfy the amount of the debt, interest and costs, the plaintiff, as sole heir of *John M. Dunn*, whose succession she had accepted purely and simply, instituted an action against *Abisha Woodward*, as principal, and *Franklin Hardesty*, as surety, for the recovery of the balance due on said debt, in which action *Margaret E. Woodward* was also joined as a defendant with her husband, for the purpose of setting aside an alleged fraudulent and simulated sale which her said husband had made to her to shelter all his property from the pursuit of his creditors.

Both *Woodward* and his wife excepted to the jurisdiction of the court, on the ground that they were domiciliated in another parish, in which they claimed the right of being sued. During the pendency of that issue, *Abisha Woodward* died and *Franklin Hardesty* was appointed administrator of his succession. The plaintiff filed a supplemental petition, setting forth the fact, and praying that the suit should be revived against *Hardesty*, as administrator. The latter filed an answer, waiving the plea to the jurisdiction of the court, and declaring that he could not deny the facts alleged in the plaintiffs' petition, and further, that the cause should be transferred to the Probate Court of West Feliciana, where the succession of *Abisha Woodward*, deceased, was opened. The exception of *Margaret E. Woodward* was sustained. On the 30th of March, 1852, there was a judgment rendered in favor of the plaintiff against *Abisha Woodward's* succession for the sum of $5010 with ten per cent. interest per annum on one-half thereof from the 15th of March, 1842, and on the other half from the 15th of March, 1843, subject to a credit of $2262 61¼ paid on the 6th of July, 1844. The present suit was instituted against the administrator of *Woodward's* succession and *Margaret E. Woodward* on the 7th of February, 1854.

The plaintiff, after setting forth the judgment thus obtained by her, and the origin of her claim, in her petition, alleges that *Abisha Woodward*, pretending to be indebted to his wife in the sum of $22,000 for her dotal and extra-dotal rights, conveyed to her in payment thereof, by notarial act dated the 12th of December, 1843, a certain tract of land and fifty-six slaves therein named; that said sale is a mere simulation, fraudulently contrived for the purpose of screening *Woodward's* property from the pursuit of his creditors; that in order to carry out effectually his scheme, his wife instituted a fictitious suit against him for a separation of property, in which she claimed as her paraphernal property, not included in the conveyance to her, land and slaves then in his possession, and through the connivance of the parties that a judgment was accordingly rendered in her favor; and that said pretended transfer, and all the proceedings thereon based, are null and void and of no effect against the plaintiff and the other creditors of *Abisha Woodward*, because the deceased was not indebted to her in any sum whatever, the said transfer, which embraced the whole of his property, being simulated and wholly without any consideration. The petition concludes with a prayer that the land and slaves be decreed to belong to the successsion of *Abisha Woodward*, deceased, and that said pretended act of transfer, dated the 12th of December, 1843, and said judgment of separation of property be decreed absolutely null and void and of no effect, and that so much of said property be sold as may be sufficient to pay said debt, interest and costs.

The general issue and the prescription of one, three, five and ten years is

bar of the action are the only pleas set up by the defendant, *Margaret E. Woodward*. The other defendant, the administrator, admits the truth of the allegations set forth in the plaintiffs' petition, and prays that the land and slaves be decreed to belong to the succession of *Abisha Woodward*, deceased, and as such delivered over to him to be administered upon according to law.

Upon these pleadings and the evidence the cause was submitted to a jury, who returned a verdict in favor of the plaintiff, declaring the sale from *Abisha Woodward* to his wife, *Margaret E. Woodward*, to be null and void. From a judgment rendered thereon, the defendant, after a fruitless attempt to obtain a new trial, has taken this appeal.

The appellants' counsel, in his brief, relies on several points for the reversal of the judgment.

I. It is objected that the plaintiff, *Jane C. Dunn*, being a married woman, could not institute this suit without being authorized to do so, either by her husband or by the court; and as she was authorized by neither, the whole proceedings are null and void, for want of capacity of the plaintiff to stand in judgment. This is an absolute nullity, and avoids all the proceedings had in the case.

The petition begins as follows: "The petition of *Jane C. Dunn*, wife of *James M. Gallent*, of the State of Mississippi, herein aided, assisted and joined by her said husband," and concludes thus: "Wherefore, petitioners bring suit and pray that said *Margaret E. Woodward*, of said parish of West Feliciana, and *Franklin Hardesty*, as administrator of the succession of *Abisha Woodward*, deceased, be cited to answer this petition," etc.

We think this is sufficient. In none of the authorities quoted, in which the objection prevailed, does it appear that the husband had joined the wife either in the petition or the answer. In the cases in which the wife alleged that she was authorized and assisted by her husband, in the absence of proof of such authority, it was held to be fatal. But here it is different: the husband having joined his wife, must be considered as one of the plaintiffs. In case of *Lacour* v. *Delamarre*, 2 An. 140, the court say: "We have held, that where the husband and wife appear in the same suit as plaintiffs or defendants, or the husband appears in court as authorizing his wife, the authority of the husband to the wife's appearance necessarily follows."

II. On the merits, it is objected that the judgment is erroneous, inasmuch as the property thus conveyed to the defendant is decreed to belong to the succession of her husband. The revocatory action being brought by an individual creditor, the contract can only be set aside in so far only as such creditor is concerned.

Were this a revocatory action, the proposition assumed would doubtless be correct. But is it so? We think not. The alleged transfer is attacked as a pretended and simulated agreement, devised for the purpose of screening the property of the deceased from the pursuit of his creditors. It is in effect an action *en declaration de simulation*. 1 An. 132, 262; 3 An. 627; 4 An. 36; 5 An. 400; see the case of *Lucas* v. *D'Armond*, ante 168.

Under the issue, it is clear that the appellant was bound to prove the genuineness of her claim against her husband for her dotal and extra-dotal rights, which constituted the alleged consideration of the transfer to her. The judgment of separation could have no more effect against the creditors of the husband than the pretended agreement itself. 8 N. S. 460; 4 L. R. 420. In the

absence of any such proof on her part, we take it to be clear, that the pretended conveyance to her must be regarded as a mere simulation.

III. The effect of the appellants' judgment against the deceased, which forms the subject of the third ground of objection, has already been considered. Our law views with jealousy all acknowledgments from the husband to the wife of the receipt of money. Such acknowledgments make no evidence against persons not parties to them, unless supported by other circumstances. The judgment rendered between them should not have more force than the confession of the husband in a public act, because that confession would authorize the court to render judgment against him at the suit of the wife. In the case of *DeBlanc* v. *DeBlanc*, 4 L. R. 421, it was held that the allegations of fraud and collusion placed the burden of proof on the plaintiff to show the truth and genuineness of the foundation on which she obtained the judgment against her husband.

IV. The prescription established by Article 1989 of the Civil Code does not apply to simulated sales. 4 An. 36; 3 An, 628.

It is, therefore, ordered and decreed, that the judgment of the court below be affirmed, with costs.

A. LELAND & Co. and JNO. SIMMONS & Co. v. A. ROSE—BUCKINGHAM & GRAHAM et al., Opponents.

An insolvent cannot be subjected to more than one trial for fraud, under the Act of 1840, for the same fraudulent acts. One conviction, or acquittal, is conclusive upon all the creditors who were parties to the insolvent proceedings.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Helme, for plaintiffs and appellants. *Schmidt* and *T. J. Semmes*, for defendant.

LEA, J. Proceedings for a forced surrender having been instituted against the defendant, under the provisions of the Act of 1840, by two judgment creditors, the defendant, under the order of the court, filed, on the 2d March, 1854, a schedule of his affairs, and what purported to be a surrender of his property to his creditors.

To this schedule and statement an opposition was filed on the 6th March, 1854, by the original plaintiffs, making allegations of fraud, and praying that the charges of fraud might be inquired into, and that the defendant might be deprived of the benefit of the insolvent laws, etc.

On the 1st day of May, 1854, other creditors (the appellants herein) intervened in the insolvent proceedings, and opposed the homologation thereof, for the reasons set forth in the opposition of the original complaining creditors, which grounds of opposition they adopt. They pray that the insolvent be declared guilty of fraud, that he be deprived of the benefit of the insolvent laws, and be otherwise dealt with as the law directs. The original plaintiffs were represented by *Messrs. Smiley & Perrin* as counsel, the intervenors by *G. W. Helme, Esq.* On the 21st and 22d days of May, 1854, a trial was had before a jury, upon the charges of fraud then pending, the counsel for the original

plaintiffs, together with the counsel for the intervenors, appearing "for plaintiffs" against the defendant. Upon these proceedings a verdict and judgment were rendered, which have become final by an affirmance upon an appeal taken by the original plaintiffs.

On the 25th May, 1855, the defendant filed a peremptory exception to further proceedings on the part of the intervenors, on the ground that he could not be tried twice upon the same charges of fraud, based upon the same alleged fraudulent acts, and on the further ground that, by the judgment before referred to, he had been deprived of the benefit of the insolvent laws, and that consequently no insolvent proceedings were pending to which an opposition could be made. The fifth section of the Act of 1840, under and by virtue of which the proceedings for a forced surrender in this case were commenced and have been conducted, provides that the proceedings to be had in such cases shall be conducted in conformity with the laws then in force relative to the voluntary surrender of property, which laws contemplate proceedings to be had against the insolvent *in concurso*.

It was never intended that the insolvent should be subjected to more than one trial for fraud, based upon the same alleged fraudulent acts. One acquittal or one conviction is, we think, conclusive upon all the creditors who were parties to the insolvent proceedings. In the case at bar the opponents were not only duly recognized as creditors on the schedule of the insolvent, but they joined in and adopted the charges of fraud filed by *Leland & Co.* and *Simmons & Co.*, and their counsel was present and took part in the trial had upon these charges. We think that, under the state of facts which the case presents, the court was right in maintaining a peremptory exception to any further proceedings against the defendant on behalf of the appellants.

Judgment affirmed.

ANDERSON & CONN *v.* A. G. FOLGER, Master of Steamer Illinois Belle, and Owners.

No protest is necessary where the drawer of the bill has no funds in the hands of the drawee, and made no provision for its payment, nor had any right to expect that a bill for the amount would be accepted.

There is no law which makes an election day a *dies non juridicus*.

Where the answer shows that the bill was drawn to release the boat from a seizure, it is too late to object that the captain of the steamboat was without authority to draw the bill.

The fifth section of the Act of 1855, "relative to evidence," does not empower the courts of this State to take judicial notice of the statutes of other States. It provides, "that the published statutes and digests of other States, shall be *received* in the courts of this State as *prima facie* evidence of the statute laws of the States from which they purport to emanate."

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Larue & Whittaker, for plaintiffs. *Mott & Fraser*, for defendants and appellants.

SPOFFORD, J. The defendants have appealed from a judgment rendered against them as the drawers of a protested bill of exchange, drawn at St. Louis, Missouri, upon a house in Memphis, Tennessee.

1. They complain that they had no notice of protest. None was necessary,

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as it is proved that they had not funds to meet the bill in the hands of the drawee, and made no provision for its payment, and it is not shown that they had any right to expect that a bill for such an amount would be accepted.

2. They complain that the cause was tried on an election day in the absence of their counsel. The cause was duly called for trial, and we have been referred to no law declaring an election day a *dies non juridicus*.

3. It is urged, that judgment was erroneously rendered against the owners of the steamer Illinois Belle, because no proof was administered to show that *Captain Folger*, who drew the bill for their account, was empowered so to do, or that the proceeds enured to the benefit of the boat. We regard this defence as inconsistent with the answer which was filed for all the defendants jointly, and which shows that the bill was drawn for the purpose of releasing the boat from a seizure.

4. Fina ly, it is contended, that damages were allowed at the rate of ten per cent. and interest at the rate of six per cent., without any legal proof that such damages and interest were due by the law of Missouri. The plaintiffs reply, by referring us to a certain edition of the revised statutes of Missouri, an extract from which, they say, was read to the court *a quâ*. The record, certified to contain a transcript of all the documents filed and testimony adduced, does not show that this law was offered in evidence. We do not understand the fifth section of the Act of March 14th, 1855, "relative to evidence" (Acts 1855, p. 209), as empowering the courts of this State to take judicial notice of the statutes of other States. The section referred to declares, "that the published statutes and digests of other States, shall be *received* in the courts of this State as *prima facie* evidence of the statute laws of the States from which they purport to emanate." The object of this law was to dispense with the necessity of procuring written exemplification of the statutes of our sister States.

In the absence of any minute in the record, showing that the statute of Missouri was offered in evidence, and of any agreement of counsel relative thereto, we do not feel at liberty to resort to a digest of the local laws of Missouri to determine the question of interest and damages.

We will rather presume their law to accord with our own, which, in analogous cases, allows five per cent. as damages, the interest to be computed upon the amount of the principal and damages from the date of protest.

It is therefore ordered, that the judgment of the District Court be reversed; and it is now ordered, adjudged and decreed, that the plaintiffs recover of the defendants *in solido*, the sum of twenty-three hundred and ten dollars, with five per cent. interest thereon, from the 22d of December, 1854, until paid, and the costs of suit in the District Court, with privilege upon the property attached. It is further ordered and decreed, that the costs of this appeal be paid by the plaintiffs and appellees.

G. & S. H. Langstaff v. William Lees & Co.

A plea of "failure of consideration" in a suit on a promissory note, without specification of the consideration, or of the time, place or circumstance of its failure, is too vague to authorise the admission of proof upon it.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Wolfe & Singleton, for plaintiffs. *J. Q. & A. Fellows*, for defendants and appellants.

Buchanan, J. The plaintiffs are holders of two notes of defendants, made payable to their own order, and by themselves endorsed in blank, which were protested at maturity for non-payment.

The defendants, by their answer, admitted their signatures, and pleaded "failure of consideration," without any specification, either of the consideration of these notes, or of the time, place or circumstances of its failure.

We agree with the District Court, that this plea is too vague to authorize the admission of proof upon it. *Pargoud* v. *Guise*, 6 La. 77.

The appellees have asked for damages, as for a frivolous appeal. But we have doubts whether this is a case for the application of such a penalty. We must infer from the bill of exceptions, that some sort of evidence was offered by defendants, which was ruled out, solely by reason of the insufficiency of the plea.

Judgment affirmed, with costs.

Adeline W. Trimble v. Francis Brichta.

The Sixth District Court of New Orleans has jurisdiction of a rule against a surety on an appeal bond, the principal in which is dead, and his succession under administration in the Second District Court.

If the judgment debtor be dead, the creditor may proceed against the surety in the appeal bond, without previously issuing execution against the judgment debtor.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Stansbury, for plaintiff. *A. Hennen*, for appellant.

Slidell, J. The plaintiff had judgment against *Francis Brichta*, the original defendant, in the Sixth District Court of New Orleans.

Brichta took a suspensive appeal from that judgment to this court, and gave the present appellant, *Osborne*, as surety on his appeal bond.

Pending the appeal, *Brichta* died. His succession was opened in the Second District Court of New Orleans, and the curator was made a party to the suit pending on appeal in this court. Upon a final hearing, the judgment of the Sixth District Court was affirmed.

The plaintiff then took a rule in the Sixth District Court, on *Osborne*, surety on the suspensive appeal bond, to show cause why he should not be condemned to pay the plaintiff's judgments against *Brichta*.

Osborne answered that *Brichta* was dead; that his succession was under

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administration in the Second District Court; and that the plaintiff was bound to wait until it should judicially appear by the result of the administration, that the judgment could not be satisfied out of that estate, before pursuing the surety.

The appeal bond, signed by the surety in the usual form, was offered in evidence.

The case was submitted upon the admission of parties, "that the succession of *Brichta* was under administration in the Second District Court of New Orleans, and that there are no funds in the hands of the executor for the payment of the judgment herein."

Upon a hearing, the rule was made absolute against the surety, and he has appealed.

The point is made here, that the Sixth District Court was wholly without jurisdiction to try the rule against the surety. The argument is founded upon the 3d section of the Act "relative to successions," approved March 15th, 1855, (Sess. Acts, p. 399,) which declares, "that the court in which the succession was opened, shall have exclusive cognizance of all suits against sureties on bonds of appeal, and all others which they are bound by law to receive or exact from appellants and administrators, tutors, curators, and executors generally; and no such suit shall be instituted against the security, until the necessary steps have been taken to enforce payment against the principal."

Without attempting, at this time, to construe the meaning of the above section further, it suffices to observe, that this was not a bond of appeal which the Second District Court was bound to receive, or did receive or exact, from the appellant; the case then does not come within the operation of the law cited.

The other position taken by the appellant is, that the rule against the surety was premature, because the "necessary steps" had not been taken to enforce payment against the principal.

The law upon this subject has not been changed by the Acts of 1855. The last clause in sec. 3d of the Act of March 15th, 1855, hereinbefore cited, is but a reënactment, *totidem verbis*, of the latter part of sec. 6 of the Act of March 16th, 1842. Sess. Acts, p. 303. Notwithstanding that law, it was held, after mature consideration and a thorough review of the cases, in *Alley* v. *Hawthorne*, 1 An. 123, that "if the creditor cannot take out his execution on the judgment, by reason of a change in the condition of the debtor's estate, which prevents its being reached by that process, the law requires from him no act in order to secure his immediate recourse against the surety on an appeal bond."

The doctrine of that case has been followed since, and applied to securities upon other bonds named in the Act of March 16, 1842, § 6. *Wells* v. *Roach*; *Wogan* v. *Thompson*; *Bourgeat* v. *A. Lewis*, 10 An.

There has been no change in our legislation, which destroys or impairs the force of the reasoning upon which the judgment in *Alley* v. *Hawthorne* was based.

It would have been an idle thing for the plaintiff to take out execution against the original defendant, *Brichta*, after his death. No step was therefore "necessary" to be taken against the principal.

Judgment affirmed.

Brand & Adams v. R. A. Wilkinson and Robert Johnson, Sheriff.

Damages against Sheriff for failure to return *fi. fa.* within the legal delay.
The alleged insolvency of defendant in execution, will not excuse the Sheriff from calling on plaintiff to point out property, as required by C. P. 726, 727.

APPEAL from the District Court, Second District, parish of Plaquemines, *Rousseau*, J. *De Choiseul*, for plaintiffs. *Penrose*, for *Johnson*, appellant.

Spofford, J. The plaintiffs obtained a judgment in the Second Judicial District Court, for the parish of Plaquemines, against the defendant, *Wilkinson*, for $805 66 and interest, with privilege on a certain plantation and on some personal property sequestered in the suit. This judgment was signed on the 9th of January, 1855.

On the 23d of January, 1855, a *fieri facias* issued upon this judgment, and was placed in the hands of the appellant, *Robert Johnson*, Sheriff of Plaquemines. He made the following return, which, it will be observed, has no definate date:

"Received, parish of Plaquemines, January 24, 1855, and on the 25th of the same month and year, proceeded to the service of the same. I hereby certify that *Robert A. Wilkinson*, the within named defendant, hath no goods or chattels, lands or tenements, to my knowledge, within the parish, by which I could cause to be made the debt and costs within specified, or any part thereof, as by the within writ commanded; that I applied to the defendant, who pointed out no property, and this writ expiring, the same is returned into court. Parish of Plaquemines, 3d, 1855.

(Signed) Robert Johnson, Sheriff."

On the 18th of June, 1855, the plaintiffs took a rule on the Sheriff to show cause why he should not pay the debt, on account of his default in failing to return the writ by the 2d of April, or within seventy days, according to the exigency thereof.

The defendant in the rule, has appealed from a judgment against him for the amount of the plaintiffs' judgment against *Wilkinson*.

This being a summary proceeding by motion under the 17th section of a statute of 1826, which has been reenacted in the Act of March 15, 1855, sec. 2, (p. 478,) entitled "an Act relative to Sheriff's sales and writs of *fieri facias*," we are precluded from inquiring into any other matters suggested by the motion, except the alleged failure of the Sheriff to return the writ within the legal delay. All the other grounds might be considered in an ordinary action of damages, but cannot be heard upon this summary proceeding, which is a statutable remedy merely.

We consider it proved, that the Sheriff did not return the writ in time. The evidence is as positive as the nature of the case admits, and it is a singular circumstance that the Sheriff, in making his return, omitted to name the month, and has made no effort to supply it.

His default being established, the *onus* was on the Sheriff to show a legal excuse. We find none in the record. His return does not show that he called

upon the plaintiffs to point out property. The case is quite analogous to that of *Gasquet* v. *Robins*, 2 An. 410, where the Sheriff was held liable. There it was also held, that the alleged insolvency of the defendant, would not excuse the Sheriff from making the call upon the plaintiff to point out property as required by C. P. 726, 727. The object of the law is to enforce the observance of diligence by public officers. See, also, *Webb* v. *Kemp*, 2 An. 870; *Magee* v. *Robins*, 2 An. 411; *Day* v. *Boyce*, 3 An. 623; *Lynch* v. *Leckie*, 9 An. 508.

The case does not appear to be one in which the damages prayed for by the appellee should be allowed.

It is therefore ordered and decreed, that the judgment of the District Court be affirmed, with costs.

C. SCHNEIDER *v.* WILLIAM VERCKER.

Where the principal, though present, is physically incapable, from sickness, of making an affidavit for a provisional seizure, the affidavit may be made by an agent.

It is not necessary that the agency be sworn to, it is sufficient to allege and prove it.

APPEAL from the Sixth District Court of New Orleans, *Reynolds*, J., presiding. *Michel*, for plaintiff and appellant. *Budd & Lambert*, for defendant.

LEA, J. This case is presented upon an appeal from a judgment setting aside a writ of provisional seizure sued out by a lessor against his tenant.

The motion to set aside the writ was based upon the following grounds:

1st. That the affidavit was informal.

2d. That it was not made by the plaintiff, but by one styling himself an agent, which agency is not sworn to by the deponent.

3d. That there was no allegation of the absence of the plaintiff, who, in point of fact, was not absent.

4th. That the affidavit is untrue, and that the debt was not due as alleged.

The writ was set aside by the District Judge, on the ground that the affidavit was made by the alleged agent, while the principal was within the jurisdiction of the court. It is shown conclusively, that at the time the affidavit was made and the writ sued out, the plaintiff was physically incapable, by reason of sickness, from making the affidavit himself. We think it was not contemplated by the law, that in case of sickness a creditor should be deprived of the benefit of conservatory writs, essential to the preservation of his rights. (See 14 La. Repts., page 92.) The authority of the agent is sufficiently proved to have been given verbally at the time the suit was instituted. The subsequent ratification in writing, did not vitiate what had been done. It was not necessary that the agency of the deponent should be sworn to; it is sufficient that it be alleged and established by other proof.

It is ordered, that the judgment appealed from be reversed; that the writ of provisional seizure be maintained, and that the rule taken to set the same aside be dismissed; and that the defendant and appellee pay the costs in both courts.

B. Antognini *v.* Charles R. Railey & Co.

Injunction of sale by Sheriff, under defendants' execution against J., of three billiard tables claimed by plaintiff under a private writing, which, after reciting the sale to J. by plaintiff, of the billiard tables, says, "it is further understood by the parties that those billiard tables will be the property of *B. Antognini*, until the payment of those notes" (the price). *By the Court:* This private writing had no date as to third persons—at least no date prior to that of its filing in this suit—and the plaintiff should have proved not only the signature of the document, but that it was made at the date which it bears. The defendants had acquired a lien upon these billiard tables, by their seizure before this suit was brought.

The plaintiff, as vendor, had no right to enjoin the Sheriff's sale. He had only the right to claim the price, in virtue of the privilege of vendor, by third opposition.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Magne, for plaintiff and appellant. *H. & J. A. Gaither*, for defendants.

Buchanan, J. The plaintiff sues for three billiard tables, seized by defendants, in execution of their judgment against one *Judd*, and in *Judd's* possession.

Plaintiff alleges that he sold those billiard tables to *Judd*, for the price of nine hundred and fifty dollars, in two notes, at ninety days and six months. Before the first of these notes fell due, the billiard tables were seized by the Sheriff, under defendants' execution; and plaintiff claims the possession and ownership of them under a private writing filed with his petition, in which the sale of the billiard tables is recited, and it is further stipulated as follows: "It is understood by the parties, that those billiard tables will be the property of *B. Antognini*, until final payment of those notes."

Plaintiff enjoined the Sheriff's sale upon this showing. The court below admitted this document in evidence, notwithstanding the opposition of the defendants, upon the simple evidence of the signature of *Judd* to the private writing filed with the petition.

We think the court erred. This private writing had no date as to third persons—at least, no date prior to that of its filing in this suit—and the plaintiff should have proved not only the signature of the document, but that it was made at the date which it bears. The defendants had acquired a lien upon these billiard tables by their seizure before this suit was brought.

The plaintiff, as vendor, would have had no right to enjoin the Sheriff's sale. He had only the right to claim the price, in virtue of the privilege of vendor, by third opposition. The suspensive condition of the sale upon which plaintiff relies, is not made out by sufficient evidence.

Judgment affirmed, with costs.

JOSEPH RAN *v.* L. LATHAM et al.

The maker, or endorser, in an action on a note, in the absence of any equity existing against the payee, cannot question the title of the holder.

The equities which defendant is entitled to plead, are such as operate in his own favor, not those which belong to a party to whom he is liable. LEA, J.

APPEAL from the Fourth District of New Orleans, *Reynolds*, J.

Schmidt, for plaintiff. *Michel*, one of the defendants, in *pro. per.*

VOORHIES, J.* The plaintiff, as endorsee, sued *L. Latham* and *H. L. Marshall*, as makers, and *J. J. Michel*, the payee, and *T. P. McMillan*, as endorsers of a promissory note.

Latham and *Michel* answered separately, the former by pleading that the plaintiff was not the *bona fide* owner and holder of the note declared upon; and the latter, among other things, "that said note, after maturity was, and is now, the property of *Elisha Crocker*, and that the same has been paid and extinguished by *John P. McMillan*, acting for his wife, in a settlement with *Elisha Crocker*." No plea was filed by either of the other defendants.

There was judgment in favor of the plaintiff against the defendants *in solido*, and *Michel* alone appealed.

We do not think there is any error in the judgment of the court below. The averment of the appellant discloses no equitable defence, not even against *Crocker*, the alleged owner of the note. If the latter had any right to the note, as shown by his own testimony, it was that of pledge. The defence is clearly inadmissible under the well settled principle, that the maker, or endorser, in an action on a note, in the absence of any equity against the payee, cannot question the title of the holder.

It is therefore ordered and decreed, that the judgment of the court below be affirmed, with costs.

LEA, J. It is shown that the plaintiff in this suit is acting as the mere agent of *Crocker*. The endorser might therefore set up any equitable defence to which he was entitled as against *Crocker*, but it does not appear that *Crocker* has been paid, though he holds securities which, until recently, have been the subject of a litigation between himself and *McMillan*. The defence, therefore, as against *Crocker*, is not made out. It is proper to remark, however, that even if payment by *McMillan*, who was the defendants' endorsee and had therefore an interest in discharging the obligation, had been proved, it would not operate as a discharge of the defendant, until he had shown that he was an endorser for the accommodation of *McMillan*, which nothing in the evidence establishes. The equities which a defendant is entitled to plead, are such as operate in his own favor, not those which belong to a party to whom he is himself liable.

I concur in the judgment which has been rendered, but prefer to place my assent on the above grounds.

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*SPOFFORD, J., took no part in this decision.

A. T. Pickerell, Curator, &c., v. F. M. Fisk.

A steamboat was purchased to be resold, and not to be engaged in the carrying trade. *By the Court:* Under the circumstances the parties were merely joint owners of the property, and not partners, or joint traders within the meaning of the law.

A partnership is founded on the voluntary contract of the parties, as contradistinguished from the relations that may arise between them by the mere operation of law, independent of such contract.

The surviving partner cannot alienate the partnership property. The power to alienate ceases with the dissolution of the partnership; the heirs of the deceased become joint owners of the common property, and the survivor can only dispose of his right in the thing sold.

An action for the recovery of the value of property belonging to a succession for which the defendant has made himself liable, is not an action for damages resulting from an offence, or a quasi-offence, and the prescription of one year is inapplicable to it.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Wolfe & Singleton, for plaintiff. *Bartlette & Collins*, for defendant and appellant.

Voorhies, J. This is a suit brought by the curator of the succession of the late *Harvey St. John*, to recover of the defendant one-half of the value of the steamer Eudora.

The plaintiff alleges that the defendant purchased the steamer jointly with *St. John*, through the agency of *John T. Jeter*, for the price of $2000, at a public sale made by the government of the United States, on the 9th of November, 1848, their title to which being consummated by *Jeter's* transfer to them on the 13th of the same month; that the deceased paid, as his portion of the price and expenses incident to the purchase, the sum of $1,031; that the defendant took possession of the steamer about the 12th January, 1849, and disposed of her for his own use and benefit, and has refused to account to the succession for its interest therein; that said steamer, purchased much below her real value, was worth $15,000, to one-half of which the succession is justly and legaliy entitled. He further alleges, that the defendant took possession of the steamer after the death of *St. John*, and previous to the appointment of the curator, and converted her to his own use, &c.

The defendant, among other things, pleaded that the steamer was bought on speculation by *St. John*, *Jeter*, another person, and himself, each for one-fourth: that afterwards the agreement was changed, whereby he acquired one-half, and *Jeter* and *St. John*, each, one-fourth of her; that he was to advance the purchase money, and the title was to be taken in the joint name of *St. John* and himself; that the price, $2,000, was paid one-half by himself and the other by *St. John*, who obtained a loan for that purpose on his endorsement; that he became liable for and paid said loan; and that the steamer was to be fitted out and sent to New York to be resold, &c.

The evidence shows that *St. John* and *Fisk* were the joint purchasers of the steamer for the price of $2,000, one-half of which was paid by each of them; that after the death of *St. John*, and previous to the appointment of the curator, *Fisk* took possession of the steamer, then lying at the port of New Orleans, and sent her off to New York, and that she was lost on her voyage thither. There is an admission in the record, that the vessel was purchased by the parties on speculation, to be sent to New York for resale. But it is manifest they did not intend to engage her in the carrying trade.

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Under the circumstances, we think the parties were merely joint owners of the property, and not partners or joint traders, within the meaning of this law. "A community of property does not of itself create a partnership, however that property may be acquired, whether by purchase, donation, succession, inheritance, or prescription." C. C. 2777. A partnership is founded upon the voluntary contract of the parties, as contradistinguished from the relations which may arise between them by the mere operation of law, independent of such contract. Partnership and community, says Pothier, are not the same thing. The first is founded upon the contract of the parties, which thus creates the community; the last may exist independent of any contract whatever. Pot. De Société, p. 2. As an illustration, in the case of the part owners of a ship, who are treated as tenants in common thereof, each having a distinct although an undivided interest in the whole. They thus may properly be said to have an undivided interest in the ship; and yet that interest does not make them partners. As Duranton says: La société aussi produit une communauté; en un mot, toute société est bien une communauté: mais toute communauté n'est point une société. Il faut pour cela la volonté des parties." Dur. Droit Fran., vol. 17, § 320.

But even supposing that the purchase constituted a partnership between the parties, still in what respect could it materially alter the position of the defendant? The partnership was dissolved by the death of *St. John*, previous to the removal of the property. The doctrine as to the power of the surviving partner to alienate the property, movable or immovable, of the partnership, is clearly settled in the case of *Simmons* v. *Parker*, 4 N. S. 207, where it was expressly held, that such power ceased with the dissolution; that the heirs of the deceased became joint owners of the common property, and the survivor could only dispose of his right in the thing sold. See also the case of *Shipman et al.* v. *Hickman et al.*, 9 R. R. 149. It is clear, therefore, that the defendant had no power to dispose of the vessel. Having done so, it was at his peril, and he is bound to account to the succession either for the property or its value.

The case of *Jouanneau, curator*, v. *Shannon*, 4 An. 330, relied on by defendant, does not appear to us to be analogous to the present. In that case, the vessel was engaged in the carrying trade, and *Whipple*, the one-fourth owner, had died; it was held, that public policy and the interest of the surviving partner, required that she should not lie idle at the wharf, but be usefully employed. The peculiar circumstances presented in that case, illustrate very strongly the propriety of maintaining such a principle, even after the death of the part owner. The steamer, it appears, had been advertised to leave, on her usual voyage, on the day of *Whipple's* death. She was a regular packet, had been taking in cargo on the day of his death and the day previous, and was heavily laden. She was lost on her voyage. It was held, that *Miller*, the surviving partner, having a right to employ the boat usefully, was not bound to bear the burden of the whole loss in the absence of proof that it was occasioned by any misconduct or negligence on his part. But in the present case, it is essentially different; the vessel was not engaged in the carrying trade, but sent to New York for resale.

We are of opinion the prescription of one year, on which the defendant relies, is inapplicable to the present action. It is not an action to recover damages resulting from an offence or quasi-offence, but one for the recovery of the

value of property of the succession for which the defendant has made himself liable.

The only question which remains to be determined is, whether the proof is sufficient to justify the amount awarded in favor of the plaintiff by the verdict of the jury. We think not. One-half of the value of the property in question, was the only amount which the succession could recover. The purchase money was $2,000. The weight of the testimony shows, that the steamer could not have been used at New Orleans at a profit. As the expenses of the repairs previous to the death of *St. John*, appear to have been defrayed by the defendant, it follows that the succession has no right to the additional value of the property resulting therefrom.

It is therefore ordered and decreed, that the judgment of the court below be avoided and reversed; that the plaintiff recover of the defendant, the sum of one thousand dollars, with legal interest from the 26th of May, 1854, together with the costs of the District Court; and that the costs of this appeal be borne by the plaintiff and appellee.

Succession of Christophe Pasquier—Jules Lapène, Curator.

Executors, administrators, curators and syndics, are bound to keep a bank book in their official names, and deposit all monies collected by them, as soon as received, in a chartered bank, if there be one in the parish, although no chartered bank of the State pays interest on deposits.

APPEAL from the Second District Court of New Orleans, *Morgan*, J. *Roselius* and *Latour*, for curator, appellant. *Clark & Bayne*, for appellees.

Sprorord, J. We are of opinion that if all the chartered banks of the State have ceased to pay interest on deposits, as asserted but not proved by the appellant, still it does not follow that executors, administrators, curators, and syndics, are thereby dispensed from the necessity of keeping a bank-book in their official names, and depositing all monies collected by them, as soon as received, in a chartered bank, if there be one in the parish.

The Act of March 13th, 1837, (Bul. & Cur. Dig., p. 2,) has been substantially reenacted on the 12th of March, 1855, (Session Acts, p. 78,) under the title of "an Act to regulate and define the duties and powers of administrators, executors, curators and syndics."

We are also of opinion that the claim in this rule for the twenty per cent. interest, and the dismissal from office of the curator, was not barred by the filing, or adjudged by the homologation of the provisional account, pending the rule.

The rule was treated by all parties as a separate and distinct claim, and was never cumulated with the proceedings upon the account. After the filing of the account, the rule was continued from time to time, as presenting an issue by itself. As that issue has never been abandoned by the plaintiff in the rule, nor sought to be cumulated with the issue upon his provisional account by the defendant in the rule, we do not think the latter can invoke the protection of the plea of *res judicata*.

Judgment affirmed.

MARGARET E. WOODWARD *v.* SEYMOUR H. LURTY, Sheriff, et al.

A sufficient authorization for the wife to appear is shown, when she and her husband were duly cited: both filed their answer on the same day—were represented by the same counsel—and the wife, in her answer, expressly alleges that she was duly authorized to appear and defend the suit.

Where a decree of court is rendered "*by reason of the consent of parties, plaintiff and defendant*," it does not matter whether the consent was given in writing, or verbally, it will be presumed, until the contrary is made to appear, to have been given in such a way as to justify the decree.

APPEAL from the District Court, Seventh District, Parish of West Feliciana. *Roselius*, for plaintiff and appellant. *Muse*, for defendants.

LEA, J.* The facts connected with the litigation which is presented in this case are substantially as follows:

Abisha Woodward, the former tutor of the minor heirs of *Eben Woodward*, was condemned by two judgments of the Probate Court of East Feliciana to pay to his former wards, represented by *Albert* and *Maria Poole* (the defendants in the injunction) the sum of $14,202, with interest. After these judgments had been rendered, viz: on the 14th day of December, 1843, *Woodward* conveyed to his wife (the plaintiff in this suit) a number of slaves and a tract of land, for the alleged purpose of replacing her paraphernal claims.

On the first day of March, 1844, the defendants in this suit instituted a suit against *Woodward* and his wife, for the purpose of setting aside the conveyance above referred to, on the ground of fraud and simulation, and for the purpose of subjecting the property to the payment of their judgment against *Woodward*. On the 1st May, 1844, *Mrs. Woodward* sued her husband for a separation of property, claiming as her own the property which is the subject-matter of this litigation. In this suit *Poole* and wife intervened, opposing the claims of the wife against her husband for substantially the same reasons as were set forth in the revocatory action.

At this stage of the proceedings, on the 30th of April, 1845, a judgment recognizing the indebtedness of *Woodward*, as claimed in the revocatory action, was rendered with the following stipulations and reservations as respects *Mrs. Woodward*, as will appear from the extract:

"The plaintiffs claim a privilege and mortgage on all the immovables and slaves of the defendant, *Abisha Woodward*, to pay and satisfy said judgment. Neither party offering any evidence, the one in support of their allegations of fraud on account of which the act of sale from the defendant, *Abisha Woodward*, to his co-defendant, *Mrs. Margaret Woodward*, is sought to be annulled and set aside; nor the other, in support of their rights to have said sale confirmed; *and by reason of the consent of parties, plaintiff and defendant.*

"It is ordered and decreed, that the said judgment of the Probate Court against said *Abisha Woodward* be affirmed, and that it operate as a privilege and mortgage on all the immovables and slaves of said defendant until the full and final payment of said judgment, subject to the credits aforesaid. And by *reason of the consent aforesaid*, it is further decreed, that the land and negroes embraced in the act of sale, and adjudged to her in suit No. 3094, shall be subject to the

* MERRICK, C. J., declined sitting in this case. In the District Court MERRICK (then) J., recused himself, having been of counsel, and the record does not show by what Judge the judgment was rendered.

payment of the aforesaid judgment; and by the consent aforesaid, it is further ordered and decreed, that the said judgment shall be payable in ten equal instalments: the first instalment thereof to fall due on the 1st day of April, A. D., 1846, the whole to bear interest at the rate of six per cent. per annum from the date of the rendition of this judgment; and by the consent aforesaid, it is further ordered and decreed, that in case the defendant shall fail to pay any of the said instalments, as the same shall fall due, then the plaintiff shall have the right to issue execution on said judgment only for the amount that may be due on said instalment or instalments at the time such execution shall issue."

Upon the judgment, of which the above is an extract, an execution was issued to enforce the payment of the fifth instalment, as provided by the judgment, by a seizure of the slaves sold by *Woodward* to his wife. For the purpose of resisting this seizure, the plaintiff in this suit has obtained an injunction, on the ground that she is not bound by the judgment rendered in the case of *Poole* v. *Woodward and wife*, for the reasons:

1st. That she was not legally made a party to said suit, not having been authorized to appear either by the court or her husband.

2d. That the debt for which execution has issued was due exclusively by her husband, and that she could not legally bind herself for his debts, if she had chosen so to do, which she denies.

3d. That she was without power to give her consent to the judgment in the suit of *Poole* v. *Woodward and wife*, and that she never did give her *written assent* thereto.

Our attention has also been directed to the fact that at the inception of this suit, *Adelaide Woodward*, who was then represented by her tutors, *Maria R. Poole* and husband, had, during the pendency of the action, intermarried with *Preston Pond, Esq.*, and that said *Pond* was not made a party to the proceedings prior to the rendition of the judgment; for which reason it is urged that the cause should be remanded for a new trial.

We find no evidence in the record that *Adelaide Woodward* is married to *Preston Pond, Esq.*, except the mere suggestion of plaintiff's counsel. Assuming it to be true, the plaintiff should not have proceeded to the trial of the case without making *Pond* a party.

She complains with a bad grace of her own neglect to bring one of the parties properly into court, especially as this very party has not been cited, or otherwise made a party to the appeal. In the absence of proof to the contrary, we will act upon the presumption *omnia rite acta* with reference to the action of the District Court.

As respects the objection that *Mrs. Woodward* was never authorized to appear, and defend her interests in the suit of *Poole and wife* v. *Woodward and wife*, we find that both she and her husband were duly cited, both filed their answers on the same day, were represented by the same counsel, and the answer of *Mrs. Woodward* expressly alleges that she was duly authorized to appear and defend the suit. We think these facts, taken together, constitute a sufficient authorization. See *Stone, syndic*, v. *Tew et al.*, 9 R. 195; also 10 La. 574. The objection that the wife could not make herself responsible for her husband's debts is without force as applicable to a case which is brought for the express purpose of attacking a sale from a husband to his wife on the ground of fraud and simulation, and for the purpose of subjecting the property thus fraudulently sold to the payment of his debts. If she had a right in such a litigation to defend

herself, she had also a right to enter into such arrangements as her interests might require, provided they were contracted in good faith and for her own advantage.

If the alleged arrangement or consent, upon which the judgment was rendered, was intended as an evasion of the law, the plaintiff should have shown it. We find nothing in the record to justify such a conclusion. This brings us to the inquiry whether any such consent was given. The plaintiff says that "she was without capacity to give such a consent," especially as she "was neither authorized by the court nor her husband, and that she never gave her *written* consent thereto."

We have already determined that *Mrs. Woodward* was properly a party to the suit referred to, and was assisted therein by her husband. Whether she gave her written consent to the judgment which was rendered by the court is not material; it may have been given verbally and in open court. The decree itself embodies the statement that it was so rendered "by reason of the consent of parties, plaintiff and defendant." If this consent was in writing, a copy has not been furnished; but whether it was given in writing, or was given verbally, it must be presumed to have been such as to justify the action of the court until the contrary is made to appear. It is to be observed, also, that the judgment has not been appealed from.

It has been urged that in whatever aspect the case may be viewed, the plaintiff in execution should have resorted to the hypothecary action. We think the proceedings, the enforcement of which have been enjoined, have all the essential elements of this form of proceeding.

Lastly, the special damages allowed for counsel's fees, in defending the injunction suit, are complained of as excessive. The amount allowed exceeds that claimed by the defendant's themselves in their answer. We think it would have been safe in the estimate of the value of the service of counsel to have adopted as a maximum the amount fixed by themselves. In this respect the appellant is entitled to a change in the judgment in her favor.

It is therefore ordered, that the judgment appealed from be amended so as to read as follows: It is ordered, adjudged and decreed that the injunction herein granted be dissolved and set aside, and that the defendant recover of the plaintiff and her surety, *D. S. Rhea*, in solido, interest at the rate of eight per cent. per annum on the amount of the execution enjoined from the date of the injunction till the date of its dissolution, and twelve per cent. damages on the amount of the said execution, with $500 as special damages for counsel fees, with the costs of suit in the District Court; and it is further ordered, that the costs of the appeal be paid by the appellees.

State of Louisiana *v.* James Costello.

It is good ground of challenge in a capital case that the juror has conscientious scruples against capital punishment.

The court has a right to discharge the jury in a capital case, when such discharge is of evident necessity; and by necessity is not meant that which is physical only, but it has application to cases of moral necessity, as where the ends of justice would of necessity be frustrated, or where it arises from the impossibility of proceeding with the case, without producing evils which ought not to be sustained.

The jury empannelled and sworn to try the prisoner on an indictment for murder, before the indictment was heard or evidence received, was, on the suggestion of prisoner's counsel, and with the written consent of the prisoner, allowed to separate—the District Attorney reserving his right, with the consent of prisoner's counsel, of making his objection the next day, should he think it important to do so, and to move for the discharge of the jury. On the next day the District Attorney, considering the separation of the jury illegal, moved for the discharge of the jury, which was accordingly ordered. Another jury was subsequently empannelled for the trial of the prisoner, when his counsel filed a plea in bar, alleging that having been once put in jeopardy of his life, he could not be tried by a different and distinct jury. There was a verdict of guilty. On appeal—*Held:* the separation of the jury, under the jurisprudence of this State, would have vitiated the verdict they might have rendered. The motion to discharge the jury was made in good faith; the discharge of the jury was without prejudice to the prisoner's rights; the prisoner stood before the second jury with every advantage he enjoyed when the first jury was empannelled. The conviction was valid.

APPEAL from the First District Court of New Orleans, *Robertson*, J.

Morse, Attorney General, and *Tappan*, District Attorney. *Field* and *M. A. Frazer*, for appellant.

Lea, J. *James Costello* having been convicted of the murder of *John Dunn* by the verdict of a jury, without qualification, is appellant from a sentence of death rendered in accordance therewith.

The grounds upon which the appellant claims a reversal of the judgment are embodied partly in two bills of exceptions, from the first of which it appears that "after the jury had been empannelled and sworn, and at a late hour in the afternoon, and before any testimony had been offered, and before the jury had heard the indictment read to them, and by the written consent of the defendant, given in open court, as well as the consent of their counsel, given in open court at the same time, the jury were discharged until the next morning, at 10 o'clock, and were permitted to separate; and on the next morning, after the jury had appeared in court and answered to their names, the District Attorney moved the court to discharge the jury from the further consideration of the cause, upon the ground and for the reason that the separation of the jury, after they were sworn, was error, and that any verdict they might render against the defendant would be a nullity, which motion of the District Attorney the court sustained and discharged the jury from the further consideration of the case, and ordered another jury to be called to try the defendant," to which action of the court the defendant, by his counsel, reserved his bill of exceptions, which was signed, the court, however, adding that "when the motion was made to allow the jury to separate for the night, the District Attorney stated that while he did not wish to object, he had his doubts as to the legality of the separation, but would consent to it, reserving to himself the right to recede from his position, and to require the discharge of the jury when brought into court the next day, in case he should, upon further investigation, find that the separation was illegal and would invali-

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date the verdict. One of the counsel representing the accused stated that there would be no objection to such a course—at least he was so understood by the court."

By the second bill of exceptions it appears that three jurors were set aside and excluded from the jury upon the challenge of the District Attorney, on the ground that they had conscientious scruples against finding a verdict accompanied with capital punishment. This last ground of defence was abandoned in the argument of the appellant's counsel, and has been too recently decided to be untenable, in the case of the *State* v. *Melvin*, to require more than a reference to the decision in that case.

Upon the empannelling of a second jury on the ensuing day, the 30th May, a plea in bar to the prosecution was filed on his behalf by his counsel, setting forth that on the 29th May a jury was duly empannelled and sworn to try the issue joined between him and the State, before which jury, so empannelled and selected by himself, he was ready and willing to defend himself, and averring that said jury so empannelled was discharged (although duly qualified and competent to try the cause) against his consent, and without any necessity for so doing, therefore he avers that having once been placed in jeopardy of his life, he is not liable to be tried by a different and distinct jury.

The matters of defence set up in this plea present the same legal question as are contained in the first bill of exceptions:

1st. Did the court err in discharging the first jury?

2d. If there was no error in discharging the first jury, have the rights of the prisoner been prejudiced in any manner by the action of the court?

It is scarcely necessary to discuss the question whether, upon the mere empannelling of a jury, a prisoner can be said to have been put in jeopardy of life or limb, before a word of testimony has been heard against him, and before the jury have received any information concerning the charge made against him by a reading of the indictment.

It may be conceded that in criminal proceedings nothing should be done within the discretion of the court to the prejudice of the prisoner, and that if in the dismissal of a jury without the consent of the prisoner, he has been deprived of any legal right, or error has been committed to his prejudice, so that he cannot stand before a second jury with every legal advantage he possessed when the first jury was dismissed, then it will be considered that such dismissal is equivalent to an acquittal, and that the accused cannot be called upon to answer to the charge before another jury; but we cannot recognize the doctrine that it is an absolute right of the prisoner to be tried by the first jury which is empannelled. His right certainly is that he shall be tried by a jury legally empannelled, and "when the jury have been charged with the trial of a case, the absolute right of the Attorney General to enter a *nolle prosequi* is suspended, or at least qualified, and cannot be exercised against the consent of the court, which will in no case grant it if the defence appears ample, or if the motion appears not to be in good faith, or to promote the ends of justice." See the *State* v. *Hornsby*, 8 R. 589.

It was formerly held in England that a jury sworn and charged by the court in cases affecting life or member could not be discharged, and this doctrine appears to have received the sanction of Mr. Justice Blackstone to this extent, that "when the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict." See 4 Black. 361. And in former times

the jury were kept without meat or drink, fire or candle, until they should agree upon a verdict, a coercion with reference to which it has been justly remarked, that though effectual in securing a verdict, "it may be doubted whether a verdict so obtained would do any honor to the administration of justice."

These doctrines have received a thorough re-examination as applicable to the criminal jurisprudence of this country, and though there has been some conflict of opinion, we think the weight of reason and authority is in favor of the right of the court to discharge a jury in cases of evident necessity; and by necessity is not meant that which is physical only, but it has application to cases of moral necessity, as where the ends of justice would of necessity be frustrated "or where it arises from the impossibility of proceeding with the case without producing evils which ought not to be sustained." Wheaton's American Criminal Law, p. 210.

Mr. Justice Kent lays down the proposition, as borrowed from Sir W. Foster, "that it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases that may come under the general question touching the power of the court to discharge juries sworn and charged in criminal cases." "Every question of this kind," says the same writer, "must rest with the court under all the particular or peculiar circumstances of the case. There is no alternative. Either the court must determine when it is requisite to discharge, or the rule must be inflexible, that after the jury are once sworn and charged, no other jury can, in any event, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity and to determine what combination of circumstances will create one." See *The People* v. *Olcott*, 2 Johnson's Cases, 300.

Mr. Justice Story affirms the same doctrine in the following language: "We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere." See *United States* v. *Percy*, 9 Wheaton.

The jurisprudence of our own State is in conformity with these views. See *State* v. *Brown*, *State* v. *Hornsby*, and *State* v. *Ferguson*, 8th Rob. In the last named case, as in the case at bar, it was urged in behalf of the prisoner that though the right of the court to discharge a jury might be conceded in certain excepted cases, yet that right was to be confined and restricted to cases of absolute necessity. "This concession," says the court, "reduces the matter to the simple question, *necessitas vel non*. Of the existence of the necessity the court must necessarily be the judge; an authority to be exercised in *all*, particularly in capital cases, within the limits of a sound legal discretion." "The amount of fancied evils, flowing as is alleged from the concession of such power to courts of justice, would be more than compensated by the possible, probable, nay positive infliction of wrong upon the unhappy class of persons themselves for whose benefit and protection the rejection of the power is now invoked."

We deem it unnecessary further to illustrate this question by a reference to authorities. We think the only question to be determined is, whether under the peculiar circumstances of the case there was a proper exercise of the discretion

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of the court in discharging the first jury? Whether the ends of public justice required it; whether the prisoner was prejudiced thereby, or was deprived of any legal advantage by their discharge?

It is to be observed that the separation of the jury on the evening of the 20th May was granted upon the suggestion, and on the motion to that effect, of the counsel for the accused, who, for the purpose of giving it effect, filed the written consent of the accused thereto with that of his counsel. It appears that the District Attorney suggested his doubts as to the legality of the proceeding, and reserved his right to make his objections on the following day, in which course the counsel for the accused, as they were understood by the court, expressed their concurrence. It is manifest, therefore, that the act which appears to have been considered as an impediment to further proceedings before the first jury, was not one over which the defendant had no control, or which he could not prevent; on the contrary, it was one which was adopted at his suggestion, upon his own motion, and granted under reservation of legal objections, to be urged if it should be considered necessary on the part of the State.

The jury having separated, as above stated, the next question is, whether it was a proper exercise of the discretion of the court, under the circumstances, before the trial began, before the jury were charged with the case, and before the indictment was read or any testimony was heard, to discharge the jury and cause a new one to be sworn in. As the case then stood, equal justice could not be done between the State and the prisoner. Under the jurisprudence of the State, it was a settled rule of practice in criminal cases, "that the separation of a jury, after being sworn, without being in charge of a sworn officer, is fatal to the regularity of the proceedings in a capital case."

We concur in the opinion of Mr. Justice Preston in the case of the *State* v. *Desmond et al.* That we should greatly doubt the propriety of such a rule of practice, were the question an original one in our courts, "but a court organized for the very purpose of establishing uniform principles and practice in criminal matters have so decided." See the *State* v. *Hornsby*, 8 Rob.

Whatever may be the practice, therefore, in other States, we must consider that in this State it is established in accordance with the ruling in the two cases above quoted. It was idle, under the circumstances, to proceed with the case before the first jury, for all the purposes of a criminal prosecution. It was proper, therefore, for the District Attorney to suggest that a new jury should be sworn, as the tribunal which was about to try the prisoner could not bring in an effectual verdict of conviction. It is evident, then, that "the motion was made in good faith, to promote the ends of justice," and without the intention of oppressing the prisoner; and it has not been shown that the defendant did not stand before the second jury with every advantage which he enjoyed when the first jury was empannelled.

The discharge of the first jury, therefore, was without prejudice to his rights. We think, under the circumstance of the case, that it was the duty of the court to discharge the jury. This conclusion disposes of the plea in bar, which is based exclusively upon the alleged error in discharging the first jury. It was properly treated by the court as presenting a question of law exclusively.

Our attention has been directed by the arguments of counsel to the alleged refusal of the court to charge the jury: "That although drunkenness is no excuse for crime, yet if in the consideration of all the circumstances of the case, they believed that the defendant was so much intoxicated as to make himself

incapable of reasoning, and committed the act in the heat of passion, they had the right to reduce the killing to manslaughter."

It appears that the Judge did charge the jury that if they considered that the act had been committed in the heat of passion, they might so reduce their verdict, but it is alleged that he refused to charge them that his being incapable of reasoning, in consequence of intoxication, was sufficient cause for such reduction.

This fact is not made to appear by a bill of exceptions taken to the charge of the court, and we are therefore relieved from the necessity of enquiring into its correctness.

It is ordered that the judgment be affirmed.

JEANNETTE MOCH, wife of A. ROSE, *v.* GARTHWAITE, GIFFIN & Co.

Where a plaintiff is seeking to recover from a defendant a sum of money, or to enforce from him the recognition of some right, or the performance of some obligation, a trial had in the absence of the plaintiff will entitle defendant merely to a judgment of non-suit as against the plaintiff. But this rule is strictly applicable to cases where the position of the party sued is purely defensive, and it cannot be extended to cases where the defendant is himself obstructed in the recognition or enforcement of his own rights, or counter claims against the plaintiff.

In an injunction suit, where the issues have once been properly presented to the court upon pleadings involving issues upon the merits, a judgment dissolving the injunction, unless appealed from, will be conclusive between the parties, where the same grounds are again set up to enjoin a second seizure for the same debt, or of the same property.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

G. & C. E. Schmidt, for plaintiff and appellant. *Morse*, for defendants.

LEA, J.* *Garthwaite, Giffen & Co.* having obtained a judgment in the 2d District Court of New Orleans, against *A. Rose*, caused property to be seized in execution, which the plaintiff claimed as her property, and for the purpose of vindicating her right as owner, she sued out a writ of injunction. Upon issues regularly made up, the case was tried. The plaintiff being absent and her counsel not appearing, the court, after hearing evidence, rendered a judgment "in favor of the defendants *Garthwaite, Giffen & Co.* and *M. Marigny*, Sheriff, and against the plaintiff *Jeannette Moch*, wife of *A. Rose*, decreeing that the injunction therein issued be dissolved, and that the defendants recover damages, &c." From this judgment no appeal has been taken.

After the judgment had been rendered, upon the attempt of the defendants to proceed with their execution by the seizure and sale of the same property, she filed another petition for an injunction, in the Second District Court, setting forth the same facts, but alleging that the former injunction had been set aside through the negligence of her counsel in defending her interests. This petition was accompanied with a rule upon the defendants to show cause why the injunction should not be granted as prayed for. Upon a trial had, the rule was dismissed, and from the judgment refusing the order of injunction, the plaintiff has appealed. While the appeal was yet pending, and within three days after it had been granted, the plaintiff, by her counsel, filed another application for an injunction, in the Sixth District Court of New Orleans, alleging

*MERRICK, C. J., not having heard the argument, took no part in the decision of this case.

her ownership of the property seized, as in the two previous petitions, but omitting all mention of the two previous applications and of the judgments thereon. Upon a rule taken for that purpose, the court set aside the injunction granted upon this last application, with 20 per cent. damages, and from this judgment also an appeal has been taken.

The grounds of the rule were: 1st. That the same matters had been twice decided by the Judge of the Second District Court, in which the original proceedings were had, and that the previous action of the court had become *res judicata;* and, 2d. That the court was without jurisdiction to enquire into the validity of proceedings had in the execution of a judgment rendered by a court of concurrent jurisdiction.

It will be necessary to examine only the first of these points.

Where a plaintiff is seeking to recover from a defendant a sum of money, or to enforce from him the recognition of some right, or the performance of some obligation, a trial had in his absence will entitle the defendant merely to a judgment of non-suit as against the plaintiff; but this rule is strictly applicable to cases where the position of the party sued is purely defensive, and cannot be extended to cases where the defendant is himself obstructed in the recognition or enforcement of his own rights or counter-claims against the plaintiff. Thus, a "plaintiff cannot, by discontinuing or submitting to a non-suit, prevent a defendant from trying his claim in reconvention. The claim of a defendant in an injunction for interest and damages, is so analogous, that the same rule will be applied to both." See 5th An., 298. The same remark will apply to the demand of the defendant, that he be permitted to proceed in the execution of his judgment, and that the legal barrier which has been interposed to the enforcement of his rights by the writ of injunction, be set aside and dissolved.

So far as this issue is presented by the pleadings, it involves a demand made by the defendant against the plaintiff, upon which the latter cannot deprive the defendant of his right to the judgment of the court by absenting himself from the court-room on the day of the trial.

It would be in the power of a judgment debtor at his caprice, and for any length of time to defeat the enforcement of the recognized rights of his creditor, if he could be permitted successively and alternately to renew the same issues, and at his pleasure to deprive the judgment creditor of an adjudication upon them. We think, therefore, that where in an injunction suit the *issue have been once properly presented* to the court upon pleadings involving *issue upon the merits* that the judgment dissolving the injunction, *unless appealed from*, will be "conclusive between the parties where the same grounds are again set up to enjoin a second seizure for the same debt or of the same property." See *Florance* v. *Wilcox*, 14th L. R., p. 58; 2d An., p. 494; 1st Hennen's Digest, 803, No. 15.*

It is ordered, that the judgment be affirmed.

*No. 4406 was another suit between the same parties, in which, for the same reasons as in this case, the same judgment was rendered.

EDMOND M. GOULD *v.* GARDNER, SAGER & CO.

The following charge to the Jury held to be strictly correct.

In order to maintain an action for damages for a malicious arrest, the plaintiff must prove malice in fact, and that the arrest complained of was made, or procured to be made by the defendants from malicious motives, and without probable cause.

If it appears from the evidence, that the defendants in making or procuring the arrest, acted under the advice of counsel given in good faith; that they had a good cause of action against the defendant in said action, and a legal right to hold him to bail therefor—then the defendants are not liable in damages to plaintiff, and the action cannot be maintained against them.

The verdict and judgment rendered in the District Court and confirmed in the Supreme Court, in the case of the present defendants against *O'Connel & Gould*, in which the plaintiff was arrested and held to bail, and which arrest is the cause of action in this case, is conclusive evidence of a good cause of action in that suit, and cannot now be contradicted by parol or other evidence.

Although the firm of *O'Connel & Gould* had been dissolved before the commencement of the action instituted by the defendants against plaintiff, yet all the partners of the firm of *O'Connel & Gould* were bound *in solido* for all the debts of the firm, and liable to be sued for them.

The evidence of the existence of malice on the part of the defendants, in making the arrest of the plaintiff, is not sufficient to maintain this action, if there was a good, or probable cause of action at the time, and an apparent legal right to hold to bail.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Hunton & Bradford*, for plaintiff. *Roselius* and *Eustis*, for defendants and appellants.

BUCHANAN, J. (LEA, J., dissenting.) This is a suit for damages for a malicious arrest in an action of debt: and has been already remanded by this court, upon a bill of exceptions to the refusal of the District Judge to charge the jury, that to maintain this action, it was necessary for the plaintiff to prove malice and the want of probable cause for the arrest.

See the decision in 8th An., p. 11.

Upon the second trial, the Judge gave the following charge to the jury, without any objection on the part of plaintiff:

"1st. That in order to enable the plaintiff to maintain this action against the defendants, it is necessary for the plaintiff to prove malice in fact, and that the arrest complained of, was made or procured to be made by the defendants from malicious motives, and without any probable cause.

2d. That if it appears from the evidence, that the defendants, in making or procuring said arrest, acted under the advice of counsel, given in good faith, that they had a good cause of action against the defendant in said action, and a legal right to hold him to bail therefor, that the defendants are not liable in damages to plaintiff, and this action cannot be maintained against them.

3d. That the verdict and judgment rendered thereon in this court, and confirmed in the Supreme Court, in the case of *Gardner, Sager & Co.* v. *O'Connel & Gould*, No. 3322 of the docket of this court, in which the plaintiff was arrested and held to bail, which arrest is the cause of action set forth in the plaintiff's petition, is conclusive evidence of a good cause of action in that suit, and cannot now be contradicted by parol or other evidence.

4th. That although the firm of *O'Connell & Gould* had been dissolved before the commencement of the action instituted by the defendants against plaintiff as aforesaid, yet that all the partners of the firm of *O'Connell &*

Gould were bound *in solido* for all the debts of the firm, and liable to be sued for them.

5th. That the existence of malice on the part of the defendants in making the arrest of the plaintiff, is not sufficient to maintain this action, if there was a good or probable cause of action at the time, and an apparent legal right to hold him to bail."

The jury retired with this charge, and returned into court with a verdict against defendants for ten thousand dollars damages, being rather more than double the amount of the judgment which the defendants had recovered of plaintiff in the suit which has given rise to the present action.

This verdict was in direct contradiction to the charge of the court: and that charge was strictly in accordance with the principles of law governing this kind of action, as enunciated in the decision of the Supreme Court remanding this cause. Besides the numerous cases upon which that opinion of our predecessors was based, there are two decisions of a later date, *Hall* v. *Acklen*, 9 An., 219, and *Talbot* v. *Stone*, decided at Monroe last summer, and not yet reported, in which the same principles have been reiterated by the present bench.

It seems to have been supposed that this cause was remanded by our predecessors for the purpose of having it decided by the verdict of a jury, whether the arrest of plaintiff was made without probable cause. But there is no ground for that supposition. Our predecessors not only decided that the action could not be maintained without proof of malice, as well as a want of probable cause for the arrest of plaintiff: but they declared in the most emphatic language that those elements were wanting to the present case.—"It appears," said Judge Dunbar, the organ of the unanimous opinion of the court, "that the defendants in this case were not without probable cause for the arrest of *Gould*. They acted by the advice of eminent and learned counsel, whose opinion was formed upon a decision of that distinguished jurist, the late Judge Martin, in the case of *Abat* v. *Robitaille*, 4th Louisiana Reports, 226, which for twenty years had been considered as the proper construction of the law of arrest, until overruled by a decision of this court in this very case of the arrest of the plaintiff *Gould*, reported in 5th An., 353, *Gardner, Sager & Co.* v. *O'Connell & Gould*, upon which this action is based. Although we still adhere to our decree in this last mentioned cause, yet there can be no doubt, under the circumstances and previous decisions, that the defendants had, in their action, probable cause for the arrest of *Gould*."

And farther down, the court says: "The question in the present case is not whether the defendants had a probable cause of action; that has been placed beyond doubt by the judgment obtained in their favor against *Gould*, for the whole of their demand against him; but whether they had probable cause for the arrest, and we have already said that they had."

In the face of these decisive expressions, it is impossible to consider that it was the intention of our predecessors to leave this matter of the probable cause for the arrest of plaintiff, an open question. They remanded the cause, because the District Judge had committed a mistake in the legal principles which govern such an action as the present, and had thereby misled the jury which first tried the cause. Our predecessors could only have intended, that this very case should be the vehicle for conveying the sound doctrine upon this important subject, to juries in the court of the first instance. For that Supreme

Court had, as this one has, full control of the facts as well as the law of civil cases submitted to their revision, and as we have seen, expressed an opinion upon the facts as well as upon the law. But the second jury disregarded this exposition of the legal principles applicable to the facts of the cause thus presented to them with the authority of the Supreme Court, as well as that of the District Court. By their verdict, they are supposed to have told us that *Gardner, Sager & Co.* had no probable cause for the arrest of *Gould*. This is, at best, but matter of inference, for the jury have given (and were obliged to give) no reasons for *their* decision. But the Supreme Court has told us, most distinctly, that *Gardner, Sager & Co. had* probable cause for the arrest of *Gould*. Now, whom shall we follow, the Supreme Court or the jury, upon this question of law? For it is purely a question of law, upon the following state of facts. *Gould*, the debtor of *Gardner, Sager & Co.*, heretofore a resident of a foreign country, when the debt was contracted, arrives for the first time in New Orleans, a man without family, and seeks employment as clerk in a commercial house, declaring to his acquaintances that it is his intention to establish himself permanently in this city.

A few weeks after *Gould's* arrival in New Orleans, his creditors, *Gardner, Sager & Co.*, acting upon the best legal advice, based upon a decision of the Supreme Court in a case presenting identically the same facts, and upon the uniform practice for twenty years as settled by that decision, procure the arrest of *Gould* for their debt. This arrest is afterwards set aside by the Supreme Court, by a judgment professedly overruling the cases previously adjudged, and establishing a new rule of practice. The question of probable cause for the arrest, is identical with the question of the legal right to arrest; and that legal right is to be determined by the law as it stood at the time the arrest was sued out, not as it stands now. The legal advisers of *Gardiner, Sager & Co.*, although of the first eminence in the profession, could not be expected to foresee that the law would be changed in this very case. One of them (*Mr. Roselius*) has given his evidence very fully upon this point. All that those learned gentlemen could look to, in giving their advice to their clients, was, the decisions of the Supreme Court *in pari materiâ*. "The decisions of the Supreme Court are evidence of what the law is," said Judge Porter, in the case of *Breedlove* v. *Turner*, 9th Martin, 367.

That was a suit against a lawyer for damages, for having given his client advice which was not in conformity to a case adjudged by the Supreme Court; by means whereof an attachment had been set aside.

The doctrine advanced by counsel on that occasion, that lawyers practicing in this State are not obliged to notice judgments given by the Supreme Court, was held to be inadmissible.

Tested by this rule, it is unquestionable, legally speaking, that there was probable cause for the arrest of plaintiff, at the suit of defendants. See case of *Walter* v. *Sample*, decided in the Supreme Court of Pennsylvania, January, 1856. Am. Law Register, vol. 4th, p. 384.

It will be observed that the indebtedness of *Gould* to *Gardner, Sager & Co.*, is taken for granted in this opinion. That indebtedness is *res judicata*, by the final judgment in the first suit; although it was questioned before the jury in the present case, as evidently appears by the call for certain documents by which plaintiff swore he expected to prove that an award of referrees, made before the institution of the suit of *Gardner, Sager & Co.*, had established a

balance due by the latter to him. The defendants correctly excepted to this evidence. Not only was the inquiry closed by the judgment in *Gardner, Singer & Co.* v. *O'Connell & Gould*, as was said by our predecessors; but an inspection of that record, (which is in evidence,) shows that the present plaintiff took out a commission in that case, to prove the very same fact.

The judgment of the District Court is therefore reversed and judgment is rendered for defendants, with costs in both courts.

ALEXANDER HILL *v.* THE NEW ORLEANS, OPELOUSAS AND GREAT WESTERN RAILROAD COMPANY.

Action for damages for injury done plaintiff by being thrown from the cars. A bill of exceptions was taken to the admission in evidence of the declarations of the Superintendent as to the conduct of the engineer.

By the Court: It is clear that the Board of Directors alone had the power to make admissions in regard to the controversy which would bind the company, and that no ordinary agent of the company would possess the power unless expressly granted.

In order to enable the plaintiff to recover it must appear that there was no want of care, and no imprudence on the part of the plaintiff, by which the injury was in any manner directly brought about, and that the injury was occasioned by the negligence of the company, or its officers, either in not having provided the necessary apparatus and fixtures to the locomotive or train by which the accident might have been guarded against, or by the carelessness or malfeasance of its agents. If it appear that the injury would have equally happened with or without such guards to the locomotive or train, then the want of them will not increase the responsibility of the company.

In actions of this kind vindictive damages cannot be given, although the negligence is clearly proven. Vindictive damages are sometimes allowed in the case of wilful or malicious injuries.

In estimating damages the jury may consider the painful nature of the wound, as well as the length of time the plaintiff may have been kept from his employment, and the permanent character of the injury. The jury should allow such reasonable sum as will compensate the plaintiff, and no more. The company in such cases is not to be punished for the negligence or carelessness of its agents as a crime.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Livingston, for plaintiff. *Cohen*, for defendant and appellant.

MERRICK, C. J. This suit is brought to recover damages from the company for injuries occasioned the plaintiff by being thrown, as alleged, from the railroad cars.

It appears that the cars ran over a blind horse, and that the defendant, a passenger upon them, was either thrown or jumped from the cars, whereby he was seriously injured. None of the other passengers were harmed, all of them except one other having kept their seats.

The jury gave a verdict of nine thousand dollars in favor of the plaintiff, and the defendant appealed.

There are two bills of exception in this case which require our notice. The first is taken to the admission in evidence of the declarations of *Payne*, the Superintendent of the road, made in the presence of the witness *Dunbar* in a conversation with *Hill* after the injury. The substance of the statement of *Payne* was that the engineer had been guilty of the most gross carelessness, and that he had requested *Mr. Gibbs*, the Chief Engineer, to discharge him, and that he would discharge him as soon as he got control, and that he (the engineer

who ran the locomotive) told him (*Payne*) that he thought the horse would jump off as soon as the engine touched him.

The testimony of *Dunbar* as to the declarations of *Payne* was objected to on the ground that *Payne* could not bind the defendants by any remarks, because he could be summoned as a witness, and at the time of making his declarations he was not under oath, and the defendants had no opportunity of a cross-examination.

It is evident that this testimony was calculated to exert a great influence upon the minds of the jury, it being the opinion of one of the officers of the company upon the cause of the accident. Aside from the liability of the loose conversations of the numerous agents of a large company to be misunderstood, it becomes important to know how far the declarations of such officers are binding and affect the company in regard to *past* transactions.

The declaration or admission of an agent is evidence against the principal only on the supposition that the agent represents the principal. But the agent only represents his principal within the scope of the authority delegated. If the agent is authorized to make a contract for the company, his declarations and admissions in regard to that contract are the acts of the company, and are admissible in evidence as forming a part of the *res gestæ*. But so soon as the transaction is ended the agency in the affair terminates, and the agent has no longer authority to speak of it so as to bind the company.

It is the duty of the engineer to run the locomotive, and keep it in running order. It is not in the scope of his authority to make admissions for the company, or settle controversies on its behalf. So of the Superintendent: it is his duty, we suppose, to superintend, through proper agents, the running of the cars, the receipt and delivery of freight, the transportation of passengers, the expenses and receipts of the road and the keeping of the books. Any contract within the scope of the authority delegated, made by him, would bind the company, but he has no authority to bind it by any admission in regard to business not delegated to him, and which he is without authority to settle.

As the declaration of the engineer to the Superintendent, and the declaration of what the engineer said to the Superintendent was retailed by him to the plaintiff in the presence of the witness after the affair had occurred, it is not important to decide whether the declarations of an agent at the time of the alleged commission of an act of malfeasance is or is not admissible in evidence against the principal.

It is clear that the Board of Directors alone had the power to make admissions in regard to the controversy which would bind the company, and that no ordinary agent of the company would possess the power, unless expressly delegated. 2 Stark. Ev., 43; Greenleaf, 113, 114; Story on Agency, 137.

The court, therefore, erred in permitting the declarations of *Payne*, in the conversation between him and the plaintiff, to go to the jury.

As the real question presented by the pleadings is whether the negligence of the defendant's agents occasioned the injury to the plaintiff, and as the term locomotive is sometimes used as a figurative expression for the train, and as the plaintiff himself had offered testimony tending to show in what manner the horse was run over by the locomotive and the cars, we think the defendat should have been permitted to interrogate the witness *Octave Villette*, and others, and to show the real manner in which the horse was brought in contact with the cars, and the injury occasioned.

It is apparent, in order to recover, it must appear: 1st. That there was no want of care or imprudence on the part of the plaintiff, by which the injury was in any manner directly brought upon himself; and, 2d. That the injury was occasioned by the negligence of the company or its officers, either in not having provided the necessary apparatus or fixtures to the locomotive or train, by which the accident might have been guarded against, or by the carelessness or malfeasance of its agents.

If it appear that the injury would have equally happened with or without such guards to the locomotive or train, then the want thereof will not increase the responsibility of the company.

This case must be remanded to the lower court for a new trial. We are the more willing to do so because we are not satisfied with the verdict. It appears to us to be much higher than the testimony as it stands will justify, even if the testimony of defendant's witnesses be disregarded. In actions of this kind it is not within the province of the jury, although the negligence is clearly proven, to give vindictive damages, as is sometimes allowed in cases of wilful or malicious injuries. It is true that in estimating the damages where a case is made out, the jury may consider the painful nature of the wound as well as the length of time the plaintiff has been kept from his employment, and the permanent character of the injury; but in assessing the damages the jury should give such reasonable sum as will really compensate the plaintiff, and no more. The company in such case is not to be punished for the negligence or carelessness of its agents as a crime.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this cause be remanded to the lower court for a new trial, with instructions to the court, in receiving and rejecting testimony to be governed by the views herein expressed, and in other respects to proceed according to law; and it is further ordered, that the plaintiff pay the costs of the appeal.

Succession of John Wilson.—Heirs of Gardner and G. Burke & Co., Opponents.

Article 2156 of the Code requires that in conventional subrogations an actual subrogation *should be expressed and made at the same time as the payment.* It cannot be made in anticipation of the payment, for the payment is the essential basis of the subrogation.
Nor can a subrogation be validly made *after* the payment.

APPEAL from the District Court, Fourth District, Parish of Ascension, *Watterson*, J., presiding. *Illsley*, for opponents and appellants. *C. A. Johnson*, for administrator.

Buchanan, J. We are of opinion there is no subrogation to *Lalande's* judgment and mortgage in favor of *Sheafe*, as against *Gardner's* heirs.

Wilson purchased of *Gardner* a tract of land on which *Lalande* had a mortgage resulting from the registry of a judgment against *Gardner*.

In part payment of the price, *Wilson* undertook to discharge *Lalande's* mortgage, and for that purpose furnished a draft, in favor of *Lalande*, on *Sheafe*, at

ninety days' date, (due 3d April, 1848,) which draft was received by the vendor as cash.

Sheafe paid the draft at maturity; but before paying it, called on the payee and holder, *Lalande*, to know whether, as a condition of the payment, *Lalande* would transfer to him (*Sheafe*) his judgment against *Gardner*, being the same judgment, the registry of which created the mortgage which the draft was given to satisfy.

A month after the maturity and payment of the draft, a written transfer and subrogation was made by *Lalande* to *Sheafe*.

Some stress seems to be laid upon the assumed fact that an agreement for a subrogation was made by the parties previous to the payment. But we regard that as immaterial. The Code requires (Article 2156) that an actual subrogation should be *expressed and made at the same time as the payment.* It cannot be made in anticipation of the payment, for the payment is the essential basis of the subrogation. The same obligation cannot exist in favor of two distinct parties, each to the exclusion of the other, at the same time. Neither can a subrogation be validly made *after* the payment. Toullier says (vol. 7, No. 116): "Dès l'instant où le paiement est fait, le créancier est sans pouvoir pour transmettre ou céder des droits qu'il n'a plus. Le moindre intervalle entre le paiement et la subrogation la rend nulle et sans effet; car il ne peut plus céder des droits qui n'existent plus."

If we look at *Lalande's* deposition we find that he says: "Before paying it *Sheafe* called on me to know whether, as a condition of the payment by him, I would transfer to him the judgment above mentioned." This appears to be substantially all the evidence of the assumed previous agreement; and we do not regard it as evidence of an agreement to subrogate to a mortgage against the property sold by *Gardner* to *Wilson*. It is in terms an agreement to transfer a judgment. Now the Article 2156 not only requires that the subrogation should be made at the time of payment, but that it should be *expressed*, not inferred from an agreement to transfer or deliver the credit or title in satisfaction of which the payment is made. Compare these expressions with those proved in *Harrison* v. *Bisland*, 5 Rob., and we think the doctrine of that case will be conclusive of this. The agreement in terms to transfer the mortgage has a later date than the payment.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; that the opposition of *Mrs. Gardner*, tutrix of her minor children, and administratrix, and of *Glendy Burke & Co.*, be maintained; and that the account of administration of the estate of *John N. Wilson* be amended by placing thereon the said opponents, with privilege of vendor, and first mortgage upon the proceeds of sale of the Manchac land, the costs of the opposition and of the appeal to be borne by the appellee.

Succession of G. M. Lucas.—P. J. Dubos and Wife, Intervenors.

Foreign judgments have no executory force in this State until they acquire it by the judgment and fiat of our own tribunals. To procure such a fiat a personal action must be brought upon the judgment—an action, the prescription of which is governed by Article 3508 of the Code.
The prescription of actions is regulated by the law of the forum.

APPEAL from the Second District Court of New Orleans, *Lea* J. *Griffon*, for intervenors and appellants. *Strawbridge*, for curator.

Spofford, J. On the 5th June, 1831, *Bazin & Garnier* obtained a judgment for upward of 11,000 francs against *Gabriel Marie Lucas* before the "Tribunal de Première Instance" of Pointe à Pitre in the island of Guadaloupe.

In the same year *Lucas* removed from Guadaloupe to the city of New Orleans, where he engaged in commerce and continued to reside, until his death, in 1851.

Cavaroc was appointed curator of his succession, and in due time filed an account which was homologated, except so far as opposed by one *Clausmadec*, who claimed to be a creditor for a very large amount, but who discontinued his opposition after evidence was taken tending to rebut it.

On the 20th April, 1853, the present appellants, *Dubos*, *Miettes* and wife filed what is called an intervention, in which they claim to be creditors of the deceased as subrogees of *Bazin & Garnier* by virtue of the Guadaloupe judgment rendered against *Lucas* in 1831.

A general plea of prescription was filed by the curator in the District Court, which has been made more specific in this court—the prescription of ten and twenty years, under Article 3508 of the Civil Code, being relied on.

The plea must prevail. Foreign judgments are evidences of debt, of high authenticity, but they have no executory force in this State until they acquire it by the judgment and fiat of our own tribunals. To procure such a fiat a personal action must be brought upon the judgment—an action the prescription of which is governed by the Article 3508 of the Code. *Succession of Tilghman*, 7 Rob. 392; *Surget* v. *Stanton*, 10 An. 318; *Shackleford* v. *Robinson*, 583.

It matters not that the judgment here sued upon was not prescribed by the law of France prevailing in Guadaloupe, as contended by the appellants; for the prescription of actions is regulated by the law of the forum only. More than twenty years had elapsed since *Lucas* became a resident of Louisiana, before any proceeding was instituted here upon the judgment in question.

Judgment affirmed.

Succession of Marie S. Viaud, deceased wife of Louis C. Faurie—Charles Faurie et al. *v.* Louis E. Faurie.

The omission to inventory the community property, will not annul or suspend the usufruct established in favor of the surviving spouse, by the Act of 25th of March, 1844.

The community is entitled to the enjoyment of the property and effects belonging to the husband at the time of the marriage, and owes no recompense for the diminution in value of such effects by reason of such enjoyment.

Furniture and other movables brought into marriage, if they still exist *in specie*, may be taken out at the dissolution of the community by the husband who brought them, but he is not entitled to credit for their value at the date of the marriage. If they have perished, the husband must bear the loss. If they have been alienated, upon showing that the proceeds went into the community, the husband can charge the sum to the community.

C. C. 536, 550, 559, 2371.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

J. & E. Bermudez, for plaintiffs and appellants. *Dufour*, for defendant.

Spofford, J. The plaintiffs are children of the defendant, by his wife, *Marie Segonde Viaud*, who died in New Orleans on the 13th of March, 1852. The defendant, who was common in property with his deceased wife, did not open her succession, or cause any inventory to be made, but continued to enjoy the entire estate which the spouses formerly possessed, and nearly all of which belonged to the community, and none of which belonged to the wife, either as dotal or extra-dotal property.

In September, 1854, the plaintiffs, setting forth some of these facts, prayed that a public inventory be taken of the property of their deceased mother. An inventory of the community was taken and homologated. The plaintiffs then, alleging that their father had administered their mother's estate since her decease, as *negotiorum gestor*, and dilapidated the same, prayed that he be ruled to file an account of his administration, so as to show the exact amount of the succession fallen to them from their mother.

Under an order of court, the defendant filed an account which the plaintiffs opposed on numerous grounds. This appeal was taken by them from a judgment overruling their opposition.

1. They complain that in his account, the defendant did not charge himself with the revenues, or rents and income of the common property, since the death of his wife. To this he answers, that by the Act of March 25, 1844, (p. 99,) "relative to community property," he was the legal usufructuary of his wife's share in the community, from the moment of her death, and, as such, he had a right to reap the revenues and is not bound to account for them to her heirs, the children of their marriage. And such is the law. C. C. 536. "The right of the survivor to the usufruct of the inheritance, attaches at the same moment that the right of property accrues in favor of the heirs." *Succession of Bringer*, 4 Ann. 395.

It seems to be contended in this court, although such a ground was not laid in the opposition under this head, that inasmuch as the usufruct established by the Act of March 25, 1844, must be governed by the rules of the Code relative to usufructs in general, the neglect of the defendant to have an inventory made of the property comprised in the usufruct, should entail upon him

the loss of the revenues, as a penalty. Article 550 of the Code requires an inventory as a preliminary step to obtaining possession of the property subject to the usufruct. But here the defendant was already in possession of right, and this possession continued after the death of his wife. Until a partition, he had a right to remain in possession. The inheritance of the plaintiffs was only of an undivided half of the community estate after all its debts were paid. It is true, an inventory should have been taken. But we have been referred to no law which declares that the omission of this formality shall annul or suspend the usufruct established in favor of the surviving spouse, by the Act of March 25, 1844. We cannot declare such a penalty. "Ainsi, la loi n'ayant prononcé aucune peine, les tribunaux n'ont pas le droit d'en créer une: c'est au nu-propriétaire de s'opposer à la jouissance de l'usufruitier, tant que les formalités voulues ne sont pas remplies." 2 Marcadé, p. 481.

2. The opposition founded upon the adjudication of certain movables of the community to the defendant, at the price estimated in the inventory, was abandoned on the oral argument in this court.

3. The attorney's and notary's fees occasioned by the opening of the succession of *Marie Segonde Viaud*, at the instance of her heirs, were properly chargeable to that succession.

4. There was error, as contended by the appellant, in overruling the opposition of plaintiffs, to the item of $605 02, charged by the defendant against the community for certain blacksmith's tools and household furniture, which were his separate goods at the date of the marriage, about thirty years since, but which have disappeared, having been alienated, lost, or worn out by use. The community is entitled to the enjoyment of the property and effects belonging to the husband at the time of the marriage. See C. C. 2371. The community owes no recompense for the diminution in value of such effects by reason of said enjoyment. Furniture and other movables brought into marriage, if they still exist *in specie*, may be taken out at the dissolution of the community, by the husband who brought them; but he is not entitled to credit for their value at the date of the marriage. *Depas* v. *Riez*, 2 An. 44. If they have perished, the husband must be the loser; for *res perit domino*. If they have been alienated, upon showing that their proceeds went into the community, the husband can charge that sum to the community. But there is no evidence to authorize such a charge in the present case.

In this particular, the judgment must be amended.

5. We concur with the District Judge in the opinion, that a forfeiture of the usufruct granted to the defendant by the Act of March 25, 1844, has not been established. If he could be required to give bond in favor of his children, (upon which point it is not necessary now to express an opinion,) still the delay to do so does not deprive him of the profits which have been due to him from the moment the usufruct accrued. C. C. 559. An inventory has now been made according to law, and the effect of a delay in this formality, has already been considered. The allegation of waste has not been proved. And the fact that the defendant has been guilty of living with a concubine, however reprehensible it may be, has not been declared by the Legislature to be a ground for arresting the usufruct created by the Act of March 25, 1844.

It is therefore ordered and decreed, that the judgment of the District Court be so amended, as to strike from the defendant's account, the item of $605 05, (to wit, $239 05, for *outils de forge*, and $366, for *meubles meublans*,) charged

as a debt of the community lately existing between the defendant and his wife, *Marie Segonde Viaud*. And it is further ordered and decreed, that in other respects the said judgment be affirmed; the defendant and appellee paying the costs of the opposition in both courts.

H. George *v.* Moses Greenwood & Co.

In a suit to rescind the sale of a slave, it is no defence that a tender has not been made, where the tender is impossible.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Elmore & King, for plaintiff. *Semmes & Edwards*, for defendants and appellants.

Buchanan, J. The plaintiff having purchased a slave upon the warranty of defendants, which slave runaway a short time after the sale, and was lost to plaintiff, notwithstanding every effort made to get him back, this suit is brought for the price, and for expenses incurred in pursuit of the runaway.

In this court, the defendants urge the necessity of a tender of the slave. But the case of *Richardson* v. *Johnson*, 1 An. 389, upon which they rely, was that of a plaintiff who alleged himself to be in possession of the same. Here the evidence as well as the pleadings, show the tender to be impracticable. *Castillano* v. *Peillon*, 2 N. S. 471. The slave appears to be in the Indian territory, and beyond the reach of any civil process. A resort to force, under the circumstances, would have been dangerous, and, in all probability, unavailing.

The power given to the Indian agent by the Act of Congress of 1834, chapter 161, section 10, relates to a different class of persons from runaway slaves, namely, unlicensed traders, trappers, settlers on Indian lands, and foreigners unprovided with passports, all of whom are declared by law to be intruders in the Indian territory, and liable to be removed by military force.

Neither does it appear, that the jurisdiction given to the courts of the United States for the districts of Arkansas and Missouri, of crimes committed in the Indian territory, by the Act of Congress of 1844, chapter 103, would have reached this case, or enabled plaintiff to have obtained process for the arrest of his runaway slave from those courts.

The judgment of the District Court appears to have done justice, and is affirmed, with costs.

Henry Gobet v. Municipality No. One and City of New Orleans.

Where the violation of a contract is passive, the putting in default is a prerequisite to the recovery of damages.

A violation is said to be passive, by not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated, or implied from the nature of the contract.

It is a sufficient bar to an action for recovery of damages for the passive violation of a contract, that the defendant was not put in default by the plaintiff previous to the expiration of the time within which the plaintiff stipulated to perform his part of the contract.

Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach, in the absence of any fraud or bad faith, are the amount of the loss he has sustained and the profits of which he has been deprived; and only for such damages as may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. Damages for supposed profits based on the speculative opinions of witnesses, are clearly inadmissable.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Roselius* and *Buisson*, for plaintiff. *Livingston*, City Attorney, for defendant and appellant.

Voorhies, J. This is an action for the recovery of damages for the breach of a contract. The plaintiff alleges in substance, that he and one *Victor Amiel* stipulated, *in solido*, by authentic act, dated the 24th of July, 1847, with Municipality No. One, to build new wharves and to repair old ones; that under the contract, extensive wharves were built by them, for which they were paid; that he was prevented from executing the contract on his part, by the neglect of the defendant to furnish the necessary materials in accordance with its stipulations, whereby a larger number of workmen employed for that purpose were forced to remain idle to his great damage; that his partner having died on the 25th of October, 1847, previous to the completion of said wharves, he proceeded to do the work as the materials were furnished, and completed the same; that the wharves thus built, yielded him very little profit, if any; and as they were more costly than the others, which remained to be constructed and repaired, he expected to be remunerated for his trouble and labor by the construction of the latter; that the defendant was put in default by authentic act, dated the 26th of May, 1848; and that the contract was also violated by the defendant, by giving the same job to other persons.

The defendant pleaded the general issue.

The cause was tried by two successive juries, whose verdicts were given in favor of the plaintiff. The verdict of the first was set aside, and a new trial granted, on the ground that the defendant had not been put in delay; and in regard to the other, a similar motion, founded on the same ground, was overruled, the Judge *a quo* remarking, that "after two verdicts in the same case for plaintiff, the Supreme Court was the only power which could bestow any efficient relief to defendant, and do justice finally to his case." The defendant is appellant from a judgment rendered on this verdict.

According to the terms of the contract, the plaintiff was bound to complete the wharves on or before the 31st of October, 1847.

Where the violation of a contract is passive, it is clear that the putting in default is a prerequisite to the recovery of damages. A violation is said to be passive, by not doing what was convenanted to be done, or not doing it at the

time, or in the manner stipulated or implied from the nature of the contract. C. C. 1906, 1927, 1925. There are three different ways by which the debtor may be put in default; by the terms of the contract, by the act of the creditor, or by the operation of law. It is not pretended here that the defendant was put *in mora*, either by the terms of the contract or the operation of law. C. C. 1905.

The question then recurs, has the defendant been put in default by the act of the plaintiff? The evidence, in our opinion, is insufficient to authorize the solution of this question in the affirmative. The letter of the plaintiff of the 10th of January, 1848, written upwards of two months after the expiration of the term within which he was bound to complete the work, cannot be regarded, it appears to us, as a putting in delay; indeed, the main object of the plaintiff, it would seem from it, was to give notice to the defendant of the dissolution of his partnership by the death of his partner, on the 26th of October, 1847. It is true, his letter concludes with the following paragraph:

"Je me trouve maintenant arrêté dans mes travaux par le manque de materiaux suffisans. Il me manque pour terminer et livrer les wharves (which he describes) encore 400 rances. J'ai jusqu'à présent employé tout ce que j'ai pu faire servir, mais la quantité de rances que je demande m'est indispensable pour compléter mon travail. Je vous prie, messieurs, de vouloir bien donner les ordres pour que cela me soit livré dans le plus court délai possible, afin que tout l'espace du port ci-dessus mentionné puisse être livré au commerce sans encombre." But it was evidently not intended as a demand in writing, to put the defendant in default, for there is not a word of complaint in it that he had been retarded or prevented from completing the work by the neglect of the defendant to furnish the necessary materials. On the contrary, we think it may be fairly inferred from it, that no such interruption had previously taken place. "Je me trouve maintenant arrêté dans mes travaux," &c. This clearly excludes the idea of any previous interruption.

The next evidence on which the plaintiff relies, is a demand, by protest, on the defendant, made by the notary public, on the 26th of May, 1848. This must also be regarded as unseasonable. Even had the defendant been seasonably put in default, we doubt much, from the circumstances disclosed by the record, whether the plaintiff would have been able to execute his contract within the term stipulated. But, be this as it may, we consider it as a sufficient bar to the action, that the defendant had not been put *in mora* by the plaintiff previous to the expiration of the term within which the latter stipulated to complete said wharves. The contract was then at an end. It is besides shown, that the plaintiff has received payment for all the work which was done by him for the municipality, previous and subsequent to the 31st of October, 1847.

It is unnecessary for us to express any opinion as to the quantum of damages assessed by the jury in this case. It may be proper, however, to add, that in cases of damages arising from the inexecution of contracts, there is no discretion left to the Judge or jury. Where the object of the contract is anything but the payment of money, in the absence of any fraud or bad faith, the law lays down the rule in explicit terms, that the damages due to the creditor for its breach, are the amount of the loss he has sustained, and the profits of which he has been deprived, and only for such damages as were contemplated, or may reasonably be supposed to have entered into the contem-

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plation of the parties at the time of the contract. Damages for supposed profits, based upon the speculative opinions of witnesses, are clearly inadmissible. 3 An. 285.

It is therefore ordered and decreed, that the judgment of the court below be avoided and reversed, and that there be judgment in favor of the defendant; the plaintiff to pay the costs in both courts.

William Whitehead *v.* Paul Tulane and C. M. Guiramand.

In an injunction suit, where there is judgment of nonsuit on the plaintiff's being called and not appearing, the injunction bond is forfeited.

A party who enjoins an execution, on the ground of ownership in himself of the property seized, and who, pending the injunction suit, makes a notarial conveyance of the same property to a third person, cannot be allowed to call such third person in warranty.

It is too late, on an application for a rehearing, to take advantage of the neglect of appellant to file his brief within two days after the cause was set for trial. The appellee should have moved for a continuance when the cause was called for argument.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Roselius* and *Hahn*, for plaintiff and appellant. *L. C. & G. B. Duncan*, for defendants.

Buchanan, J. Two questions of law are presented by this record:

1st. Whether a judgment of nonsuit (the plaintiff being called and not appearing) in an injunction suit forfeits the injunction bond?

2d. Whether a party who enjoins an execution on the ground of ownership in himself of the property which has been seized, and who, pending the injunction suit, makes a notarial conveyance of the same property to a third person, can he allowed to call such third party in warranty? The first of these questions was decided in the case of *Penniman* v. *Richardson*, 3 L. R. 103, when Judge Porter said: "The plaintiff in the suit voluntary abandoned it, and by so doing became, with his surety, responsible for all damages which the plaintiff in execution sustained," etc.

The second question is no less clear. The warranty contended for by defendants, belongs to neither of the kinds mentioned in Article 379 of the Code of Practice. Neither does the conveyance in question contain any such stipulation of warranty. Indeed, as the Judge below remarks, it is quite a reversal of the ordinary course of things, to suppose a warranty of the vendee towards the vendor. The facts, as disclosed by the evidence, are that the defendant, *Tulane*, having a judgment against one *Conner*, seized *Conner's* household furniture in 1842, under a *fieri facias*, and bid the same off at Sheriff's sale, through a friend, whose evidence is in the record. The property was left in *Conner's* possession after this sale, and so remained to the year 1847, five years afterwards, when it was again seized by the present plaintiff in execution of a judgment against *Conner*.

Tulane, who had never exercised any ownership or control since his apparent purchase, then came forward and enjoined plaintiff's execution, claiming the property. Pending the injunction suit *Tulane* made a conveyance to *Robert R. Barrow* of his interest in the property seized, for the consideration of *Barrow's*

note, payable three years after date, with an express renunciation of all warranty on the part of the vendor. Some time after this conveyance, the injunction suit being assigned for trial, and the plaintiff in injunction, *Tulane*, being called and not appearing, a judgment of nonsuit was entered against him. It is proved that fruitless efforts have been since made by the Sheriff to satisfy the writ against *Conner*, or to regain possession of the property, the sale of which was enjoined by *Tulane* in 1847. The value of that property is proved to be eight hundred dollars, the amount of the injunction bond.

These facts make out a case against the defendants of damages to the full extent of the injunction bond signed by them. The legal presumption arising from this continued possession in *Conner* is that the purchase of *Conner's* property by *Tulane* at Sheriff's sale was a simulation. The anomalous sale, pending the injunction suit, to *Barrow*, (who is shown by the record to have claimed other property seized at the same time with this furniture, and under the same execution,) coupled with the equally anomalous call in warranty of *Barrow* by his vendor, are facts which corroborate this legal presumption.

Perhaps it is even unnecessary to advert to these circumstances, inasmuch as the voluntary abandonment of the injunction suit, in the language of the case cited, has fixed the responsibility of the principal and surety in the injunction bond. We allow interest from the date of the judicial demand.

It is, therefore, adjudged and decreed, that the judgment of the District Court, as between plaintiff and defendants, be reversed; that plaintiff recover of *Paul Tulane* and *C. Morel Guiramand, in solido*, eight hundred dollars, with legal interest from the 16th February, 1853, until paid, and costs in both courts; and that, as between the defendants and the warrantor, *Robert R. Barrow*, the judgment dismissing the call in warranty be affirmed.

ON A REHEARING.

On an application for a rehearing the court rendered the following judgment:

BUCHANAN, J. The suggestion in the petition for rehearing, that the appellant's brief was filed more than two days after the cause was fixed for trial, comes too late. Parties are bound to take notice of the fixing of causes for trial; and the appellee should have appeared in court, when the cause was called for argument, and moved for a continuance, if he were entitled under the rule of court to do so.

Rehearing refused.

THE STATE OF LOUISIANA, on the relation of JOHN M. BELL, *v.* JOSEPH HUFTY.

The address for the removal of *Hufty* from the office of Sheriff of the parish of Orleans was presented to the Governor, and approved by him. His official approval and signature consummated the removal.

Article 97 of the Constitution is in these words: "All civil officers, except the Governor and Judges of the Supreme and Inferior courts, shall be removable by an address of a majority of both Houses, except those the removal of whom has been otherwise provided by this Constitution." Accurately speaking, the Constitution itself nowhere else provides a mode of removing Sheriffs.

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Article 99 allows the impeachment and the prosecution of Sheriffs. But the power of impeachment, or prosecution for misdemeanor in office, which, in case of conviction, involves a removal from office as an incident, and the power of removal without impeachment, or prosecution, are concurrent powers, both of which are clearly recognized by the Constitution, and neither of which excludes the other.

The theory of our representative Governments is, that offices are created, not for individual emolument, but for the public good. And the object of the Constitution was to provide not only for the punishment of official delinquents, which would involve the dismissal from office, but also a mode of removing civil officers, against whom no accusation of crime could be made, or sustained, whenever the public good should require such removal.

It would be rebellion in a Judge to say that a plain and unqualified grant of power, given by the Constitution to a particular department of the government, was null because he thought it was against common right.

It is hardly tenable to say that a man can have a "vested right" to any public office under our form of government. Certainly it cannot be said of a Sheriff, when, in the language of the 90th Article of the Constitution, the very tenure of the office is, that he shall hold it "for the term of two years, *unless sooner removed*."

The power of removing an officer upon address of the two Houses is not a judicial power, but is essentially administrative, and therefore not within the prohibition of Article 2 of the Constitution, which provides that "no one of these departments, [legislative, executive and judiciary] nor any person holding office in one of them, shall exercise power properly belonging to either of the others." But even if this power of removal did somewhat partake of a judicial character, its exercise would not, on that account, be void, for it is protected by the concluding words of the same Article 2: "No one of these departments, nor any person holding office in one of them, shall exercise power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted*."

The verdict of the jury in favor of *Hufty*, in the contested election between *Bell* and *Hufty* was not a bar to the removal of *Hufty* by the Legislature. The question before the court was: Shall *Hufty* receive a commission? The question before the Legislature was: Shall *Hufty* be removed from office? In the one case there were two parties, each urging that he could count the greater number of votes in his favor. In the other case there were no parties, but a mere act of administration. The judgment in favor of *Hufty* has been enforced. *Hufty* has been placed in possession of the sheriffalty.

The reasons assigned in the preamble to the address for the removal of *Hufty*, whatever they may be, cannot vitiate the act of removal, which act was within the constitutional competency of the Legislature, uncontrolled by any superior power. With their reasons, whether good, bad, or indifferent, the judiciary have nothing to do.

While the Legislature has power to remove a Sheriff by address, *proprio motu*, without any accusation preferred by memorial against him, yet Article 97 of the Constitution does not authorize the Legislature to hear evidence upon, and decide judicially, the legality or validity of an election of Sheriff. BUCHANAN, J., dissenting.

Unless the reasons assigned by the Legislature exhibit an unconstitutional exercise of power, they could not be examined judicially. BUCHANAN, J., dissenting.

The exercise of judicial power by the Legislature is unconstitutional, except in the instances expressly directed or permitted in the Constitution. BUCHANAN, J., dissenting.

The identical specifications upon which the relator had contested the election of *Hufty* before a tribunal, the decision of which was final, are the very grounds set forth in the address for the removal of *Hufty*. The address is thus an interference with the legal course of proceedings of the regularly constituted judiciary of the State, and an appellate jurisdiction claimed and exercised by the Legislature. BUCHANAN, J., dissenting.

APPEAL from the Sixth District Court of New Orleans, *Cotton* J.

Benjamin, Bradford & Finney, for the relator. *Durant & Hornor* and *Price & Day*, for defendant and appellant.

SPOFFORD, J. The present relator, *John M. Bell*, having produced a commission as Sheriff of the parish of Orleans, *vice Joseph Hufty*, removed, and having given the bond and taken the oath prescribed by law, was, some days since, recognized by this court as its executive officer.

In so recognizing him, this court acted upon the presumption that all things had been rightly done; there was no *contestatio litis*, and the showing made *ex parte* was apparently regular upon its face.

We did not, and do not, regard that action on our part as decisive of the present issue. For the first time we have a controversy touching this matter presented before us according to the forms of law, upon a devolutive appeal from the decision of a tribunal having original jurisdiction, which this court has not.

The defendant has appealed from a judgment of the Sixth District Court of New Orleans, ordering him to surrender to the relator all the papers and other effects belonging to the office of the Sheriff of the parish of Orleans.

There is no dispute as to the power of the Governor to appoint a Sheriff in case the office becomes vacant from any cause during a term. Const., Art. 80. There is no dispute as to the fact that the relator, *Bell*, has been so appointed with the advice and consent of the Senate, and that he is duly qualified to fill the office.

Then the sole question is, was there a vacancy when the relator was appointed? If there was, the judgment of the District Court is right; if there was not, it was wrong.

The defendant, *Hufty*, is admitted to have been the legal Sheriff of the parish of Orleans until the 21st day of February, 1856, when it is alleged that he was removed from office by the following address of a majority of both Houses of the General Assembly:

"An Address removing from office *Joseph Hufty*, Sheriff of the parish of Orleans.

"Whereas, freedom of suffrage and the inviolability of the ballot-box are the only basis of republican government; and whereas, the great palladium of American liberty has been overthrown and trampelled under foot at the late general election held in New Orleans on the 5th November, 1855, whereby the free expression of the popular will has been illegally suppressed by partisan Commissioners of Elections, who arrogated to themselves the power to disfranchise legal voters, and by bands of lawless men who not only drove peaceful citizens from the polls by intimidation, violence and bloodshed, but even after the polls had been closed, destroyed more than thirteen hundred legal votes which had been received during the election by the Commissioners, to the truth of which outrages the whole population of New Orleans bear witness; and whereas, the late Governor of this State has urged the Legislature to "crush the evil at once, and before it has taken root, and by the most pointed and energetic means;" and whereas, the Legislature is constituted by the organic law the grand inquest of the State, for the protection of the elective franchise from tumult, violence and other improper practice, and to vindicate the constitutional rights of the people rising above and not the subject-matter of ordinary judicial investigation, but totally independendent of and not to be confounded with individual claims to office; and whereas, the 97th Article of the Constitution declares that "all civil officers, except the Governor and Judges of the Supreme and inferior courts, shall be removable by an address of a majority of both Houses, except those the removal of whom has been otherwise provided for by this Constitution;" and whereas, a Sheriff is a civil officer, whose removal is not otherwise provided for by the Constitution; and whereas, it has been indubitably established to the satisfaction of this Legislature that the constitutional rights of the citizens of New Orleans have been grossly violated in the late election for Sheriff of the parish of Orleans;

Therefore, be it resolved by the Senate and House of Representatives of the

State of Louisiana in General Assembly convened, a majority of the members of both Houses concurring in this address, that *Joseph Hufty*, commissioned as Sheriff of the parish of Orleans, be and he is hereby removed from the office of Sheriff of the parish of Orleans.

Be it further resolved, that this address be presented to the Governor of this State in compliance with the Constitution thereof, and that the same take effect from and after its passage.

(Signed,) WILLIAM W. PUGH,
Speaker of the House of Representatives.

(Signed,) C. H. MOUTON,
Lieutenant Governor and President of the Senate.

Approved, February 21st, 1856,

(Signed,) ROBERT C. WICKLIFFE,
Governor of the State of Louisiana."

If this address, thus approved, effected a removal of *Joseph Hufty* from the office of Sheriff, there is an end of the case.

The objection of form, upon the ground that the address purports itself to remove the defendant from office, whereas the Article 97 of the Constitution requires the Executive to intervene upon the request of the Legislature, appears to be untenable. The address was presented to the Governor, and approved by him. His official approval and signature consummated the act. Constitution, Art. 54.

The constitutionality of this Act of removal being then the only matter of inquiry necessary to the determination of this cause, we proceed to its investigation in the following order:

1st. Has the power of removing a Sheriff by means of an address of a majority of the members of both Houses been expressly conferred by the Constitution in any case?

2d. If it has, are there any restraints or limitations laid down elsewhere in the Constitution, which rendered the exercise of the power, in this particular case, null and void?

I. Article 97 of the Constitution is in these words: "All civil officers, except the Governor and Judge of the Supreme and inferior courts, shall be removable by an address of a majority of both Houses, except those the removal of whom has been otherwise provided by this Constitution."

It is conceded that the Sheriff is a civil officer, and that the power of removing him by address is expressly granted under this Article, unless he comes within the last exception, to wit: those officers, the removal of whom has been otherwise provided by this Constitution.

Accurately speaking, the Constitution itself nowhere else provides a mode of removing Sheriffs.

But it is contended that Article 89, under the title of "Impeachment," (title 5,) brings Sheriffs within the exception to Article 97 by declaring that "the Legislature shall provide by law for the trial, punishment and removal from office of all other officers of the State" [*i. e.* except those enumerated in the preceding Articles] "by impeachment or otherwise."

The power of impeachment or prosecution for misdemeanor in office, which in case of conviction involves a removal from office as an incident, and the power of removal without impeachment or prosecution, are concurrent powers, both of which are clearly recognized by the Constitution, and neither of which excludes the other.

The theory of our representative government is, that offices are created, not for individual emolument, but for the public good. And the object of the Constitution was to provide not only for the punishment of official delinquents, which would involve their dismissal from office, but also a mode of removing civil officers against whom no accusation of crime could be made or sustained, whenever the public good should require such removal.

The Governor alone seems to have been exempted from the possibility of removal without impeachment or prosecution and trial for crime.

Thus, "the Judges of all courts shall be liable to impeachment, but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor shall remove any of them on the address of three-fourths of the members present of each House of the General Assembly. In every such case, the cause or causes for which such removal may be required shall be stated at length in the address, and inserted in the journal of each House." Constitution, Art. 73.

Clerks of the inferior courts are put upon a peculiar footing. "The Judges of the several inferior courts shall have power to remove the Clerks thereof for a breach of good behavior, subject in all cases to an appeal to the Supreme Court." Constitution, Art. 77.

But as a breach of good behavior may not amount to a crime, Clerks of courts would also seem to be embraced in the purview of Article 89, which commands the Legislature to provide by law for the trial, punishmen and removal from office, by indictment or otherwise, of all officers of the State, except the Governor, Lieutenant Governor, Attorney General, Secretary of State, State Treasurer, Judges of the Supreme Court, and all Judges of the inferior courts, save Justices of the Peace; the "trial, punishment and removal from office" of those officers, by way of impeachment, having been provided for in the preceding Articles 85, 86, 87 and 88.

The Commissioners of the Board of Public Works also fall within the scope of Article 89, for whose trial, punishment and removal from office, by indictment or otherwise, the Legislature is bound to provide, although a special mode of removing them is provided by the Constitution itself in Article 133: "The Commissioners may be removed by the concurrent vote of a majority of all the members elected to each House of the General Assembly; but the cause of the removal shall be entered on the journal of each House."

The last clause in Article 97: "Except those the removal of whom has been otherwise provided by this Constitution," seems, therefore, to refer to Clerks of the inferior courts and to Commissioners of Public Works, and, perhaps, might also be held to embrace members of the General Assembly, each House of which is empowered by Article 21 to expel a member with the concurrence of two-thirds. All other civil officers (saving also the Governor and Judges of the Supreme and inferior courts) "shall be removable by an address of a majority of both Houses."

The construction contended for by the appellant, if carried out, would nullify and make surplusage of the whole Article 97. If the removal of all other officers is provided by Article 89, much more is the removal of the Governor, Lieutenant Governor, Attorney General, Secretary of State, State Treasurer and Supreme and inferior Judges provided in Articles 85, 86 and 87, under the same title of impeachment. Judgment in cases of impeachment extends to removal from office, and perpetual disqualification therefor. Constitution, Art.

87. And between Articles 86 and 89 a possible removal of all officers of the State by impeachment or trial and punishment in a proceeding analogous thereto, (by indictment or otherwise,) has been provided for, so that, according to this view, nothing remains for Article 97 to operate upon; the saving clause takes every officer in the State out of its scope; the grant of power in the body of the Article is wholly withdrawn by the proviso. It is impossible thus to violate the plainest canons of interpretation.

The Act of March 15th, 1855, (p. 370) relied upon by the appellant, fully recognizes the two distinct but co-existing modes of removal indicated so clearly in the Constitution itself. That Act is entitled "an Act to determine the manner and regulate the proceedings in impeachments." It provides only for cases where there is personal accusation of some offence against the officer himself. Even then, in section 3, it provides that if the House shall deem it expedient, after the preliminary investigation, it may abandon the impeachment and fall back upon the alternative and milder course, of removal by address. Conviction under impeachment forever disables the convict from holding office; a simple removal by address entails no such disability. An impeachment implies a personal and ignominious punishment for guilt; a removal by address need not imply any criminality on the party removed; it merely asserts that his interests must yield to the public weal.

We, therefore, conclude that the Constitution in express terms conferred upon a majority of both Houses the power of removing the Sheriff, by an address presented to the Governor, upon his approval thereof.

II. The second branch of our inquiry then is, are there any restraints or limitations laid down elsewhere in the Constitution which rendered the exercise of the power of removal by address, in this instance, null and void?

We say "elsewhere in the Constitution," because, if the power is expressly granted, we disclaim the right to limit or control it by considerations outside of the Constitution. We are not the makers but the expounders merely of the paramount law. We cannot add one jot or tittle to its terms. We cannot, by glosses and interpretations, subtract one particle from its substance. It would be rebellion in a Judge to say that a plain and unqualified grant of power given by the Constitution to a particular department of the government was null, because he thought it was against "common right." And it would be an assumption of sovereign authority for the Judge to say: "I will construe, qualify and pare away this unqualified grant of power, so as to make it consort with my ideas of common right."

Fixing our eyes, then, on Article 97 of the Constitution, as the source and measure of the legislative power in this instance, we find it to be untrammeled by any conditions or reservations. It says simply that the class of officers to which the Sheriff belongs "shall be removable by an address of a majority of the members of both Houses."

Looking at provisions for the removal of other officers, we find each qualified in a way peculiar to itself.

"For any reasonable cause, which shall not be sufficient ground for impeachment, the Governor shall remove any of them [the Judges of all courts] on the address of three-fourths of the members present of each House of the General Assembly. In every such case, the cause or causes for which such removal may be required, shall be stated at length in the address and inserted in the journal of each House." Constitution, Art. 73.

Clerks of the several inferior courts may be removable by the Judges thereof, "for breach of good behavior; subject in all cases to an appeal to the Supreme Court." Constitution, Art. 77.

Commissioners of Public Works "may be removed by the concurrent vote of a majority of all the members elected to each House of the General Assembly; but the cause of the removal shall be entered on the journal of each House." Constitution, Art. 133.

When we consider how carefully every word is weighed in framing the fundamental law of a sovereign State, the omission in Article 97 of all these various qualifications affixed to the power of removal in other cases, becomes significant of a purpose. It leads us to the conclusion that the makers of the Constitution intended to leave the power of removing the civil officers embraced in Article 97 absolutely to the prudence of a majority of both Houses of the General Assembly, unless the exercise of the power in a particular case should come in conflict with a positive inhibition contained elsewhere in the same instrument.

It has been contended for the appellant that such an inhibition is found in Article 105: "No *ex post facto* law, nor any law impairing the obligation of contracts shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made."

It is hardly tenable to say that a man can have a "vested right" to any public office under our form of government. Certainly it cannot be said of a Sheriff, when, in the language of the 80th Article of the Constitution, the very tenure of his office is, that he shall hold it "for the term of two years, *unless sooner removed.*"

Again, it was said that an implied restraint upon the power of removal by address is to be found in Article 103 of the Constitution: "Prosecutions shall be by indictment or information. The accused shall have a speedy public trial by an impartial jury of the vicinage; he shall not be compelled to give evidence against himself; he shall have the right of being heard by himself or counsel; he shall have the right of meeting the witnesses face to face, and shall have compulsory process for obtaining witnesses in his favor." But here was no prosecution. No accusation was made against the defendant. No accusation was necessary. The argument that the Act was void because the defendant had no hearing and no notice, confounds the unrestricted power of removal by address under Article 97 with the distinct but concurrent power of removal which results from a successful impeachment or prosecution for misdemeanor, when the party accused must have a trial, pursuant to the Articles under the head of impeachment. This distinction, founded in reason, and recognized both by the Constitution and laws, has already been developed.

Finally, it was urged that the address in this case was an usurpation by the Legislature of a judicial power, and therefore within the prohibition of Article 2 of the Constitution. The power of removing an officer upon address of the two Houses is not a judicial power, but is essentially administrative. As we have seen, this proceeding, having for its end the public welfare and not the punishment of an individual, is not at all in the nature of an impeachment, which requires a trial, and of which, in case of conviction, the removal from office is a mere consequence, making a necessary part, but only a part, of the sentence.

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Even if there were something of a judicial character in the proceeding, it would not be void on that account, because the Constitution itself has vested unqualified power over this subject in the legislative department, and the case would come within the saving clause of Article 2: "No one of these departments, [*i. e.* the legislative, executive and judiciary,] nor any person holding office in one of them, shall exercise power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted.*"

We therefore find no other Article of the Constitution which so modifies Article 97 as to render the exercise of the removing power in this particular case null and void.

But as it has been pressed with much earnestness that the verdict and judgment in favor of the defendant, *Hufty*, when the present relator, *Bell*, contested his election in the First District Court of New Orleans, before any commission had been issued, formed a peremptory bar to action of the Legislature in this matter, we remark:

1st. There is no element of the *res judicata* in that judgment which could bar the power of removal under Article 97.

The question in one case was, shall *Mr. Hufty* receive a commission? in the other, shall he be removed from office?

There were two contending parties in one case, each urging that he could count the greater number of votes in his favor; in the other there were no parties, the act being an act of administration intrusted by the Constitution, without qualification or control, to a particular department of the government.

2d. The judgment in the case contested between *Bell* and *Hufty* is not disturbed, but has had its full force and effect. That judgment declared the defendant the Sheriff elect. It was no more and no higher evidence of title to the office than the return of the proper officer in his favor would have been in case there had been no contest. The judgment was final, just as the return would have been if not contested within the legal delay. No appeal lay from it. No new trial could be granted. No second suit could be instituted by *Bell* contesting the election of *Hufty*. The judgment secured to the defendant the commission and station of Sheriff of the parish of Orleans for two years, "unless sooner removed." No verdict and no judgment could expunge that condition from the tenure of his office, for it was inserted in his commission by the Constitution itself. The defendant, therefore, has had the fruits of his judgment; he has been Sheriff of the parish of Orleans; until removed he reaped its emoluments, and his right to do so, and the binding force of his official acts until his successor was qualified, can never be questioned, for the judgment of the First District Court is unreversed and irreversible.

3d. There are reasons assigned for the act of removal, in the preamble to the address, other than those pleaded in the controversy between *Bell* and *Hufty* upon the legal inquisition into the state of the vote.

4th. If the Act of removal was within the constitutional competency of the Legislature, uncontrolled by a superior power, as we have found it to be, the reasons assigned by the preamble to the address could not, in any case, vitiate the Act, so as to authorize the judiciary to annul it. The independent and coordinate department of the government to which this whole business has been exclusively confined is composed of men who, like ourselves, act under the sanction of official oaths, and who render their account, not to us, but to their consti-

tuents, the people. When they do an act within their constitutional sphere, we, as Judges, have no right to say whether the reasons they give for it are good, bad or indifferent, much less to veto the Act because we find the reasons for it open to criticism. As well might it be said that another department of the government might set aside the final judgments of this court, because the reasons assigned for such judgments are lacking in solidity. To the people alone are the two Houses responsible for the purity of their motives, the sufficiency of their reasons, and the wisdom of their conduct in this matter.

We, therefore, pass in silence what was said at bar, on the one side, as to the hardship of removing an officer for no alleged fault of his, and without a hearing, and on the other, as to the necessity of teaching all men to revere the sanctity of the ballot-box and the freedom of the elective franchise, which are the life of republican institutions. These arguments touch a question of expediency only; they were doubtless considered in the legislative halls before the measure was adopted, and may be considered again in popular assemblies where legislators give an account of their stewardship; but they cannot with propriety be permitted to disturb the deliberations of this tribunal, removed, as it is and ever should be, from the arena of political strife.

Mr. Justice VOORHIES and Mr. Justice LEA concurring in this opinion, and Mr. Chief Justice MERRICK concurring in the decree for separate reasons: It is, therefore, ordered and decreed that the judgment of the District Court be affirmed, with costs.

MERRICK, C. J. However desirable the mature consideration of constitutional questions may be in ordinary cases, we have thought that on account of the important public interests which are suspended during this litigation, that the case ought to be disposed of at the earliest moment practicable.

It may be against common right that any person should be deprived, without fault on his part, and without being heard, of the office to which he has been elected. But so far as it concerns the address of the Legislature removing *Mr. Hufty*, it is probably in the same form it would have assumed if charges had been preferred against him, and he had, as is usual in other cases, been heard upon the floor of the house. We are not therefore permitted to infer anything unconstitutional on account of the mere form of the proceeding. On the contrary, we are bound to presume that the proceedings are regular; for the members of the two houses are the sole judges of the regularity of the proceedings before them, except in those particulars only, which are prescribed by the Constitution, and we have no more right to question the reasons or causes, or successive steps in their proceedings, than they would have to review the proceedings, orders and decrees of this court.

Neither do I consider that we have the right to determine whether the motives which have influenced the Legislature, are or are not sufficient to justify the address. The exclusive control of this matter has been, by the Constitution, vested in the Legislature, as to all offices not otherwise expressly provided for in that instrument.

The members of the two houses alone are the judges of the grounds and causes of the removal, and as this power has been confided by the people to their representatives, it would seem that they are responsible alone to the people for its exercise or abuse.

But it is said that the Constitution commands the Legislature to provide by law for the trial, punishment and removal from office, by indictment or other-

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wise, of all other officers, except the Governor, Lieutenant-Governor, Attorney General, Secretary of State, State Treasurer and the Judges of the Supreme and District Courts; and the Legislature having obeyed the injunction of the Constitution in this particular, are themselves obliged to follow the law which they have enacted.

The argument is conclusive, if Article eighty-nine of the Constitution applies to the same class of cases as Article ninety-seven. But I find Article eighty-nine under the title of Impeachments, and the provisions in it became important, because several offices were omitted from Article eighty-six, (providing for impeachments,) such as Auditor of State, Superintendent of Public Education, Commissioners of the Board of Public Works, Sheriffs, Recorders, Justices of the Peace, Notaries, &c. As these important officers were not required by the Constitution to be impeached before the Senate, it was left to the Legislature and made its duty to provide by law the manner in which they should be tried. I am therefore inclined to think that Article eighty-nine applies only to such offences committed by the inferior officers, as would, in the officers enumerated by Article eighty-six of the Constitution, give rise to an impeachment before the Senate. But when we compare Articles seventy-three ninety-seven and one hundred and thirty-three, with eighty-six and eighty-nine, we find the former provide for another class of cases, (viz,) the removal of officers for causes not affording sufficient grounds for an impeachment. In the case of Judges, the cause must be stated in the address and inserted in the journals of the Senate and House of Representatives. In all other cases, (the Governor alone excepted,) a bare majority of the members of both houses have the power to remove, and it does not appear to be important that the cause should be stated in the address or inserted in the journals of the House or Senate, with the exception of the Commissioners of the Board of Public Works, who, although subject to removal by a bare majority of the members elected, must have the causes of their removal inserted in the journals of the two houses.

The object of these provisions is doubtless to enable the Legislature to remove men from office who, from infirmities or other causes, have become incapable of discharging the duties of their office. Debates in Convention of 1845, p. 671.

The Constitution looks rather to the qualification of the incumbent than other grounds of removal, and an exercise of this power upon purely party considerations, would be as much an abuse of power as would be the like reasons for the judgments of this court. But should the members of the Legislature so far forget the duties imposed upon them by the Constitution and their office, as to be governed by such motives, I know of no power save public opinion and the ballot-box by which their acts are to be revised.

Again I do not consider the re-enactment of the statute of 1826 by the Legislature in 1855, a compliance with the injunctions of the Constitution of 1852. Bullard & Curry Dig., p. 470. This old statute, which has been re-enacted, provides the mode by which any one may lay before the Legislature the grounds for an impeachment or removal by address of any officer subject to impeachment before the Senate. But as Justices of the Peace cannot be impeached in this manner, the Legislature has not yet, in my opinion, obeyed the injunction required by Article eighty-nine, which was, without doubt, mandatory as to all officers not subject to impeachment before the Senate, under the Constitu-

tion. I do not therefore think that the Act of 1855 excludes the other mode of proceeding, even on the grounds urged by defendant's counsel.

It has been admitted in argument that the address removing *Mr. Hufty* was voted upon considerations not at all personal to him; that it was not pretended that he had committed any act which was a ground of removal on his part.

On this state of facts, it is argued by defendant's counsel, that it is against common right that a man should be deprived of his office without any fault on his part and without an opportunity of being heard in defence.

It is undoubtedly repugnant to all our notions of correct administration of justice, to deprive a citizen of the smallest right without a hearing, and much more to take from him an important office. But that is not the question before us: it is one of power. Has the Legislature the power to remove one of this class of officers without a hearing? As liable as such a power may be to abuse in the hands of mere partizans, I think it is vested in the two houses as to all officers, except the Governor, the Judges and perhaps the Commissioners of the Board of Public Works.

An impeachment requires a process by which a party is brought to trial. And perhaps in those cases where the Constitution requires a cause to be assigned for removal, it pre-supposes a hearing upon that cause in order to ascertain whether it is real or imaginary.

But where it is not necessary, under the Constitution, to assign any cause for the act, I am not prepared to say that any other mode of hearing is absolutely required than the usual channels of information upon which the ordinary legislation and action of the two houses are based.

The important questions presented by this case, although illustrated by masterly arguments on both sides, are not free from difficulty, and it is not without hesitation that I arrive at the conclusion that the judgment of the lower court should be affirmed.

BUCHANAN, J., dissenting. This record presents to my mind, a case of unconstitutional assumption of power on the part of the legislative department of the State government.

The first article of the State Constitution declares: "The powers of the government of the State of Louisiana, shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judicial to another."

Article 2. "No one of these departments, nor any person holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Article 3. "The legislative power of the State shall be vested into two distinct branches, the one to be styled the House of Representatives, the other the Senate, and both the General Assembly of the State of Louisiana."

Article 61. "The judiciary power shall be vested in a Supreme Court, in such inferior courts as the Legislature may from time to time order and establish, and in Justices of the Peace."

The Legislature has carried into effect this last article of the Constitution, by establishing courts with various attributes of jurisdiction; to one of which courts so established, the First District Court of New Orleans, it has given authority, by an Act approved 15th of March, 1855, to hear and determine

contests of elections of Sheriff in the parish of Orleans. "The Judge," says the Act, section 41, "shall proceed without delay to examine the grounds of contestation; and may, on the application of either party, order a jury to try the issue, and its decision thereon shall be final." And by section 45: "The issue thus formed, shall be proceeded with summarily before court and jury. The trial shall be conducted and submitted to the jury according to the laws by which other jury trials are governed. A majority only of the jurors shall be required to return a verdict. The jury shall have power to determine by their verdict, which of the parties is entitled to the office; or to refer the same again to the people. The court shall have no power to grant a new trial, as in other cases, and no appeal shall be allowed."

Section 46. "The judgment rendered upon the finding of the jury shall be final; and on certifying the same to the Governor, a commission shall be issued by him in favor of the person in whose favor the verdict may be."

On the 5th of November, 1855, an election of Sheriff was held in the parish of Orleans, *Joseph Hufty* and *John M. Bell*, being the candidates; and the former being returned elected, the latter contested his election by a petition presented to the First District Court of New Orleans, with the formalities prescribed by the Act of 1855. This contest was tried by a jury, which rendered a verdict in favor of *Hufty*, by a majority of seven to five; and judgment was therefore rendered by the court, "that *Joseph Hufty* is declared to be the Sheriff elect of the parish of Orleans, and is entitled to enter upon the discharge of the duties of Sheriff, upon complying with the formalities prescribed by law.

Upon this judgment being certified to the Governor, he issued a commission of Sheriff to *Hufty*, dated December 31, 1855.

The grounds upon which *Bell* contested the election of *Hufty*, were eleven in number, being specifications of illegal acts and decisions of the commissioners of election in refusing to receive legal votes; and acts of violence in destroying the ballot boxes and scattering the votes, committed by bands of lawless men, at the polls.

We have seen that the special tribunal created by law for the trial of such an issue, a judicial tribunal, composed of a Judge and jury, did judicially investigate and decide upon all the facts of illegality and violence alleged to have taken place at the election of Sheriff in the parish of Orleans, on the 5th of November, 1855, and that its decision in the premises is, by law, final and without appeal.

In the language of the second article of the Constitution, the power of deciding the question of the legality and validity of *Hufty's* election as Sheriff, the question raised by the opposing candidate, *Bell*, assisted by twenty voters, was a power properly belonging to the judicial department of the government. This proposition is beyond all question. It follows, therefore, of necessity, that neither of the other departments of the government (legislative or executive) could constitutionally exercise that power, unless the direction or permission to do so, can be found in the Constitution itself. A careful scrutiny of that instrument in all its articles, has failed to show me any thing indicating such a direction or permission. I am clear that the 97th Article neither directs nor permits anything of the sort. I admit that that article authorizes the removal of a Sheriff by an address of a majority of the members of both Houses, for the Sheriff is certainly a civil officer, and I do not understand the

Act No. 304 (page 370) of the Session Acts of 1855, as having imposed any restraint upon the action of the General Assembly, *proprio motu*, in the way of address. The provisions of that Act seem to be intended for the case of accusations preferred by individuals against public officers, in the form of a memorial addressed to the Legislature; which accusations, after the observance of certain rules of proceeding in the Act set forth, may result in an impeachment or in an address, as the Legislature shall determine.

The Act was undoubtedly intended to carry out the articles of the Constitution on the subject of impeachments, and the removal of public officers from office generally. But I do not find in it, any provision to the effect, that every address for the removal of an officer, must be preceded by those formalities which are therein indicated as essential to be pursued upon a memorial presented to the Legislature, and containing accusations against a public officer.

But while I make the admission that the Legislature has power to remove a Sheriff by address, *proprio motu*, without any accusation preferred by memorial against the officer removed, yet I repeat that the Article 97 does not authorize the Legislature to hear evidence upon, and decide judicially, the legality or validity of an election of Sheriff. And this is what the Legislature has done in the case at bar.

At the risk of appearing tedious, I will repeat the whole of the preamble, which constitutes what may properly be called "The Address," being introductory to the resolution for the removal of *Hufty*, and containing the reasons justificatory of such removal.

"Whereas, freedom of suffrage and the inviolability of the ballot box are the only basis of republican government; and whereas, this great palladium of American liberty has been overthrown and trampled under foot at the late general election held in New Orleans, on the 5th of November, 1855, whereby the free expression of the popular will has been illegally suppressed by partizan Commissioners of Election, who arrogated to themselves the power to disfranchise legal voters, and by bands of lawless men, who not only drove peaceful citizens from the polls, by intimidation, violence and bloodshed, but even, after the polls had been closed, destroyed more than thirteen hundred legal votes which had been received during the election by the Commissioners, to the truth of which outrages the whole population of New Orleans bear witness; and whereas, these facts have been brought to the knowledge of the Legislature by judicial investigations, and by executive communications; and whereas, the late Governor of this State has urged the Legislature to 'crush the evil at once, and before it has taken root, by the most pointed and energetic means'; and whereas the Legislature is constituted by the organic law the grand inquest of the State, for the protection of the elective franchise from tumult, violence and other improper practice, and to vindicate the constitutional rights of the people, rising above and not the subject-matter of ordinary judicial investigation, but totally independent of, and not to be confounded with, individual claims to office; and whereas, the 97th Article of the Constitution declares, that 'all civil officers, except the Governor and Judges of the Supreme and Inferior Courts, shall be removable by an address of a majority of the members of both Houses, except those, the removal of whom has been otherwise provided by this Constitution'; and whereas, a Sheriff is a civil officer, whose removal is not otherwise provided for by the Constitution; and whereas, it has been indubitably established to the satisfaction of this Legisla-

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ture, that the constitutional rights of the citizens of New Orleans have been grossly violated in the late election for Sheriff of the parish of Orleans: Be it Resolved," &c.

It is said, that the Supreme Court has nothing to do with the reasons contained in the address for the removal of *Hufty;* that for the decision of this issue, it suffices, that the Legislature has a constitutional right to remove a Sheriff by an address of a majority of both Houses; that as well might it be contended, a decree of the Supreme Court, in a matter within its jurisdiction, is invalid, because the reasons given by the court for its decree, may happen to contain bad logic or bad law. But with all deference to those who entertain such an opinion, and professing what I truly feel, a profound respect for the legislative branch of the government, yet I cannot forget that it is the peculiar province of this tribunal, to expound in the last resort, those rules of action and acts of administration which are contained in the statutes promulgated as the expression of legislative will in the State of Louisiana; to determine if, at any time, the consistency of such enactments with the State Constitution be drawn into question, whether in truth they are in contradiction; and in case they be, to pronounce that the statute must yield to the Constitution, as the paramount law.

The Supreme Court of the United States, in a case in 3d Dallas, to which I will have occasion again to refer, have said, that the State courts are the proper tribunals to decide, whether laws contrary to the State Constitution are void.

In the present case, the unconstitutionality of the address removing the defendant from office, is expressly pleaded; and is in fact the only matter at issue. To determine this plea, we must needs examine the address itself. And as this is the first occasion of the exercise of the power of removal of an officer, by address, under this Constitution, we are without precedents to guide us in the construction of the article of the Constitution, in virtue of which the removal is said to have been made, and which is copied into the address. The first thing that strikes me in Article 97, is that the address and the removal are simultaneous. The words used are, "shall be removable by an address." It is not, as in the Article 73, the Governor, who is to remove upon an address of the Legislature; but the General Assembly itself removes the officer. The removal is strictly an Act of the Legislature, under this article. And it is plain, that the Legislature have, in the case before us, taken this view of the article. For the address, after the preamble copied above, proceeds to remove *Hufty* from office by resolution. By a second resolution, indeed, it is directed that the address be presented to the Governor. But this, I understand to have been done in compliance with Article 54 of the Constitution, which requires that "every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on a question of adjournment, shall be presented to the Governor, and before it shall take effect, be approved by him, or being disapproved, shall be repassed by two-thirds of the members elected to each House of the General Assembly."

The address under the Article 97 of the Constitution is, therefore, neither more nor less, than an ordinary Act of the Legislature; and the form of an Act of Assembly, which is the one adopted on this occasion is, in my opinion, the correct form of an application of the Article 97 of the Constitution. Why, then, has the peculiar appellation of "address" been used by the framers of

our Constitution in this article? Here, again, I think the Legislature has correctly interpreted the meaning of the article. The order, resolution or vote, for the removal of an officer, is something more than "*sic volo, sic jubeo; sit pro ratione voluntas.*" It is a solemn manifesto by the Legislature to its constituents, of the causes which have moved it to take the extraordinary step of abridging the term of office of one who has seemed worthy to his fellow citizens, of being selected to discharge the duties and receive the emoluments of a post of honor and profit in their service; a declaration of motives, which it must be presumed the Legislature will never be either afraid or ashamed to make, which is in thorough consonance with the spirit of our institutions, and which is due as well to that portion of the people who have given their votes at the election of the officer, as it is to the officer removed himself. Let us not be told, that because, in this country, a man has no property in an office, it is, therefore, unnecessary to give any reason for depriving him of it. I should be loth to admit that any man, by accepting office under our government, has degraded himself so far below the level of his fellow citizens, that when disgraced by the infliction of a penalty which implies dishonor, or impoverished by the sudden withdrawal of an income upon which he had good reason to calculate for some time to come, he shall have no right to be informed in what he has sinned, or in what respect he has been found wanting.

Such is not the meaning of the 97th Article of the Constitution; neither is such the interpretation which the Legislature have given to it on this occasion. Their act is truly an "address"—a declaration to the world of the motives of their proceedings.

We know, then, from the most authentic source, what were the reasons for defendant's removal from office by the Legislature. And I agree that, unless those reasons exhibited an unconstitutional assumption of power, they could not be the object of examination before this court. The exercise of judicial power by the Legislature, is unconstitutional, except in the instances expressly directed or permitted in the Constitution.

Have the Legislature exercised judicial power in this instance?

The address sets forth the rejection of legal votes by the Commissioners of Election, and the destruction of the votes which were received, by bands of lawless men. These were the identical specifications on which the relator had already contested the election, before a tribunal whose decision, by a statute yet unrepealed, was final. I find in this, an interference with the legal course of proceedings of the regularly constituted judiciary of the State, and an appellate jurisdiction claimed and exercised by the Legislature.

That the jurisdiction thus exercised, is judicial in its character, evidently appears from the statement of the address, that the facts stated "have been brought to the knowledge of the Legislature by judicial investigations." That the power exercised was a judicial power, is furthermore formally enunciated in the declaration of the address, that the Legislature is constituted by the organic law the grand inquest of the State, for the protection of the elective franchise from tumult, violence and other improper practice. The French text of the address is still more expressive—"*Grande Cour d'Enquête*"; and as the Article 129 of the Constitution requires the laws to be promulgated in the French as well as the English language, the French text is not to be left out of view, in ascertaining what is the meaning of the Legislature.

Is it then true, that the Constitution has made the Legislature a grand in-

quest, or Court of Enquiry, for the protection of the elective franchise from tumult, violence, and other improper practice? Not so. The 93d Article of the Constitution says: "The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence therein, from power, bribery, tumult, or other improper practice." This Article of the Constitution has been executed by the adoption of the Act relative to elections, approved 15th of March, 1855, (Session Acts, p. 408,) and of the Act relative to Crimes and Offences, approved 14th of March, 1855. Session Acts, p. 130. Proceedings under both these statutes, are carried on before the ordinary judicial tribunals of the State. The 74th section of the Act relative to Crimes and Offences, punishes violence and riots at elections, and I do not understand our predecessors as having decided, in the cases of *Rice* v. *Dubuys*, and *Borgstede* v. *Clark*, in 5th Annual, as is contended by the counsel for the relator, that the verdict of the jury in a contested election under the Act of 1846, (from which the Act of 1855 is copied,) was not final in regard to the validity and legality of the election.

The learned counsel of the relator, has also referred to two decisions of the Supreme Court of the United States, *The Baltimore and Susquehannah Railroad* v. *Nesbit & Goodwin*, 10 How., 395, and *Calder* v. *Bull*, 3 Dallas, 386, in support of the constitutionality of a review by the Legislature of a State of a judgment rendered by the courts of the State. But an enunciation of those decisions will show that they constitute no authority in the present case. In that from 10 Howard, indeed, the only point presented by the plaintiff in error was, that the statute of Maryland complained of, divested vested rights and impaired the obligation of a contract. The court indulged, it is true, in some remark, *arguendo*, upon the distributions of powers, legislative, executive and judicial, in the Constitutions of the several States, as a matter not to be inquired of except by the State authorities; but it concludes those remarks by declaring that "no such inquiry regularly arises upon this record"; and the unqualified proposition stated by the reporter in his head notes of the case, "the States have a right to direct a rehearing of cases decided in their own courts," does not appear warranted by anything in the decision.

As to the case from 3d Dallas, which is a very remarkable case, as being the leading one upon the definition of the phrase "*ex post facto* law" in the Constitution of the United States, it was certainly decided therein, that an Act of the Legislature of Connecticut, granting a new trial upon a judgment of a Court of Probate of that State, refusing probate of a will, was in conformity to the Constitution of that State, which was then (in 1798) nothing more than a royal charter of Charles the Second of England. The following is the language of Mr. Justice Iredell upon this subject: "From the best information to be collected relative to the Constitution of Connecticut, it appears that the Legislature of that State has been in the uniform, uninterrupted habit of exercising a general superintending power over its courts of law, by granting new trials. It may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with regard to suits depending or adjudged, new rights of trial, new privileges of proceedings, not previously recognized and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending power of her Legislature."

From these remarks, it will be seen that the difference between the Constitution of Connecticut in 1798, and that of Louisiana in 1856, is simply this: that the former sanctioned the reversal of a judgment of a judicial tribunal by the Legislature, and the latter prohibits such a reversal. For the same reason, therefore, that the statute of Connecticut was held to be valid, the address for the removal of the defendant should, in my judgment, be held to be void and of no effect.

C. D. STEWART v. JAMES CLARK AND OWNERS OF STEAMER NATCHEZ No. 2.

Plaintiff enclosed an account against defendants to P. & H., (partners,) with instructions to take all necessary steps for the collection of the same. P. made an affidavit for and obtained a sequestration, which was set aside, and plaintiff appealed. *By the Court:* The authority conferred on the agents was that of taking all necessary steps for the collection of the plaintiff's debt. Either of the partners was competent to act for the plaintiff in the matter. The affidavit points to the necessity which existed for the sequestration as a necessary step for the collection of the debt. The plaintiff was not present. Under the statute of 1828, his agent was authorized to make affidavit and give bond.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Chilton & Perkins, for plaintiff. *Marks*, for defendants and appellants.

VOORHIES, J. The plaintiff brought this suit to recover the price of 145 cords of wood sold and delivered to the defendants, the master and owners of the steamer Natchez No. 2, at the rate of $2 50 per cord. He also claimed a privilege on the steamer and caused her to be sequestered.

The defendants in their answer admitted the purchase of the alleged amount of wood, but averred that the price agreed upon between the parties was $1 75, and not $2 50 per cord as claimed by the plaintiff.

The court below gave judgment in favor of the plaintiff for the amount claimed by him, but ordered the sequestration to be set aside, on the ground that the authority of the plaintiff's agent was insufficient to bind him on the bond. From which judgment defendants appealed.

In this court the appellees have prayed for the amendment of the judgment in their favor, by reinstating the sequestration of the steamer.

There is no error in the judgment to the prejudice of the appellants.

In relation to the sequestration, it is shown that the plaintiff enclosed his account to the firm of *Payne & Harrison*, with instructions to take all necessary steps for the collection of the same; that *J. A. Payne*, one of the partners of that firm, made an affidavit in which he declared, among other things, that they were the agents of plaintiff, who was absent; that he had good reason to apprehend the said boat would be removed out of the limits of the State before plaintiff could have the benefit of his privilege on the same for the satisfaction of his debt.

We think the Judge *a quo* erred in setting aside the sequestration. The authority conferred on the agents was that of taking all necessary steps for the collection of the plaintiff's debt. Either of the partners was competent to act for the plaintiff in the matter. The affidavit points to the necessity which existed for the sequestration as a necessary step for the collection of the

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debt. The plaintiff was not present. Under the statute of 1828, his agent was authorized to make affidavit and give bond. Session Acts of 1828, p. 108, § 4; 14 L. R., 92.

It is therefore ordered and decreed, that the judgment of the court below be amended in favor of the appellee; that said appellee recover of the defendants *James Clark* and *Charles Morgan, in solido*, the sum of three hundred and sixty-two dollars and fifty cents, with legal interest from the 26th of December, 1853, till paid; and further, that the sequestration be reinstated, and that said steamer Natchez No. 2 be sold according to law, to satisfy this judgment, the costs of both courts to be borne by the defendants and appellants.

SOLON HUMPHREYS & CO. v. CAPTAIN SWITZER AND OWNERS OF STEAMER D. S. STACY.

In an action against a common carrier, alleging non-delivery of goods, the plaintiff must give some evidence in support of the allegation.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Hunton & Bradford*, for plaintiffs. *Wolfe & Singleton* and *Clarke & Bayne*, for defendants and appellants.

SPOFFORD, J. The plaintiffs sued the defendants as common carriers for the non-delivery and loss of certain packages of sugar shipped on board the defendants' steamer at New Orleans, to be delivered to the plaintiffs or their assigns at the port of St. Louis, the dangers of the navigation and fire alone excepted.

The only answer was a general denial.

The only evidence offered below was the bill of lading, proof of its signature by the agent of the steamboat, and the shippers' invoice.

There was judgment against the defendants for the amount claimed, and, without asking a new trial, they appealed.

They now, for the first time it would seem, make the objection that the plaintiffs offered no evidence tending to show a non-delivery of the goods.

The authorities are clear and concurrent to the effect that it was incumbent on the plaintiffs to make some such showing.

The declaration against a carrier of goods, says Greenleaf, "involves three points of fact, which the plaintiff must establish *upon the general issue:* namely, the contract, the delivery of the goods, and the defendant's breach of promise or duty." 2 Green. Ed., § 208. Again: "If the *loss* or *non-delivery* of the goods is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character." Ib., § 213. The cases of *Tucker* v. *Cracklin*, 2 Stark. R., 385; *Griffith* v. *Lee*, 1 C. & P., 110, and *Day* v. *Ridly*, 1 Washb., 48, are referred to in support of this doctrine.

The same doctrine is announced by Angell in his treatise upon the law of Carriers, § 470.

In the case of *Day* v. *Ridly*, 16 Vermont R., p. 48, (1 Wash., cited by Greenleaf,) it was held that "in an action against common carriers, the burden of proof is on the plaintiffs to show that the property did not reach its desti-

nation; but, where the plaintiffs proved that the defendants' boat, in which the property was stowed, was capsized and the property damaged, and a portion of the property carried by the defendants to a place out of their course, it was held sufficient to throw the burden of proof on the defendants to account for the property." 4 U. S. Dig., p. 248, No. 166.

In Illinois it was held, that "if, in an action against a common carrier, the plaintiff alleges that the article sent was not delivered, he must prove the allegation; but slight evidence will change the burden of proof." *Woodbury* v. *Frink*, 14 Ill. R., 279; 14 U. S. Dig., p. 70, No. 73.

So in California: "In an action against a common carrier for the *loss* of goods, it is necessary to prove that the goods were not delivered." *Ringgold* v. *Haven*, 1 Cal. R., 108; 14 U. S. Dig., p. 70, No. 77.

We are not aware that there is anything in our law which modifies this rule of evidence as it prevails in other commercial States.

As it is said the point was not brought to the notice of the court *a quâ*, we will remand the cause for further evidence.

It is, therefore, ordered that the judgment of the District Court be reversed and the cause remanded for a new trial, the costs of this appeal to be borne by the plaintiffs and appellees. *

LEWIS B. HORNE *v.* CHARLLS BELCHER and CHAS. BELCHER & BROTHER.

The makers of a note caused it to be sequestered, and prayed for its restitution, &c., on the ground of error and fraud. The sequestration was afterward set aside, and a judgment on the note obtained against them. Pending this litigation, the makers of the note became insolvent, and after execution against them returned *nulla bona*, this suit against the sureties on the sequestration bond was brought. *Held:* Plaintiff could not have maintained an action on the note pending the litigation for its restitution, the sequestration being merely a conservatory act.

The sequestration had the effect not only of suspending the payment of the note, but of placing it beyond the reach of commerce.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

H. D. Ogden, for plaintiff. *Wolfe & Singleton*, for defendants and appellants.

VOORHIES, J. This is an action against the sureties on a sequestration bond.

On the 22d of October, 1851, *Witter & Brother*, commercial partners, made their promissory note for the sum of $1,500 in favor of the plaintiff, payable thirty days after date, the consideration of which purported to have grown out of certain transactions which had taken place between the parties through the agency of one *S. B. Conrey*, a bill broker. That note was extinguished at maturity by the payment of $1,000, and a new note given by *Witter & Brother* for the sum of $510, payable thirty days after date. *Witter & Brother* afterwards brought suit against the plaintiff for the restitution of the note and money thus given in payment by them, on the ground of error and fraud. The note was sequestered, and the bond given therefor forms the subject of the present suit. The result of that suit being favorable to the plaintiff, he thereupon brought suit upon the note against *Witter & Brother*, and recovered

* In *Conerey* v. the same defendants, and *Chateau, Harrison & Vallé* v. same, similar judgments were rendered for like reasons.

judgment against them for the amount thereof. A writ of *fieri facias* was issued on said judgment and returned *nulla bona*. The plaintiff alleges that *Witter & Brother* caused the note to be sequestered on the eve of its maturity, for the purpose of preventing its collection; that they took an appeal from a judgment setting aside the sequestration on the 23d of February, 1852, which judgment was affirmed on the 17th of May following; that they were solvent at the date of the sequestration; that he could have collected said note had he not been prevented from doing so by the sequestration; and that in the meantime they fraudulently conveyed away all their property, and became insolvent, whereby he lost his debt. He therefore prays that the defendants be decreed to pay him *in solido* the amount of said note, interest, and the costs incurred in the suit thereon against *Witter & Brother*, and also the sum of $100 expended by him for counsel fees in the defence of the sequestration suit.

The defendants, after a vain attempt to obtain a new trial, took the present appeal from a judgment rendered against them on the verdict of a jury in favor of the plaintiff, for the sum of $800.

It is urged by them, that the sequestration did not have the effect of suspending the plaintiffs' right of action on the note against *Witter & Brother*; that the note was in the hands of the Sheriff, and he could, at any time, have obtained a sufficient description of it in order to sue them. We think it is clear, that the plaintiff could not maintain an action on the note pending the litigation for its restitution, the sequestration being merely a conservatory act. The object of the writ of sequestration, it is said by the appellants, was to prevent the payee from disposing of the note to some innocent third person, thereby depriving the makers of their legal defence to it. This may be conceded as true, but the result of that suit shows that there was no legal foundation for it; and it is of the injury flowing from this, that the plaintiff complains. The other position assumed by the appellants, that the plaintiff cannot recover, as he could have obtained, without delay, in reconvention, a judgment on the note against the makers, by praying for it in his answer to the sequestration suit, appears to us to be equally untenable. The sequestration had the effect not only of suspending the payment of the note, but of placing it beyond the reach of commerce. Had not this been done, we think it may not be considered improbable, from the usual punctuality prevailing in regard to negotiable paper among commercial houses, that the plaintiff would have realized the amount of his note at its maturity.

On the merits, we have carefully examined the evidence, and are not prepared to say that the verdict of the jury has not done justice between the parties.

It is therefore ordered and decreed, that the judgment of the court below be affirmed, with costs.

Patrick H. Murphy v. The City of New Orleans.

A police officer may be entitled to a reward offered by the city, for detecting and bringing to conviction one charged with arson.

The ordinance offering the reward was not intended to be temporary, and is still in force.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Henderson, Jr., and *Holland*, for plaintiff. *Livingston*, City Attorney, for appellant.

Voorhies, J. This appeal is taken by the defendant from a judgment rendered in favor of the plaintiff for the sum of $500, allowed him as a reward under an ordinance of the city, approved the 28th of June, 1813, for detecting and bringing to conviction one *W. E. Roberts*, for the crime of arson.

The defence is placed on two grounds: 1st. That the plaintiff was a police officer, acting in the discharge of his duty, and was therefore not entitled to any compensation; and 2d. That the ordinance was intended to be temporary

I. It does not appear that the defendant was acting as a polic officer when *Roberts* was accused of the crime for which he was convicted and sentenced. But admitting that he did, nothing shows that it was incumbent on him as such to perform the act for which he claims the reward allowed under the ordinance. It is clear that this cannot be viewed as an agreement to compensate the plaintiff for services which he was bound to render as a police officer.

II. We are of opinion the ordinance is still in force, and was not intended, when passed, to be temporary, as contended for by the defendant's counsel. The fact of its being inserted in the Digest of the City Ordinances published in 1831, shows conclusively to our minds, that it has never been considered as a temporary ordinance. The case of *Loring* v. *The City of Boston*, 7 Met. 409, does not appear to us to be analogous to the present. There, the Mayor, who was probably authorized either by law or an ordinance, offered a reward for the apprehension and conviction of any person committing the crime of arson within the limits of the city. Upwards of four years afterwards, a fire broke out in Boston, and the plaintiff, who had procured the conviction of the offender, claimed the reward. Under the publication thus made by the Mayor, it was held that the plaintiff could not maintain the action. Here, the ordinance itself fixes the reward in such cases, and must have its effect until repealed.

It is therefore ordered and decreed, that the judgment of the District Court be affirmed, with costs.

A. D. Grieff & Co. *v.* Captain Switzer and Owners of Steamboat D. S. Stacy.

The measure of the carrier's liability is the market value of the goods at the port of destination.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Durant & Hornor*, for plaintiffs. *Wolfe & Singleton* and *Clarke & Bayne*, for defendants and appellants.

Spofford, J. We find no error in the judgment to the prejudice of the defendants and appellants.

They contracted to carry fifty hogsheads of sugar for the plaintiffs from New Orleans to their consignees in St. Louis, (the dangers of the navigation and fire only excepted) at a freight of 40 cents per hundred pounds.

They delivered only eleven hogsheads in conformity with their contract.

This default being proved, it devolved upon them to show that the remaining thirty-nine hogsheads were lost by reason of one of the perils excepted by their bill of lading. Angell on Carriers, § 472. This they have not attempted to do.

But they complain that the District Judge erred in assuming that the missing hogsheads weighed 1000 pounds each.

The plaintiffs, joining in the appeal, contend that the Judge erred to their prejudice in not allowing the weights as estimated at New Orleans, where they bought the sugar, just before the shipment, and in not awarding a sufficient sum for the value of the sugar at the port of destination.

The complaint of the appellees appears to be well founded. There is nothing to cast suspicion upon the fairness of the purchase by the plaintiffs from their vendors. It was in the usual course of business. They paid their money, at an unsuspicious time, for the sugar according to the weights, as certified to by a public weigher. His testimony is positive as to the portion of the sugar weighed by himself, and the evidence of the broker is satisfactory as to the size and general weight of the lot.

The measure of the carrier's liability is the market value of the commodity at the destined port. In this case the evidence satisfies us that the value of the article shipped was 5¼ cents per pound at the port of St. Louis at the time it should have been delivered.

From the total value of thirty-nine hogsheads sugar, weighing 1077 .8 pounds per hogshead, at 5¼ cents per pound, should be deducted freight at 40 cents per 100 pounds to obtain the balance due the plaintiffs.

It is, therefore, ordered and decreed, that the judgment of the District Court be amended in favor of the plaintiffs, and it is adjudged and decreed that they recover of the defendants, *in solido*, the sum of two thousand and thirty-eight dollars and forty-nine cents, with five per cent. interest thereon from the 9th November, 1853, until paid, and costs in the court below, and that the privilege of the plaintiffs upon the steamboat D. S. Stacy for said sum be recognized and enforced; it is further ordered that the costs of this appeal be paid by the defendants and appellants.

Dunn & Sackett v. Wm. B. McComb et al., owners of Steamboat Bella Donna.

It is well settled in the jurisprudence of Louisiana that where a collision occurs, if both parties, by their own fault, contribute to the collision, the damages will not be apportioned as in admiralty, but neither party shall recover. But in determining the question of fault, we must look to the proximate and not to the remote cause of the injury.

The flatboat of the plaintiffs being lawfully moored where she was sunk, the burden of proof is on the defendants to show that the accident could not have been avoided.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Hamner & Hays, for plaintiffs. *Wolfe & Singleton*, for defendants and appellants.

Spofford, J.* This action was brought by the owner of a flatboat loaded with produce, against the owners of the steamboat Bella Donna, to recover damages for the destruction of their flatboat with its contents.

The flatboat was moored to the shore of the Mississippi river, opposite the town of Plaquemine. The Bella Donna, in effecting a landing at night, swung against the flatboat and sunk her.

The defence is two fold:

1st. Carelessness on the part of the plaintiffs.

2d. Inevitable accident.

It is well settled in our State jurisprudence, that where a collision of this kind occurs, if both parties by their own fault contribute to the collision, the damages will not be apportioned as in admiralty, but neither party shall recover.

But we understand that, in determining the question of fault, we must look to the proximate and not to the remote causes of the injury.

In this case it is contended that the flatboat was moored out of her proper place, and that she was within the limits of the usual steamboat landing at Plaquemine.

There are no ordinances nor fixed regulations at that place upon this subject.

The weight of evidence is with the plaintiffs upon this branch of the case; although there is some conflict, it is established, we think, that the flatboat was not within the limits of the customary steamboat landing. The plaintiffs acted with reasonable caution in mooring the boat. Upon their arrival they made inquiry of people resident there, and were told they were in the right place.

It is true one witness says that when he went on board the flatboat to make a purchase, on the day of the collision, he advised a man on board to drop lower down, for fear of accidents.

Considering the advice the plaintiffs had previously received, and the absence of regulations at the port, we cannot consider the fact that they did not immediately drop lower down as proof of fault, contributing directly and proximately to the accident that evening.

The banks of rivers are free to the public, subject, of course, to suitable police regulations. "The use of the banks of navigable rivers or streams is

* Merrick, C. J., took no part in this decision.

public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like." C. C. 446.

The flatboat of the plaintiffs having been lawfully moored at the spot where she was sunk, the burden of proof is on the defendants to show that the accident could not have been avoided.

An allegation was made in the answer that there was no light on the flatboat at the time of the accident, which happened in rather a dark night. This allegation is rebutted by the evidence. A lantern was displayed when the steamboat rounded to, and in season to have been observed if there had been a suitable watch on the steamboat.

Upon the second branch of the defence we think the respondents equally unsupported by the evidence. A strong wind was blowing towards the Plaquemine shore, it is true; but we think there is not reason to suppose that the collision was inevitable had greater care been used by the officers of the steamboat. Their total indifference to what had happened, after the damage was done, is some indication of recklessness.

There is no controversy as to the amount of damages, the District Judge having only allowed such as were actually proved.

The judgment is, therefore, affirmed, with costs.

Rehearing refused.

MARGARET FORBES *v.* DAVID B. FORBES.

The legal presumption is that a slave, bought by the plaintiff pending the community of acquests, is community property, and the unsupported declaration in the act of sale that the purchase money was given to the plaintiff by her father cannot conclude creditors who were not parties to the act.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Mott & Fraser, for plaintiff and appellant. *Livingston* and *DeChoiseul*, for defendant.

SPOFFORD, J. The ends of justice seem to require that this cause should be remanded for further evidence.

It is admitted of record that the appellants are creditors of the community of acquests and gains, formerly existing between the plaintiff and the defendant, in the sum of $1000, and it seems that the community is insolvent.

The legal presumption is that the slave bought by the plaintiff pending the community of *acquests* is community property. The unsupported declaration in the act of sale that the purchase money was given to her by her father cannot conclude the appellants, who were strangers to the act.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that this cause be remanded for a new trial according to law, the costs of appeal to be paid by the plaintiff and appellee.

Bullitt, Miller & Co. v. Hewitt, Norton & Co.

Plaintiffs sue to recover back the amount of a bill of exchange, which they had accepted and paid.

By the Court: Plaintiffs, having paid the bill to defendants, cannot recover, unless they have established their allegation that there was a material alteration in the bill, by which they were defrauded out of their money. A mere alteration is not enough. They must show that it was such a fraudulent alteration in the substance of their contract as, *per se*, to destroy the obligation resulting from it.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Miller and *Elmore & King*, for plaintiffs and appellants. *Benjamin, Bradford & Finney*, for defendants.

Stofford, J. We do not think the defendants stand precisely in the position of *Mitchell*, from whom they received the bill accepted by the plaintiffs.

Mitchell owed the defendants an antecedent debt larger than the bill. He sent the bill to them, before its maturity, with instructions to collect and place proceeds to the credit of his account. Thenceforward they had an interest in the bill under these instructions.

Their statement that they held it on account of *Mitchell*, and would be liable to him for failing to protect it, does not put them in the position of mere agents without an interest. They would certainly have been compelled to credit him with the amount of the bill should it be lost by their *laches*, even though they had taken it as collateral security.

But however it may be, the plaintiffs having paid the bill to the defendants, cannot recover, unless they have established the allegation that there was a material alteration in the bill, by which they were defrauded out of the money. A mere alteration is not enough. They must show that it was such a fraudulent alteration in the substance of this contract as, *per se*, to destroy the obligation resulting from it. It will not answer for them to bring in other considerations, such as that they were accommodation acceptors, acceptors for a special purpose, that they have been disappointed in receiving shipments to meet the bill, etc., and thus to cloud the real issue made by their pleadings.

They sue in repetition of money paid to the defendants in error, upon amounts, under their allegations, to a forged endorsement of a bill which they had accepted.

The want of consideration is, in our judgment, wholly irrelevant to this issue. The plaintiffs trusted *Walker*, the drawer, and *Walker* alone. They choose to accept his bill without funds in hand, upon the faith that he would reimburse them. They have paid the bill to the defendants, and it matters not if, by so doing, they have lost their money, unless they have lost it by a forgery, that is, by a material alteration made with intent to defraud, and which in fact did defraud them.

It appears to us that there was an absence both of a fraudulent intent and of a fraud in fact, in making the alleged alteration.

Walker drew the bill to the order of himself, and it was so accepted. After the word "myself" there was a blank space left, sufficient for the insertion of an ordinary name.

Walker first negotiated the bill to a man named *C. J. Wilson*, by special endorsement. After a time, *Wilson* returned the bill to him, with his own endorse-

ment in blank thereupon, the negotiation between them having assumed another form. *Walker* then, it seems, erased his own special endorsement to *Wilson*. Afterwards, having entered into a large contract with *John S. Mitchell*, which obliged him to make certain advances, he negotiated this bill absolutely to *Mitchell*. In so doing he wrote immediately over the unerased blank endorsement of *C. J. Wilson* the words: "Pay to the order of *John S. Mitchell*." *Walker* swears that this was done in good faith, for the purpose of effecting a transfer of the bill to *Mitchell*, and that he supposed he had so transferred it. Whether from ignorance or inadvertance, he thus left the bill which he had transferred *bona fide* to *Mitchel* without his own endorsement. *Mitchell*, then, to show the true meaning of the parties, inserted the name of "*C. J. Wilson*" in the blank space after the word "myself," upon the face of the bill. This is what is charged by the plaintiff to be a forgery.

But it effected precisely what the parties, *Walker* and *Mitchell* intended to do, and what the former thought he had done. Where, then, was the fraud? The insertion of this word by *Mitchell* was incautious and improper, it may be, but if its sole effect was to carry out the design and contract of *Walker* and *Mitchell*, the only parties interested *quoad hoc*, we cannot see how *Bullitt, Miller & Co.* have been defrauded or can complain of the act. It is only by mixing with this issue (which is the only issue in the case) matters connected with the consideration of the acceptance and that of its transfer, which are quite foreign to the issue, that a serious doubt can be raised as to the rights of the present parties.

Walker, as the drawer of the bill, is as much bound to the plaintiffs as if he had really endorsed it, as he intended to do.

If any liability were sought to be fastened on *Wilson*, as endorsee, a very different question would be presented.

But the plaintiffs have paid their acceptance in favor of *Walker*, or order, to the endorsees of a person to whom *Walker* really transferred it. We are not satisfied that they have made out a case for the recovery of money as paid in error upon a forged endorsement.

The judgment is, therefore, affirmed, with costs.

SAMUEL G. LAYCOCK, Administrator, *v.* THOS. GREEN DAVIDSON.

Parol proof is inadmissable to prove a *dation en paiement*, or an exchange of slaves by an administrator. Code, 2415, 2629, 2637.

APPEAL from the District Court, Sixth District, Parish of East Baton Rouge, *Robertson*, J. *Seymour*, for plaintiff. *Lacy*, for defendant.

MERRICK, C. J. This case was before the court in 1854 on a question of jurisdiction. 9 An. 162.

The only question now presented is raised by a bill of exceptions taken by the plaintiff to the refusal of the District Judge to receive the testimony of *Laycock*, to show that a negro woman named "*Lucy* and her children were exchanged for the girl *Sylvia*, and that *Davidson* was consequently entitled to no credit upon the note sued on for the price of said *Lucy* and her children."

The note sued on was made payable to *W. H. George*, deceased, and *Laycock* sues as his administrator.

The plaintiff contends that he is entitled to offer the testimony, because the object is not to show title, but simply to prove the payment of money; to prove that the thirteen hundred and fifty dollars, which *W. H. George* had agreed by his contract in writing to credit to the note when *Davidson* should make a valid title, was discharged by the exchange of *Sylvia* for *Lucy* and her children. There are two reasons why this testimony should not be received:

1st. There could be no *dation en paiement* or exchange recognized as between these parties, the administrator of *George* and the defendant, except by the production of an agreement in writing. C. C 2415, 2629, 2637.

2d. The parol proof offered tended to contradict the written agreement of the intestate, the slaves having been in his possession and sold as his property, and now being in the possession of the plaintiff by purchase at the probate sale.

As no complaint is made of the judgment of the lower court in any other particular, we discover no reason why the same should not be affirmed.

Judgment affirmed, the plaintiff and appellant to pay the costs of appeal.

N. GIROD'S LEGATEES *v.* H. PARGOUD.

A vendee has no claim against his vendor for the reimbursement of expenses incurred in defending a title which was set aside for fraud, of which the vendee not only had knowledge, but in which he participated.

As between two executors, the action of the court cannot be invoked for the purpose of assessing their proportionate shares of a liability growing out of a joint fraudulent administration.

Where it was stipulated, in a consent judgment, that an intervention, to which an exception and answer in reconvention had been filed, should be withdrawn, and the whole litigation terminated, *Held*: that the consent judgment cannot be considered merely as a judgment on the exception, dismissing the intervention, but as a final judgment on the adverse claims of the intervenor and the defendants.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Soulé and *L. Janin*, for plaintiff. *Benjamin, Bradford & Finney*, for defendant.

LEA, J. The facts out of which the litigation in this case arises are substantially as follows:

Claud François Girod, a resident of the parish of Assumption, in this State, died in the year 1813, leaving a last will and testament, by which (after making certain particular legacies) he bequeathed the bulk and residue of his estate in equal shares to eight of his brothers and sisters. One of these brothers, by name *Jean François Girod*, died subsequently, leaving a will, by which he constituted, as his universal legatee, his brother, who bore the same name with himself. Thus the surviving *Jean François Girod* became entitled to two-eighths of the estate of *Claude François Girod*.

By the terms of the will of *Claude François Girod*, his brothers, *Nicholas* and *Jean François Girod*, both then residents of this State, were appointed his testamentary executors, which trust, it appears, they administered unfaithfully. By means of sales made under the sanction of judicial authority they became, through persons interposed, the purchasers of the entire estate of their testator:

Nicholas becoming the purchaser of the property in New Orleans, and his brother, *Jean François*, and himself becoming the joint purchasers of the lands and slaves in the parish of Assumption and elsewhere. Some years afterwards *Jean François* sold out his half of the joint purchase to *Nicholas* for $70,000, who thus became the possessor of the entire estate of his brother *Claude*, which he held until he died, in 1840, leaving a will, by which he bequeathed the sum of $710,000 in different and unequal sums to several public institutions and private individuals in this city, who are the plaintiffs in this suit.

After the death of *Nicholas Girod*, and when it appeared that so large a portion of his estate had been diverted from the ordinary channel of inheritance, the legal heirs of *Claude François Girod* instituted a suit in equity in the Circuit Court of the United States, sitting in New Orleans, against the legatees and legal representatives of *Nicholas Girod*, setting forth the foregoing facts, and many other matters of detail, which it is not necessary to recapitulate, claiming that the sales to *Nicholas* and *Jean François Girod*, and the settlements based upon their accounts as executors be set aside and annulled as fraudulent, "that the property be treated as belonging to the estate of *Claude François Girod*, that it should be again sold, and its proceeds distributed among the heirs of *Claude François Girod*, according to his will, and that the defendants be ordered to render an account of the rents and profits of the property from the time of those sales."

This suit was brought against the estate of *N. Girod* alone, the whole of the property having been transferred to him before his death, as before stated. *Jean François* having ceased to be a resident of the country, was not made a party to the litigation.

The plaintiffs gained their case. The court ordered that the adjudications to *Jean François* and *Nicholas*, of the property belonging to the estate of *Claude François Girod* be set aside and treated as nullities, and that the settlements based upon their accounts, as executors, be also set aside; that the adjustment of the mutual rights and credits to which the parties litigant were entitled should be referred to a master in chancery to take an account of the same and report thereon. And the court further decreed, (inasmuch as *Jean François Girod* was not a party in the cause, but was nevertheless, under the wills of his two brothers, entitled to a share of the estate of *Claude François* to the extent of one-fourth part thereof,) that he should be permitted to "become a party to the proceedings," for the purpose of claiming his share in the general distribution, but stating at the same time that his claim would be subject to all the equities subsisting between the said *Jean François* and *Nicholas*, and especially to the allowance of the purchase money given by *Nicholas* to *Jean* for the one-half of the joint purchase of the property of their testator, with interest, etc.

Acting upon the permission granted by the decree of the court, *Jean François Girod* did intervene in the subsequent proceedings, and claimed one-fourth of all the property and sums of money which, by the aforesaid decree, were due or might become due by the estate of *Nicholas Girod* to the estate of *Claude François Girod*, "*subject to the deduction of the purchase money paid by the said Nicholas Girod to the said intervenor, as appears from an act passed before Lavergne, notary, on the 19th January*, 1831, *viz: the sum of* $70,000, *with interest*" from the periods at which the several installments respectively became due, according to the stipulations of the act of sale.

To this intervention the legatees made appearance, and on grounds in the exception set forth, excepted to the right of *Jean François* to make himself a party to the proceedings, and claimed "*in case that the court should be of opinion that notwithstanding the exceptions the said Jean François Girod is entitled to make himself a party to the said suit in chancery*, that then the said *François* should account *not only for the sums set forth in the petition, with interest*, but also for all the damage and injury resulting from his illegal and fraudulent conduct as one of the executors in the administration, or rather mismanagement, of the succession of his testator," which damage was alleged to exceed the sum of $300,000.

In this position towards each other stood the respective parties to this suit nearly five years after the original litigation had commenced. Tired of the past, and uncertain of the future, they concluded to effect a compromise. Its terms are set forth in the briefs of counsel. In payment of the five-eighths of the balance due the estate of *C. F. Girod*, belonging to the plaintiffs, they were to receive certain designated sums and specified credits, which it appears they were willing to take; the sixth article of the act of compromise, however, stipulates as follows: This proposition is made on the footing that the claim of *J. F. Girod* is withdrawn; *that the whole litigation is terminated;* that the above amount is to be received by the plaintiffs clear of any costs, etc., and that thereafter the estate of *Nicholas Girod* can divide any remaining assets among the legatees. The terms and stipulations of this compromise were embodied in a consent decree based upon it, bearing date of the 24th April, 1847.

Since then *Jean François Girod* has also died, leaving *Hypolite Pargoud*, the defendant, his universal legatee, and it is against him in that capacity, as the representative of *Jean François Girod*, that the plaintiffs in the institution of this suit have sought to make him responsible, first, for the sum of $70,000, being the price of the half of the joint purchase sold by *C. F. Girod* to his brother *Nicholas;* second, for the sum of $5000, with interest from the 19th January, 1830, being the proceeds of a tract of land sold by *C. F. Girod*, for which the estate of *N. Girod* was held accountable under the judgment before referred to; and third, on the sum of $24,000, with interest, being the one-half of the expenses incurred by the estate of *N. Girod* in defending the defective title obtained from said *J. F. Girod* by the act of sale of 19th January, 1830.

The claim for $5000 on account of the sale to *Robinson* and *Ballard* was abandoned on the trial of the cause in the District Court; and we consider that a claim against a vendor for reimbursement of expenses incurred in defending a title which was set aside on the ground of fraudulent dealings, of which the vendee not only had full knowledge, but in which he participated, cannot be seriously entertained by the court.

We may add, as an incident of the litigation in this case, that the same remark would apply, and would have applied to any claim, as against each other, for a division of their liability for damages growing out of their joint mal-administration. Neither party could invoke the assistance of the court to determine rights of such a character.

The only issue, therefore, which we think it important to examine is that which has reference to the plea of *res judicata*. What rights were determined in the compromise upon which the judgment of April 24th, 1847, was based?

The plaintiffs who represented an interest equal to five-eighths of the estate of *Claude François Girod*, had obtained a judgment annulling all proceedings had

during the previous administration thereof, and reinstating the entire succession in a condition to be the subject of a partition among the heirs. The decree provided that all the heirs, whether plaintiffs or not, might intervene to claim a distributive share. *Jean François* was an heir to the extent of one-fourth of the whole estate.

His right to intervene would have been subject to any claims or offsetts which his co-heirs might have against him, but his participation in a fraudulent administration did not and could not destroy his capacity as heir. But whether his right to intervene might have been successfully contested or not, the fact is, that he *did* intervene, and claimed rights amounting in value to $140,000, tendering at the same time reimbursement of the $70,000, the price of the sale made by him to *N. Girod* of the joint purchase they had made from the estate of their deceased brother. The legatees, excepting to his right to intervene, claimed from him not only "the sums set forth in his petition, with interest," but also $300,000 damages.

Can it be contended that upon such pleadings a judgment in favor of the defendants for the whole of their demand would not have embraced the $70,000 with interest, which was referred to in the defendants' answer as the "sum set forth in the petition, with interest?" or that a judgment in favor of the intervenor would not equally have recognized and disposed of this claim, as being included in the general adjustment of their mutual rights?

It is quite clear, then, that *Jean François Girod* was a party to the litigation as well as to the compromise; and had such a judgment as either of those above referred to been rendered on the pleadings, that future litigation with reference to the claim of $70,000 would have been forever closed. But no such judgment was rendered. The parties preferred immediate mutual concession to the uncertainty of future triumph. *Jean François* consented to withdraw and forever abandon his claims; that the estate of *Nicholas Girod* might divide any remaining assets among the legatees, upon the understanding, however, "that the whole litigation is terminated."

That was the consideration for the withdrawal of his claims. It matters not for what object they were urged, or with what motives they were withdrawn. His motives or his intentions formed no part of his contract. His part of that contract has been performed. The plaintiffs have had the benefit of it according to its spirit and tenor, and we think the defendant is entitled to the benefit of the only stipulation contained in it which conferred upon his testator any solid advantage, or extended to him any useful protection, for we have before remarked that, as between the two executors or their representatives, the action of the court could not be invoked for the purpose of assessing their proportionate shares of a liability growing out of a joint fraudulent administration.

It is ordered that the judgment appealed from be affirmed, with costs.

Dwight Durkee *v.* Price, Frost & Co.

Defendants received a claim for collection from D. T. W. & Co. The firm of D. T. W. & Co. was dissolved, and B. who had been one of the members, instructed defendants to put the proceeds of the claim, when collected, to the credit of plaintiff, which defendants accordingly did, and so instructed B. and the plaintiff. Subsequently defendants paid the money under instructions from D. T. W., as liquidating partner of D. T. W. & Co. Plaintiff then brought this suit for the amount of the claim. *Held:* That after defendants had notified plaintiff that, as requested by B., they had placed the money collected to plaintiff's credit; they had no right to divest the funds without plaintiff's assent; that having done so, they were liable to plaintiff.

After the dissolution of a partnership, no one of the partners can use the social name so as to bind the others; and to draw or endorse a note in the name of the former partnership, the authority must be express and special. Any subsequent power must be derived, not from the previous relations of the parties as partners, but from a new contract, which is one of mandate, and this mandate must be express and special. Voorhies, J., dissenting.

No one of the partners, after the dissolution, can alienate anything more than his own interest in the partnership property. He is not permitted to do any act, still less, to make use of the partnership funds in a manner inconsistent with the purpose of a just and proper settlement. Voorhies, J., dissenting.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Hunton, for plaintiff. *Wolfe & Singleton*, for defendants and appellants.

Voorhies, J. The facts of this case may be briefly summed up as follows: The firm of *D. T. Wheeler & Co.*, composed of *D. T. Wheeler* and *Samuel B. Bullock*, of St. Louis, Mo., enclosed to the defendants a claim of theirs against *Turner, Wilson & Co.*, of the city of New Orleans, for collection. The claim was collected by suit brought in the name of *D. T. Wheeler & Co.* against *Turner, Wilson & Co.*, by *Messrs. Wolfe & Singleton*, attorneys at law, and the net proceeds, $1529 75, paid over to the defendants on the 7th December, 1852. On the 11th September, 1852, *S. B. Bullock* addressed a letter to the defendants, instructing them to place the proceeds of this claim, when collected, to the credit of *Durkee, Axtell & Co.*, of which firm he was then a member. This firm continued in business until January, 1853, when *Axtell* withdrew, and then continued in the name of *Durkee & Bullock*. *S. B. Bullock*, in a letter to defendants, dated 19th October, 1852, says: "This claim I have placed in the hands of *Mr. Dwight Durkee, for a specific purpose*, which, when collected, you will please apprise him and pay to his order." The firm of *D. T. Wheeler & Co.* was *dissolved on the 7th June*, 1852. Conceding the authority of *Bullock* to transfer this claim, still it may be observed in passing, that this could hardly be construed into a transfer vesting the absolute ownership in *Durkee;* indeed the subsequent acts of the parties clearly indicated that such was not their intention. *Bullock*, in a letter of the 11th December, 1852, to the defendants, says: "Your favor of the 1st instant is at hand. I wish you to invest the proceeds of the claim against *Turner, Wilson & Co.*, in your own bill on *Frost & Foster*, New York, at 70 days, in favor of *James S. Felps*, and remit the same *to me.*" The letter of the 1st instant referred to, announced the collection of the claim by *Messrs. Wolfe & Singleton.* On the 7th of the same month, the defendants enclosed to *S. B. Bullock* a statement of the attorneys, showing the settement of the claim on *Turner, Wilson & Co.*, and informing him that the net proceeds, $1529 75, were placed *to the credit of Dwight Durkee, as requested.* The latter was also advised of this by letter of

the same date. On the 13th December, 1852, *Bullock* wrote to the defendants, acknowledging the receipt of this letter and informing them of the tenor of his letter of the 11th, adding: "On another page you will please find an order from *Mr. Dwight Durkee* for the same." The order referred to is as follows, viz:

"SAINT LOUIS, Dec. 13th, 1852.

Messrs. Price, Frost & Co., New Orleans.

Gentlemen: Your favor of 7th instant is received. You will please invest the amount to my credit, in a seventy day bill, as requested and directed by *Mr. S. B. Bullock* in a late communication from him to you. On the other page you will find those instructions copied.

DWIGHT DURKEE."

This new disposition of the fund held by the defendants was then fully acquiesced in and ratified by the plaintiff, who thereby ceased to have any further interest therein. It is clear that this fund then reverted back to the late firm of *D. T. Wheeler & Co.*, even supposing that it had been legally transferred to the plaintiff. That transfer had been made by *Bullock* in his individual name, as we have seen, and it does not appear that *D. T. Wheeler* ever had any notice of it. The following draft was drawn by the latter on *Messrs. Wolfe & Singleton*, viz:

"ALTON, December 1st, 1852.

"For value received, please pay to the order of *W. S. Gilman* any funds you have, or may hereafter collect, on account of a judgment obtained in favor of *D. T. Wheeler & Co.*, against *Turner, Wilson & Co.*, of New Orleans, after paying your fees and the necessary expenses attending its collection.

D. T. WHEELER & Co.,

By *D. T. Wheeler* in liquidation."

In this draft we see *Wheeler* assuming an authority to act for the late partnership in the liquidation of its affairs; and in the absence of proof to the contrary, we are bound to presume that he had the same authority so to act as the other partner *Bullock*. *Mr. Wolfe's* testimony shows that shortly after the money collected had been paid over by *Wolfe & Singleton*, within a few days, this draft was presented to them. It was taken to *Price, Frost & Co.*, and by them paid to the extent of $1529 75. The plaintiff and *Bullock* were both notified of the payment of this draft, by letters addressed to them respectively by the defendants, and which, the evidence shows, they received about the 26th December, 1852. No answer appears to have been given to either of these letters.

On the 22d February, 1853, the plaintiff drew a draft at sight on the defendants, in favor of and to the order of *Lucas & Simons*, for the sum of $1529 75, and is closed as follows: "and charge the same to account of as advised by your letter of December 7th, 1852." It is endorsed in blank by *Lucas & Simons* and *Matthews, Finley & Co.*, and protested for non-payment on the 1st March, 1853. This draft, with the blank endorsements stricken out, and the defendants' letter of the 7th December, 1852, formed the basis of the plaintiff's action, which was resisted by the defendants on various grounds, among others, that they had paid the draft in favor of *W. S. Gilman* on *Messrs. Wolfe & Singleton*, of which the plaintiff immediately advised, and knew at the time he drew this draft that he had no funds to his credit on their books, and by his silence acquiesced in the disposition of said funds; that shortly

after this claim was sent to the defendants, the firm of *D. T. Wheeler & Co.* was dissolved, and *S. B. Bullock* formed a commercial partnership with the plaintiff, who still continues to be his partner; that the plaintiff paid no valid consideration for this claim, and the funds belonged to *D. T. Wheeler & Co.* at the time they were paid over to the defendants; that the plaintiff and *Bullock* had fraudulently combined to make the defendants pay this debt twice, although they had no other interest in the matter than to give their friendly assistance to *D. T. Wheeler & Co.* to collect their claim; that at the time said draft was paid by them, said funds were still under the control of *D. T. Wheeler & Co.* We have before us the testimony of both *D. T. Wheeler* and *S. B. Bullock*. *Wheeler* says he knew nothing of the transfer to plaintiff, but it was agreed between himself and *Bullock*, at the time of the dissolution of their firm, that the debt due by *Turner, Wilson & Co.*, when collected, should be applied to the payment of a judgment against them in favor of *J. Coons;* that he drew an order on *Wolfe & Singleton*, in the name of *D. T. Wheeler & Co.*, for the amount of the claim; $712 62 of which were applied to the payment of *one-half of Coon's judgment*, the other half having been paid by *S. B. Bullock*, and the balance was paid to *W. S. Gilman* for money borrowed from him and placed in the firm of *D. T. Wheeler & Co.* as capital.

Bullock says, that he is now and has been, since the dissolution of the firm of *D. T. Wheeler & Co.* connected with the plaintiff as partners in business; that *Mr. Wheeler*, senior member of the firm of *D. T. Wheeler & Co.*, was collecting debts and selling claims of said firm, and at the same time refusing to appropriate the funds thus received to the payment of debts due by the firm, but applied the same to the payment of his individual debts. He was putting property out of his hands to prevent the payment of debts justly due by the late firm of *D. T. Wheeler & Co.*, and forcing them upon him. This was the condition of their business when he (*Bullock*) wished, and was determined, that the assets of the firm, as far as he could control them, should be appropriated to the payment of the debts due by the firm. "*There was a suit of* $1250 *against the late firm of D. T. Wheeler & Co.*, in one of their courts in St. Louis city, somewhat connected with the case against *Turner, Wilson & Co.*, and was willing to transfer their claim against the latter to the plaintiff in that suit, but his proposition was declined. He then wished the plaintiff to advance him the money on it to pay the debt of the late firm of *D. T. Wheeler & Co.* This was declined by the plaintiff, on the ground that he did not wish to be troubled with the suit. After some persuasion he assented, and a transfer was executed in his favor.

Under this state of facts, we are of opinion, the defendants are clearly not liable to the plaintiffs.

It is therefore ordered and decreed, that the judgment of the District Court be avoided and reversed; and the demand of the plaintiff against the defendants be rejected at his costs; said appellee to pay costs of both courts.

A rehearing having been granted in this case, the judgment of the court was pronounced by

SPOFFORD, J. (VOORHIES, J., dissenting.) Upon a reconsideration of this case, a majority of the court have become satisfied that the judgment formerly rendered should be changed.

The defendants treated with *S. B. Bullock*, as the person who had control of this particular asset of the dissolved partnership of *D. T. Wheeler & Co.*

At *Bullock's* request, they placed the funds which they had collected from the claim, to the credit of *Dwight Durkee*, the plaintiff, and notified him thereof in a letter, stating that the amount was "subject to his order." After that, they had no right to divert the fund without his assent. The only way for them to exonerate themselves from liability to the plaintiff, would be to show that they had obeyed his instructions with regard to the disposition of the fund.

They have not done so. He directed them to invest the amount they had to his credit, "in a seventy day bill, as requested and directed by *Mr. S. B. Bullock*, in a late communication." *Bullock's* communication, written two days earlier, requested them to invest the amount in their own bill on *Frost & Forest*, New York, at seventy days, favor of *James S. Phelps*, and remit the same to him.

They do not pretend to have paid the slightest attention to this joint request of the party with whom they had constantly corresponded and dealt, as the person who had the rightful control of the claim, and of his new partner, the plaintiff, *Durkee*, to whose credit they had put the sum on their books, notifying him of the same.

They are, therefore, liable to the plaintiff. There is no evidence that he ratified what they say they have done with the funds. The alleged payment was upon an order of *Wheeler*, not directed to them, but to a legal firm out of whose control the funds had passed. It is not pretended that either *Bullock* or *Durkee* authorized this diversion of the fund. The defendants, themselves, were conscious that it was a departure from the usual course of commercial dealings, for they took advice about paying the money on *Wheeler's* order to *Wolfe & Singleton*, and finally said that "they knew *Wheeler & Co.* trusted in them, and would pay the draft; they supposed it would be all right, and if it was not right, they would make it so."

It is therefore ordered, that the judgment heretofore rendered by this court in this cause, be set aside. And it is further ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

VOORHIES, J., dissenting. I am unable to concur with the other members of the court in the opinion, that the judgment heretofore rendered should be disturbed.

I hold it to be well settled under our jurisprudence, that after the dissolution of a partnership, no one of the partners can use the social name so as to bind the others; and that to draw or endorse a note in the name of the former partnership, the authority must be express and special. Any subsequent power must be derived, not from previous relations of the parties as partners, but from a new contract, which is one of mandate; and this mandate must be express and special. 11 R. R. 95. 6 Ibid, 70. C. C. 2966.

It is equally well settled, that no one of the partners, after the dissolution, can alienate any thing more than his own interest in the partnership property. 9 R. 149. He is not permitted to do any act, still less to make use of the partnership funds, in a manner inconsistent with the purpose of a just and proper settlement. 2 An. 87. The fund in question belonged to the firm of *D. T. Wheeler & Co.*, which was dissolved on the 7th of June, 1852. Could *Bullock*, in October following, alienate any thing more than his own interest in this fund? It is clear that he could not, without express and special authority from his former partner, who was a joint owner of the same. It cannot

be said that the plaintiff was ignorant of the nature or origin of this claim, for it is fully disclosed by the correspondence between *S. B. Bullock* and the defendants, and on which his pretensions are founded. Neither could he have been ignorant of the dissolution of the partnership, for we find that he shortly afterwards formed a partnership himself with his transferrer.

In the case of *Prudhomme* v. *Henry*, 5 An. 700, it is held, that where a liquidating partner has borrowed money to pay the debts of the firm, the partnership is liable so far as the evidence shows the money was used for the benefit of the firm. Is it shown here that the plaintiff had advanced for the payment of the debt of the firm of *D. T. Wheeler & Co.*, the amount equivalent to the fund thus transferred to him? The testimony of *Bullock* shows that the transfer was for money advanced and to be advanced by *Dwight Durkee* to him, to pay the debts of *D. T. Wheeler & Co.* Was such an advance made? *Bullock* says: I paid $500 of that amount, received of *Durkee*, to meet a note of *D. T. Wheeler & Co.*, and $200 for a draft drawn by *D. T. Wheeler & Co.* on Philadelphia, held by *Q. T. Swearingen*. *Durkee* himself, testifies that he advanced the $500 in August, 1852, and the $202 in January, 1853, to *Bullock*, to make those payments; and, also, in January, 1853, $712 75, to pay part of a judgment against *D. T. Wheeler & Co.* in favor of *Dr. Coon*, of St. Louis. He says: "The object of the transfer was to secure me in my advancement of these three sums." It is then clear that *Dwight Durkee* was fully conversant of the nature of his transferrer's title to the funds in the defendants' hands. Now, it appears from the testimony of *Mr. Wolfe*, that the draft drawn by *D. T. Wheeler & Co.* on *Messrs. Wolfe & Singleton*, was paid by the defendants, shortly after the amount was collected from *Turner, Wilson & Co.*, and placed in their hands. The evidence leaves no doubt on my mind that this was previous to the month of January, 1853. The testimony of *D. T. Wheeler* proves that he knew nothing of the transfer, but that it was agreed between himself and *Bullock*, at the time of the dissolution of their firm, that the debt against *Turner, Wilson & Co.* should be applied to the payment of a judgment in favor of *Andrew J. Coon*, against the firm; that he drew the order on *Wolfe & Singleton*, in the name of the firm of *D. T. Wheeler & Co.* and applied $712 62 of the amount thereof to the payment of that judgment; and the residue was applied to the reimbursement of money borrowed from *W. S. Gilman*, and placed in the firm of *D. T. Wheeler & Co.*, as capital. Under this state of facts, it appears to me clear, that the plaintiff is not entitled to a recovery.

The New Orleans Draining Company praying for the Confirmation of a Tableau.*

The power of the legislative department of the government is supreme, except where restricted by the Constitution.

The Legislature has the power to drain the swamps in the rear of the city of New Orleans, directly, or by its own agents, and so it has the power to drain them through the intervention of a company created for that purpose.

Article 124 of the Constitution, guarranteeing to the city of New Orleans the election of its own officers, was not intended to direct the manner in which contractors for works of public improvement should be selected, nor to abrogate contracts already made. It is the right of appointing the several *public* officers necessary for the administration of the police of the city that is secured to the citizens of New Orleans. The kind of officers intended is shown by the proviso to Article 124. An incorporated company taking a contract for the draining of a swamp cannot be called a public officer necessary for the administration of the police of the city.

It was within the power of the Legislature to require the proprietors of the marshy lands in the rear of the city themselves to drain them. It had the power also for sufficient causes, of which the Legislature alone was the judge, to cause the work to be done and charged to the proprietors respectively, and all this would not be the levying of a tax in the sense of that word as used in the Constitution. The money was not intended to go into the treasury, and become subject to the rules, by which alone it could be appropriated annually.

The property drained has been benefited in amount greater than the cost of the assessed work. Were not this the case, the property of each proprietor, to the extent of the difference between the increased value and the cost of the work assessed to him, would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of the provisions of Article 105 of the Constitution.

Under the charter the estimate that the company was required to make of the probable cost of the work, did not limit the lien to the amount of the estimate, should the cost of the work exceed the estimate.

It is in the power of the Legislature to determine in what manner parties are to be brought into court.

If the estimate of the cost of the work was irregular, such irregularity has been cured by a judgment of a competent tribunal, which has not only become final, but has been acquiesced in by the parties, who daily saw the work upon their land in progress, and who made no objection or remonstrance.

By the charter of the company the cost of drainage was levied, not as a personal tax upon the individual proprietor, but as an assessment against the property benefited by the labor of the company, and to repay the company, not to go into the public coffers. And for the benefit which it was supposed the city would derive in point of salubrity from the improvement, the municipalities were required to keep the draining machinery in perpetual operation, without any extra tax on the lands. Spofford, J.

All the rights of the company were acquired under the Constitution of 1812; these were reserved by the schedules of the Constitutions of 1845 and 1852, so that the clauses in the Constitutions of 1845 and 1852, which are not to be found in the Constitution of 1812, touching "vested rights" and the "equality and uniformity of taxation," can have no bearing upon these rights. Spofford, J.

To go behind the Constitution of the State and of the United States, in search of an unwritten bill of rights, which is said to lie at the foundation of every free government, and there to find a principle on which the legislation in question may be declared null and void, would be to prostrate the plainly declared will of a co-ordinate department of the government, not because it contravenes

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* By certain Acts of the Legislature, the New Orleans Draining Company was incorporated. The object of the incorporation was to enable the Company to drain the swamp lands in the rear of the city of New Orleans. A lien was created by the charter upon the lands drained, to pay the costs, etc., of the drainage. The present proceeding was to establish the lien, and to recover the costs of expenses of the drainage, etc. The Acts of the Legislature under which the Company claimed will be found very much at large in the opinions rendered by the several Judges.

When the case was first heard in the Supreme Court, Mr. Justice Buchanan pronounced the judgment of the court, Mr. Justice Spofford dissenting, and Chief Justice Slidell recusing himself, having an interest in the cause. There was an application for a rehearing, and pending the application Chief Justice Slidell and Mr. Justice Ogden resigned their seats upon the bench, and Merrick, C. J., and Lea, J., were elected in their places respectively. A rehearing having been granted, Merrick, C. J., delivered the opinion of the court, all the Judges concurring in the decree, with the exception of Buchanan, J., who adhered to the opinion previously pronounced by him as the organ of the court.

any provision of the organic law, which the court is to expound, and all are to obey, but because it contradicts the notions of justice that the court may entertain. SPOFFORD, J.

Perhaps the court has such a power; like the right of revolution, it is sometimes obscurely hinted at in judicial opinions. Conceding that the court has the power to protect the citizen against encroachments from the legislative power which are not specially, or by necessary implication, inhibited by the Constitution, it is obvious that a flagrant case of wrong and hardship should be made out to justify a judicial tribunal in thwarting the legislative will, without a direct warrant for doing so to be found in the Constitution itself. SPOFFORD, J.

The charter of the New Orleans Draining Company is unconstitutional in this, that it levies a tax only upon the owners of the property drained, for an improvement intended for the benefit of the whole city of New Orleans, and so declared to be in the preamble to the charter. BUCHANAN, J., dissenting.

The power conferred upon the Draining Company by the Act of 1839 is a power of taxation, which is unconstitutional for the Legislature to delegate to a joint stock company, and is inconsistent with the taxing power vested in the Municipal Corporation by the various Acts incorporating the city of New Orleans, which are not repealed. BUCHANAN, J., dissenting.

The inscription of a mortgage and privilege for an undefined amount, in favor of the Draining Company, against each and every proprietor of land embraced within the company's operations, seems to be a divestiture of vested rights, because it must render all property thus situated unsaleable in the interval between the inscription of the decree creating the mortgage and privilege before the work is undertaken, and the homologation of the assessment and tableau of contribution after the work is completed. BUCHANAN, J., dissenting.

The superiority which is given by the Act of 1839 to the mortgage and privilege of the company on the lands embraced in their operations, over all mortgages, conventional, legal, or judicial, is a provision divesting vested rights and impairing the obligation of contracts. BUCHANAN, J., dissenting.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Roselius and *Janin*, for the Draining Company. *Eustis*, *Morel*, *Strawbridge* and *Bryon*, for opponents and appellants.

BUCHANAN, J. (SPOFFORD, J., dissenting.) Of the many oppositions filed herein, sixteen have called in question the constitutionality of the charter of the New Orleans Draining Company.

The points of unconstitutionality urged, may be reduced to four, namely:

1. The charter taxes a portion of the community only, for a work beneficial to the public at large; which is against the principle of equality and uniformity in taxation, consecrated by Article 127 of the Constitution of 1845, and Article 123 of that of 1852.

2. The charter divests vested rights, without an adequate compensation previously made, contrary to Article 109 of the Constitution of 1845, and Article 105 of that of 1852.

3. It delegates the taxing power to a private corporation, which the Legislature had not the constitutional power to do.

4. It delegates the administration and police of a portion of the territory comprised within the limits of the political or municipal corporation of New Orleans, to a private corporation, in violation of section 23 of the 6th Article of the Constitution of 1812, which was repeated verbatim in the 128th Article of the Constitution of 1845, and the 124th Article of that of 1852.

Of these points, it is only necessary to examine the first. Tested by the doctrine of the majority of this court, in the Benton street case, 9th An. 444, it must prevail.

The New Orleans Draining Company was incorporated by Act of the Legislature of 19th of March, 1835. An unusually full preamble leaves no doubt of the motives which actuated the Legislature in granting this charter; and as those motives have an important bearing upon the constitutional question under examination, we will here transcribe the preamble in full:

DRAINING CO. PRAYING, &c.

"Whereas, in accordance with the opinion of physicians of the greatest experience, it appears that the epidemics which, with few exceptions, have annually prevailed in the city of New Orleans and its faubourgs, are in general to be attributed to two causes, intense heat and excessive humidity, which, when combined, frequently produce the most fatal diseases; and although the limited powers of man cannot obviate or control the first, yet he may mitigate its virulence, by adopting such means as will effect a free circulation of air; and the latter would be in a great measure, if not entirely, removed by draining off the stagnant waters which accumulate on the low and marshy grounds. And whereas, after the draining of the said grounds shall have been accomplished, if the woods which at present mostly cover the entire space between Lake Pontchartrain and the said city and faubourgs, be cut down and removed, it is more than probable that the salubrious breezes from the said lake, will be felt to the banks of the Mississippi, and after passing over a well drained surface, reach the city, free from those exhalations which are now brought thither by winds blowing from that quarter, vitiating the atmosphere and proving fatal to human life. And whereas, the improvements aforesaid form an object of serious importance, not only to the inhabitants of the said city and faubourgs, but also to those of every other section of the State, as their inevitable results would be the increase of population, and the general prosperity thereof. And whereas, so desirable an object can only be effected through the medium of a large capital, in consequence of the great number of workmen required, and the immense expenses necessarily attending the undertaking thereof, and which the proprietors of the soil may want either the means or the inclination to provide for the same, particularly as the success of an enterprise of this nature chiefly depends upon the preparation and adoption of a judicious plan of well combined operations, on which it might be impossible for them to agree. And whereas, it being a well established maxim among all civilized nations, that the welfare of society always takes precedence of the interests or the will of individuals, should it conflict with the same; hence, it becomes the duty of those to whom the legislative power is confided, to prescribe and adopt the most efficient measures for the accomplishment of so important an object."

For these considerations, a company was created by the statute, with the style of the New Orleans Draining Company, with a capital stock to be raised by subscription, whose duty it should be to drain, fill up and improve, all that portion of the incorporated limits of the city of New Orleans, which were not then drained and improved; which comprised perhaps three-fourths of the superficial extent of the territory of that corporation as defined by law. The *modus operandi* of the Draining Company, in effecting these improvements, was minutely detailed in the charter, but has been since essentially changed by an amendatory statute passed the 20th of March, 1839. By the provisions of the last mentioned act, the company was authorized to clear and drain the land by sections, taking an accurate account of all the expenses incurred, hire of laborers, and salaries of officers, and by means of Assessors appointed by themselves to apportion the whole of the said charges among the proprietors of the land comprised within the section thus cleared and drained. For the security of their payment, a mortgage of the first class, superior to all other claims or liens upon the land, was granted to the company; and the most summary process for the collection of the assessment from each proprietor of the land.

As in the case of the Act of 1832, for the opening and widening of streets in the city of New Orleans, the assessment upon the individual proprietors of land, goes through the formality of a judicial inquiry and a judgment of homologation; but this does not change its character of a tax or impost, paid by the proprietors of the section drained, to defray expenses incurred for the benefit of the whole community.

That the work has been done for the public benefit, the preamble of the Act of 1835, and the 13th section of the Act of 1839, prohibit the company from disputing. This being the case, it is unconstitutional to charge the proprietors of the land drained with all the expenses of drainage. It strikes us as entirely inadmissible, to permit the company, in the face of the declarations of the preamble and the whole tenor of the charter, original and amended, to assume the quality of *negotiorum gestor* of the proprietors embraced in their assessment roll. The *negotiorum gestor* is one who does the business of another without an authorization. But whose business has the Draining Company done? The business of the State, who had given it the most formal authority, and the business of the city, which it was preserving from pestilence by its operations, at the same time that it was increasing her population and resources. The relation of the company to the proprietors of the land, is not that of an agent, but of a creditor—a creditor of the most favored and peremptory kind—who is equally independent of the insolvent court, and of the court of probates.

It should be observed, that the stock of the Draining Company is owned almost entirely by the State and the city, and has been paid for in city and State bonds. With the proceeds of these, the company has done the work which is the subject of this tableau. In rejecting the claim against the proprietors of the land drained, that charge falls where it properly belongs—upon the taxpayers of the city and State at large.

Judgment of the District Court reversed; and it is decreed that these proceedings be dismissed; the costs in both courts to be paid by the New Orleans Draining Company.

OGDEN, J. The suit being one, based entirely on the authority which the Draining Company claim to have derived from the Acts of the Legislature, which are, in my opinion, unconstitutional, I therefore concur in the judgment pronounced by Mr. Justice BUCHANAN, dismissing the proceedings, without thinking it necessary to express any opinion as to the right of the plaintiffs to recover, in an equitable action, the amount to which the defendants have been benefited by the work and labor done in the improvement of their property.

SPOFFORD, J., dissenting. By an Act entitled "an Act to provide for the draining and clearing of the Marshy Grounds and Cypress Swamps, situated between the city of New Orleans, its incorporated suburbs and Lake Pontchartrain," the Legislature of Louisiana, on the 19th of March, 1835, incorporated the "New Orleans Draining Company."

The provisions of that Act were numerous and complicated, and although the company went into operation under it, some of its requisitions were found to be impracticable.

Another Act was, therefore, passed and approved, on the 20th of March, 1839, of which the following are the material sections:

AN ACT

To amend an Act, entitled "an Act to provide for the draining and clearing of the Marshy Grounds and Cypress Swamps, situated between the city of

DRAINING CO. PRAYING, &C.

New Orleans, its incorporated suburbs, and Lake Ponchartrain," approved 19th March, 1835.

Whereas, the draining of the low and marshy grounds behind the First Municipality of the city of New Orleans, by the Draining Company, has proved completely successful; whereas, similar experiments made by private citizens on their plantations, on the Mississippi, have been attended with the same beneficial results, whereby the practicability and utility of the system of draining, lately adopted in this State, has been fully and satisfactorily tested: but, whereas, difficulties are found to exist in the execution of several provisions of the Act incorporating the said Draining Company, and it is desirable to simplify, (expedite and extend the operations of the said Company,) therefore:

Section 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That the New Orleans Draining Company shall have the right to proceed to drain the lands embraced within the limits designated in the Act to which this is an amendment, and to be compensated, therefor, in the following manner: whenever the said Draining Company is prepared to drain a portion of land, which shall conveniently form a separate section, it shall have a plan thereof made, accurately designating the limits of the said section, and as much as possible the subdivision of the property therein contained, and the names of the proprietors, and also the dimensions and direction of the canals intended to be dug, and the place where the steam engine, if any, will be established. The plan shall be deposited in the office of a notary public, in the city of New Orleans, and a notice shall be inserted in French and English, in two newspapers printed in the city of New Orleans, at least once a week during four weeks in succession, announcing that the company will proceed to drain the said section, describing the place where the plan thereof is deposited, accurately defining the limits thereof, and indicating as nearly as possible, the time within which the draing thereof will be completed, and the probable cost of said works. After said publications, the said Company will apply by petition to the Court of the First Judicial District, or at its option, to the Parish Court of the parish of Orleans, if the section is entirely situated in the parish of Orleans, which court, upon proof being made that the said advertisements were regularly published, shall decree that each portion of the property, situated within the said limits, is subject to a first mortgage and privilege in favor of the said Draining Company, for such amount, as may be assessed on it for its proportion of the whole cost of the draining of the said section. The said decree shall be recorded in the office of Recorder of Mortgages of the parish or parishes wherein the section is situated, and a copy of the aforesaid plan shall also be deposited in the said office or offices, for the information of the said Recorder of Mortgages. The said Recorder shall be entitled to twenty dollars for the recording of the said decree, and the deposit of said plan; and if he is required by the said company to record the said decree in the name of any or all the proprietors of the said section, he shall be entitled to receive fifty cents for the special recording in the name of any proprietor, whose name, and the description of whose property is furnished to him; and, whenever the said Recorder of Mortgages is required to deliver a certificate of mortgages of any property embraced within the said section, he shall mention thereon that the said property is subject to a privilege and first mortgage in favor of the said Draining Company, for such sum of money as will hereafter be assessed on said property for the draining thereof. The said privilege and first mortgage shall take precedence over all mortgages whatsoever, whether conventional, tacit, legal, or judicial, and shall attach to said property, until the amount which will be assessed on it, and the notes which may be given for said amount, as provided in the 5th, 6th, 7th and 8th sections of this Act, shall have been paid in full.

Sec. 2. Be it further enacted, &c., That the said Draining Company shall, thereafter, proceed to the draining of the said section with all possible expedition, and complete it as much as practicable, before the draining of any other section is commenced. The said company shall open an account for the said section, and charge it with all the expenses incurred for the draining thereof, including the amount of the contracts paid therefor, the machinery, damages paid, the labor of its slaves, at the rate of $30 per month, for each slave, and the salaries of its officers, for the time during which the company

is exclusively occupied with the draining of the said section. If other works of the company shall be progressing at the same time, only a ratable proportion of the said salaries shall be charged to the said section, and the same ratable distribution shall also take place, whenever the machinery or other works established on one section shall be used at the same time for the draining of another section; and on every charge in the said account, interest shall be calculated at the rate of ten per centum per annum from the time it is made.

Sec. 3. Be it further enacted, &c., That as soon as the draining of the said section is completed, the said company shall make out and close a general account of all the expenses charged to the same, as aforesaid; and shall then appoint three Appraisers, who shall be sworn, faithfully, and to the best of their skill and judgment, to perform the duties assigned to them by this Act. The said Appraisers shall define the limits within which property lying in the section, is to be charged for the draining of the section; they shall then assess on each individual property, such portion of the amount of the aforesaid account of the Draining Company, as will appear to them in due proportion, in such a manner that the amount of their assessment will be equal to the amount of said account. In making this distribution, the said Appraisers will principally take into consideration the extent of the said individual properties; and they shall also assess property which might be above the level of ordinary inundations, if, in their opinion, it became more easily accessible and cultivable, or habitable by the means of the said draining; they shall have a plan made, if the plan made before the said assessment should not be sufficiently detailed, and prepare a tableau setting forth the names of the proprietors, the extent of their property and the amount with which it is charged, and accompany the said tableau with such observations as circumstances may seem to them to require. The said plan or plans shall be paid for by the said company, and for the said assessment and tableau the said company may allow to the said Appraisers a compensation not exceeding three hundred dollars, which several expenses will also be included in the account of the section, together with those incurred for judicial proceedings on account of the said section: the said tableau shall then be deposited by the said Draining Company, with the clerk of the court which rendered the decree, described in the first section, together with a copy of the detailed account of the said section, for the inspection of whomsoever it may concern. The said Draining Company shall then give notice by advertisements, printed at least three times, within fifteen days after the first notice, in French and English, in two newspapers published in the city of New Orleans, of the day on which the said tableau will be filed for confirmation in the said court, which day shall not be less than twenty days later than the day of the said first notice. Any person, whose interests may be affected by the said tableau and assessment, may then specially state his objections to the same, in writing, and deposit them with the clerk within five days before the day on which the said tableau is to be filed for confirmation; if the said objections shall appear well founded to the said Appraisers, they shall amend their said tableau, and the tableau so amended, or the original tableau, if no amendment should have been made, shall be filed for confirmation. In all matters made the duty of the said Appraiser by this section, a majority of them may act, and in case of the death, or resignation, or departure of any of them, they may be replaced by the said Draining Company. Within ten days, and no more after the the filing of said tableau for confirmation, any person, whose interests may be affected thereby, may file his opposition thereto, which shall be heard by the said court, by rule or order, whereafter the said court shall either confirm the said tableau, or order it to be amended within a delay to be fixed, and then homologate and confirm it, if it has been amended according to the judgment of the said court.

Sec. 4. Be it further enacted, &c., That, whereas, by proceeding under this Act, the said Draining Company is only reimbursed for its outlays with interest, and bears the risk of the loss of its slaves, and other property—and, whereas, it is important that its operations should not be arrested by delays in the payments of the amounts due by the proprietors of the lands drained, the amounts charged in the said tableau as confirmed, shall be payable and may be required of them; although they, or any of them, or the said Draining Company shall appeal from the said judgment of confirmation, and in case of the reversal of the said judgment on appeal, they shall either be refunded

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what they have paid too much, or be liable to pay an additional amount, if by judgment of the Supreme Court, the tableau should be amended or altered, as to charge them with a greater amount than that for which they were carried on the original tableau, as confirmed by the court of original jurisdiction.

Sec. 5. Be it further enacted, &c., That the amount due upon each property for the draining thereof, as settled by the said confirmed tableau, shall be payable in cash with ten per cent. interest from the day at which the aforesaid account of the Draining Company shall have been closed. But if the amount to be paid by any individual proprietor, shall exceed the sum of one hundred dollars, he shall be at liberty to give his notes thereof to the order of said company, payable at one and two years from the date of the said account with ten per cent. interest from the said date, and also bearing ten per cent. interest from maturity, if not then punctually paid. And in order more fully to secure the payment of the said notes, the drawer thereof shall execute a special mortgage in favor of the said company on the property drained, or on such portion thereof as to the said company may appear sufficient, and the said notes shall be identified with the said mortgage. The payment of the said mortgage shall be assumed by any subsequent purchasers of the said property, and shall not be extinguished by any insolvent proceedings, or by any sale made by virtue of an order of a Court of Probates. The said mortgage shall hold the same privileged rank as the mortgage provided for in the first section, and shall be considered as identical with the same and not as a novation thereof. In case of the non-payment of any of the said notes at maturity, the said company shall have the right of suing on its said mortgage and privilege, by order of seizure and sale, which right of said company shall not be impaired, or in any manner affected by any subdivision, forced or voluntary sale of the said property, respite, cession of property, or transmission of said property by death or otherwise. The said proceedings may be either directed against the said property or the drawers of the said notes. The property mortgaged, or so much thereof as may to the said company appear sufficient to pay its claim, shall be sold for cash without appraisement; if both the said notes are overdue, or in case the second of the said notes be not yet due, then the said property shall be sold for an amount sufficient to pay the first of the said notes with interest and costs of protest and the costs of suit, the purchaser moreover binding himself to pay the second of the said notes at maturity. In either case the balance of the price, if any, shall not be payable in cash, but shall remain in the hands of the purchaser, secured by a special mortgage, and be subject to the claims of the former proprietor of the said lands, or of the person or persons who may have a mortgage on said lands.

Sec. 6. Be it further enacted, &c., That the notes and mortgages mentioned in the foregoing section, shall be given by the same persons who, by the 17th section of the Act to which this is an amendment, are authorized to enter into contracts with the said Draining Company, and shall be binding upon the persons represented by them in the same manner as the contracts made by them in virtue of the said section would be.

Sec. 7. Be it further enacted, &c., That if, within thirty days after the said Draining Company shall have given notice in French and English, in two newspapers printed in the city of New Orleans, that the tableau has been confirmed by the court of original jurisdiction in which it was filed, and shall in said notice have called on the proprietors of the said land included in the said section, to settle for the amount due on their said property, the said proprietors or their legal representatives shall not have effected the said settlement, either by paying the amount due or by furnishing notes and mortgages as provided for in the fifth and sixth sections, it shall be lawful for the said Draining Company to proceed by order of seizure and sale against the property for which no settlement may have been made. The said company shall be entitled to the said order of seizure and sale by merely exhibiting the certificate of the Recorder of Mortgages, showing that a judgment creating a mortgage and privilege on the section, and described in the first section, was duly recorded, and also the confirmed tableau on which the said property was assessed, and copies of the newspapers in which the notice prescribed in this section was inserted. These proceedings may be directed either against the person or persons who may then be owners of the said property, or against the person or persons who were the owners thereof at the time when the aforesaid judgment creating the

mortgage was recorded; and the fact of said ownership shall be established either by a copy of the Act or judicial proceeding by which the said property was acquired, or by the affidavits of two witnesses annexed to the petition. If the said Draining Company should, notwithstanding diligent enquiry, not be able to ascertain who are the owners of any piece of property for which a settlement is to be made as aforesaid, or who were the owners thereof at the time the judgment mentioned in the first section was recorded in the Office of Mortgages, said company shall publish an advertisement in French and English in two newspapers printed in the city of New Orleans, which advertisement shall appear at least three times during fifteen days, and shall contain a clear description of the property referred to, and set forth that the said property has been assessed for the draining thereof, on a tableau confirmed by a competent tribunal, that the owners thereof are unknown to the said company, and that if the said owners do not make themselves known within twenty days from the date of the first insertion of the said advertisement, the said property will be proceeded against as belonging to absent or unknown persons: if, within the said delay, the said owners have not made themselves or become known to the said company, the said company shall be entitled to obtain an order of seizure and sale against the said property on exhibiting the certificate of the Recorder of Mortgages mentioned in this section, and the confirmed tableau, and on proving that the said advertisements were regularly published, which proof may be made by production of copies of the newspapers in which the said advertisements were published. The said company shall then move the court to appoint an attorney to represent the unknown owner of the said property, and the notice of seizure shall be served on the said attorney. In either of the cases provided for in this section, the sale shall be made in the same manner as is indicated in the fifth section, and the price shall be made payable at the same time or times at which the mortgage notes of the owners of the property would have fallen due, if he had furnished said notes.

Sec. 8. Be it further enacted, &c., That on receiving from any of the proprietors the notes and special mortgage mentioned in the fifth section, the said Draining Company shall raise the mortgage resulting from the recording of the judgment confirming the tableau, as provided in the fourth section, in which case the mortgage resulting from the said judgment shall be raised to the amount of the said notes only, and shall still remain in force to secure the payment of any additional amount which the person so furnishing his notes, may have to pay, in consequence of any judgment which may be rendered by the Supreme Court; but the said company shall, at all times, be at liberty to raise the mortgage resulting from the judgment described in the firrst section, in toto, if it can make a different and satisfactory settlement with an individual proprietor for securing the whole amount to be paid by him.

Sec. 9. Be it further enacted, &c., That if any property drained by the said company shall be in suit or claimed by different persons, and neither of the said claimants shall be willing to pay the amount assessed thereon, or to settle therefor by giving his notes and a mortgage, as provided by the fifth section, the company shall proceed against the said property, and against the different claimants thereof, jointly, as far as may be known to the said company, by order of seizure and sale, in the same manner as is provided in the fifth section, in doing which the said company shall as much as possible, separate the property in contestation from the property which is not in contestation; and the balance of the price, if any, over and above the amount due to the said Draining Company, and the costs of proceeding, shall remain in the hands of the purchasers, be secured by a special mortgage, and be subject to the rights of the persons who claimed the said land previous to the sale thereof, or who had mortgaged thereon. If any person who furnished his notes and a mortgage for the amount due for the draining of the land claimed by him, as provided in the fifth section, should thereafter be evicted from the said land by a judgment of the Supreme Court, or by a final judgment of original jurisdiction not appealed from, before the said notes or any of them shall fall due, he shall not be personally responsible for the payment at its or their maturity, unless the same shall have been discounted by the said Draining Company; and the person or persons who may have recovered the said lands and the subsequent purchasers of the lands shall be responsible for the payment of said note or notes, and the mortgage given to secure them may be proceeded on in

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the same manner as is provided in the fifth section: and if any person who has paid any amount for the draining of land claimed by him in conformity with the provisions of this Act, should thereafter be evicted therefrom, he shall be entitled to claim from the persons succeeding in the said suit the amount so paid by him, with ten per cent. interest from the time of the institution of said suit.

Sec. 10. Be it further enacted, &c., That the said company shall clear, and cause the wood to be cut as much as possible to the level of the ground on any land which it may have drained, and dispose of the same to the best advantage for account of the proprietors of the said wooded land; and the said wooded portions of the land drained by the said company shall be ratably charged in the account and tableau described in the third section, for the expenses incurred for cutting, removing and selling the said wood, and be credited with the proceeds thereof; and nothing in this Act, or in the Act to which this is an amendment, shall be so construed as to render it obligatory upon the said Draining Company to fill up and raise any land which it may undertake to drain.

Sec. 11. Be it further enacted, &c., That the damages which the said company may be bound to pay, as provided in the twentieth section of the Act to which this is an amendment, shall be estimated by three appraisers, one of whom shall be appointed by the Governor, one by the Mayor of the city of New Orleans, and one by the Board of Directors of the Draining Company, and each of them shall remain in office during one year, or until his successor is appointed; and the said appraisers shall take an oath well and truly, and to the best of their skill and judgment, to perform the duties assigned to them by this Act, and by the twentieth section of the Act to which this is an amendment.

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Sec. 13. Be it further enacted, &c., That whenever any section of land shall have been drained and cleared by the said Draining Company, it shall abandon the same to the Municipality or Municipalities in which the said section may be situated; and whereas the said draining will have been effected entirely at the expense of the proprietors of said land, and will greatly contribute to the salubrity and drainage of the front part of the said city, the said Municipality or Municipalities shall thereafter maintain the ditches and levees made by the said Draining Company, and the machinery and other works erected by the same on the said sections, in good repair and efficient condition, without ever laying an extra tax on the lands so drained. If any of the said sections should extend into two Municipalities, the steam engine and other machinery erected thereon by the said Draining Company, shall be kept in repair and operation by the Municipality within the limits of which it is established; but the other Municipality shall contribute to the expenses thereby occasioned, in the same proportion which the extent of the portion of the said section lying within the limits bears to the extent of the portion of the said section embraced within the boundaries of the Municipality wherein the said steam engine or other machinery and building have been constructed; but each Municipality shall maintain the ditches and levees made by said company within its own limits.

And the 20th section of the original Act, alluded to in the 10th section of the amendatory Act, provides as follows:

Sec. 20. Be it further enacted, &c., That for all lands taken for the works of the company, such as canals, drains, basins, roads, streets, and other necessary works, the said company shall be bound to pay the value thereof to the owners, to be ascertained by the appraisers appointed under this Act, and in all cases the estimate is to be based on the value of the land in its primitive state, without improvement; and that, if there should be any portion of land within any of the sections aforesaid which the company shall not have drained, the said company shall have no claim whatever against the owner of the land for any moneys or labor expended on the part of the land unreclaimed.

It will be observed, by inspecting the foregoing provisions, that the Draining Company was required to keep an account for each section of land it undertook to drain, to charge against it all the expenses incurred, with 10 per cent. interest, for the reimbursement of which all the land within the section was, upon compliance with certain pre-requisites, to be bound by mortgage, and in default of payment, a proceeding *in rem* was given against the property drained for each defaulting proprietor.

The cost of drainage was thus levied, not as a personal tax upon the individual proprietor, but as an assessment against the property benefited by the labor of the company, and to repay the company, not to go into the public coffers. And for the benefit which it was supposed the city would derive in point of salubrity from the improvement, the Municipalities were required to keep the draining machinery in perpetual operation, without laying any extra tax upon the lands.

Under its amended charter, the company undertook, in the fall of the year 1845, to drain what was styled Section No. 2, consisting of about 2000 acres, back of the city proper, bounded in front by Claiborne, St. Marc and Magnolia streets, in the rear by the Metairie Road, on the upper side by the canal of the Canal and Banking Company, and on the lower side by the Metairie Road, the Bayou St. John and the Canal Carondelet.

Out of the company's demand for compensation for this work the present controversies have grown.

Claiming to have complied, so far as it was possible, with the injunctions of its charter, the company presented to the Third District Court a tableau of assessments against section number two, amounting in all, principal and interest, to the sum of $826,000.

After advertisement, according to law, a large number of proprietors appeared, and filed separate oppositions to the confirmation of the tableau, upon very numerous grounds.

The greater number of the opponents, however, confined their opposition to alleged informalities in the proceedings of the company, as not being in conformity with the requisitions of its charter, to specific items of the account as being overcharged or incurred by reason of the company's culpable remissness and extravagance, and to the basis of assessment, which was declared by some of the opponents to operate unequally.

All these oppositions tended simply to the reduction of the claims of the company.

But some of the opponents took a broader ground, and resisted the right of the company to claim anything for the labor bestowed upon their lands because, as they asserted, the Acts of the 19th March, 1835, and the 20th March, 1839, creating the company and defining its powers, duties and rights, were unconstitutional and void.

After a protracted trial, the District Judge overruled the objections to the constitutionality of the legislative Acts in question, but sustained some of the oppositions in part, so as to reduce the total claim of the company nearly $100,000, confirming the tableau for the balance.

The company has appealed, and complains of this reduction as erroneous; numerous opponents have joined in the appeal, and have renewed in this court all the controversies which were waged in the court below.

I. It is urged by some of the proprietors that the Acts in question are void, because they are in contravention of Section 10, Article 1 of the Constitution of the United States, which, among other things, declares that "no State shall pass any law impairing the obligation of contracts."

In support of this position, they adduced in evidence their titles from the former proprietors, asserting them to be contracts, the obligation of which is impaired by the charter of the Draining Company.

I find no clause in either of the legislative Acts referred to which infringes, in the slightest degree, the mutual rights and obligations of the vendors and vendees. The contract is left intact.

The case of *Fletcher* v. *Peck*, 6 Cranch, is very far from being analogous. There the Legislature itself was a party to the contract, and occupied the position of vendor in an act of sale.

A subsequent Legislature declared the contract null, and attempted to divest the title of the vendees and reinvest it in the State.

The very case contemplated by the framers of the Constitution of the United States had arisen, and the paramount authority of that instrument was vindicated by the decision of the supreme federal tribunal.

II. I do not see how the Acts of 1835 and 1839 are invalidated by that provision in Section 4, Article IV, which binds the United States to guarantee to each State in this Union a republican form of government.

III. By Section 23, Art. VI of the State Constitution of 1812, under the dominion of which the Draining Company was chartered, and its rights vested, it was provided that "the citizens of the town of New Orleans shall have the right of appointing the several public officers necessary for the administration and the police of the said city pursuant to the mode of election which shall be prescribed by the Legislature." It is urged that if the right to drain the lands compulsorily existed at all, it was a measure of police, and was thus confided exclusively to the city of New Orleans.

The citizens of New Orleans have not been deprived by these Acts of any of their rights with regard to the election of public officers thus guaranteed to them. Indeed it is difficult to perceive the force of this objection on the part of the proprietors, when we consider that the city itself is the owner of nearly seven-ninths of the stock of the Draining Company, and acquiesces in the constitutionality and binding force of the acts.

I have said that the rights of the company, as against these lands, vested under the Constitution of 1812. For, before the adoption of the Constitution of 1845, the stock had been taken upon the faith of the charter, ($350,000 by the city of New Orleans, $50,000 by the State, and $53,000 by individuals,) the machinery had been purchased, the preliminary outlays made, the plan of the drainage section drawn, and the decree procured and recorded subjecting the lands to a first mortgage and privilege in favor of the company, which it is now seeking to enforce. The rights of the company were reserved by the schedule of the Constitution of 1845, Art. 142, (as well as that of 1852, Art. 143,) which provided that "all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate," shall continue as if the new Constitution had not been adopted.

It therefore becomes unnecessary, in my judgment, to inquire what effect the new features touching "vested rights," and the "equality and uniformity of taxation," introduced for the first time in this State by the Constitution of 1845, (and preserved in that of 1852) might have had upon the rights of the company, if they had not been thus solemnly guarded through all the changes of the fundamental law.

I cannot believe, after reading the opinion in the case of *Le Breton* v. *Morgan*, 4 N. S., 139, that there is anything in this charter obnoxious to the provisions of the Constitution of 1812.

And I find no article either in the national or State Constitutions applicable to the present case, which annuls the claim of the company to reimbursement out of the lands.

But we have been asked to go behind these Constitutions in search of an un-

written bill of rights, which is said to lie at the foundation of every free government, and there to find a principle on which the legislation in question may be declared null and void.

This is very delicate ground.

It is asking us to prostrate the plainly declared will of a co-ordinate department of the government, not because it contravenes any provision of the organic law which we are to expound, and all are to obey, but because it contradicts our notions of justice.

Perhaps we have such a power; like the right of revolution, it is sometimes obscurely hinted at in judicial opinions. Thus, in the case of *Fletcher* v. *Peck*, cited by the opponents, the Supreme Court of the United States remarked: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honesty acquired, may be seized without compensation."

So in the case of *Oakey* v. *The Mayor, etc.*, 1 L. R., 11, our own predecessors, through Porter, J., observed: "It is not necessary for us to say in this case whether there are not, in the Constitution of every free country, certain fundamental principles, under which the citizen can find shelter and protection in extreme cases. We will think of that when a case arises which requires us to do so."

But, conceding that we have a right to protect the citizen against encroachments from the legislative power, which are not specially, or by necessary implication, inhibited by the Constitution, it is obvious that a flagrant case of wrong and hardship should be made out before this tribunal can be justified in thwarting the legislative will, without a direct warrant for doing so to be found in the Constitution itself.

I do not find the present to be such a case. On the contrary, there is a strong equity in favor of the company and against the proprietors.

In the first place, the necessity of the work which has been done by the company is apparent. It was necessary to render the land of any utility to the proprietors. In its primitive condition the vast morass in the rear of New Orleans was unfit for habitation or culture. A barren possession to the owners, it was supposed to be fruitful of mischief to the public by engendering the seeds of pestilence and death.

It has been redeemed from sterility. A property has been, as it were, created for the proprietors. It was a labor almost as great as that by which, in other countries, human ingenuity has contrived to reclaim land from the dominion of the sea.

In the next place, the work could never have been done by the proprietors singly. Combined action and a large capital were requisite. Without the intervention of the legislative power the object could not have been achieved. The proprietors, in common with other citizens, were represented in the Legislature. They must be considered as having had notice of the Acts as they passed through the various stages of legislation; not that such notice makes the Acts binding on them, but it raises a presumption that, as they made no remonstrances, they did not then regard the projected measure as oppressive to themselves. But some of the opponents assert that the legislation was vicious, because it took all authority in regard to the lands from the proprietors and gave it to a company. In the able printed argument submitted on behalf of the opponents, it is said

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that "Massachusetts and Connecticut have provided by statute in regard to swamp lands, that a majority of two-thirds or three-fourths shall control the action of the remaining minority. To this," it is said, "there can be no objection; it is perfectly in harmony with a free government. The rights of private property will be perfectly secure under such a procedure. It is leaving private interests to be controlled by those concerned *as much as the necessity of the case permits.*"

But, looking at it in the light of principle, it seems to me that the legislation of those States is liable to all the objections, so far as the dissenting minority is concerned, that are urged with so much vigor against our own. If it is tyranny for the Legislature to do this thing, it is tyranny for a majority of proprietors to do it under the legislative sanction.

The charter of the company did not contemplate that the company should make a profit out of the work, or gain anything at the expense of the owners. Reimbursement for actual expenditures was the measure of the contribution. Even this was not to be exacted in case of failure to accomplish the beneficial result. The company took all that risk upon itself. Restrictions were imposed upon the company to guard against the perversion of its charter into an instrument of gain, and the regularly constituted judicial tribunals of the country were required to protect the proprietor from extortion, as well as to enforce the equitable right of the company to indemnity in case it succeeded in benefiting the proprietors.

A majority of proprietors could not have done all this. And it may safely be said that the private rights of the owners have been guarded by this legislation, as far as the necessity of the case permitted, if the work was to be done at all.

But there is still a further view of the equity of the company's claim. Not only did the proprietors, so far as we are informed, make no remonstrance to the Legislature with regard to what they now style the exorbitant power of the company, but although ample public notices were given of the intended proceedings of the company in pursuance of its charter, no injunction was sought from the courts to prevent this alleged interference with private rights, nor was any opposition filed to a decree being entered subjecting the lands to a mortgage pursuant to the 1st section of the Act of 1839. The servants of the company were allowed, without hindrance or opposition, to enter upon the lands, and commit what is now termed a trespass, running through a period of several years, nor until the reimbursement was called for does a complaint appear to have been uttered.

It is conceded that the work has been eminently beneficial to the proprietors, and that it has been carried on with their silent acquiescense, during many years, to this successful result.

Under these circumstances, a mere *negotiorum gestor* would be entitled to reimbursement from the proprietors. C. C. 2278.

Can the company be put *in duriori casu*, because it had a legislative warrant for its acts?

Undoubtedly, as the company claims under its charter, this principle of equity would yield to a higher consideration if the charter were in conflict with the Constitution of the State, under which the company acquired its vested rights, or with that of the United States. But as I do not find it to be so, nor, under the facts in evidence, to be in violation of common right, I cannot concur in declaring the Act of the Legislature in question to be null and void, and the company is in my judgment entitled to the rights therein conferred upon it.

But as a majority of the court have decreed otherwise, it would be idle for me to give my opinion upon the only questions which have been mooted between the company and the greater number of the opponents.

A rehearing having been applied for and granted, *Roselius* and *Janin*, for the Draining Company, submitted an elaborate argument, the substance of which was as follows:

I. According to the principles recognized by the majority of the court in the "*Benton street case*," the decision ought to have sustained the constitutionality of the charter of the Draining Company.

In the *Benton street case*, Mr. Justice OGDEN, who was the organ of the majority of the court, says:

"Applying the test of our Constitution to the principles of law, thus recognized and established by the decisions of the courts of New York, where this subject has been fruitful of litigation, the question of the constitutionality of the assessment must be solved in the negative. Both the exercise of the right of eminent domain, and the power of taxation, are limited under our Constitution, and the rule with us is deduced not from general principles, but from the Constitution itself, that there does not exist either in the Legislature, or in any of the sub-divisions of State sovereignty, a power of apportioning taxation for public purposes, whether of a general or of a local character, except on the principle of equality and uniformity. There appears to be no other reason for the distinction which has been drawn between an assessment and taxation, when resorted to for the purpose of defraying the expenses of a public improvement, than the fact that the Legislature in 1832, thought proper to provide, that the costs and expenses of opening new streets in the city of New Orleans, which had been previously, under the act of incorporation of the city, paid out of the public funds in the city treasury, should be thereafter paid by what is called assessments for the benefits on the lots adjacent to the newly opened street. This act had only the effect of shifting the burthen of the expense from the people at large, who paid city taxes, to individual proprietors of lots in the neighborhood; it was not the less a tax, because the burthen was imposed on a few property holders in the shape of what was called an assessment. *There existed then no constitutional restriction of the power of taxation, or the exercise of eminent domain, and the validity of the Act of the Legislature, however unjust and liable to abuse, could not have been successfully impeached.* Under our present Constitution it is different, unless we should decide that the article referred to, was not intended to apply to city or parish taxes."

From the language here used by the learned Judge, it is evident that the decision of the majority of the court in the Benton street case, was placed wholly upon the ground that the Constitution of 1845 and 1852, had restricted the taxing power of the Legislature as well as of municipal corporations, by introducing the rule of equality and uniformity. If this be so, it seems, to our humble apprehension, obvious, that the learned Judge who delivered the opinion of the majority in the case of the Draining Company, was mistaken in saying, "tested by the doctrine of the majority of this court in the Benton street case, (9th A. R.) it (the constitutional objection) must prevail," for the rights of the Draining Company had been acquired and been completely vested on the 18th October, 1845, by the judgment of the Parish Court, decreeing, "that each portion of the property, situated within the section, shall be subject to a first mortgage and privilege in favor of the Draining Company, for the sum of eighty thousand dollars, which judgment was duly recorded in the mortgage office. The Constitution of 1845, was not adopted and did not go into operation until January, 1846. This judgment was rendered in contemplation of law, contradictorily with all the owners of property within the limits of the section, for the previous publications in the newspapers, according to the charter, stand in lieu of citations, as in the proceedings for the collection of taxes, or the monition in admiralty. It surely cannot be seriously contended that the subsequent adoption of the Constitution of 1845, could affect the validity of the judgment thus rendered. Hence, it appears to us, perfectly clear, that tested by the doctrine of the majority of this honorable court in the Benton street case, the constitutional objection cannot prevail. As, therefore, the foundation of the decision fails, the superstructure raised upon it must fall.

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II. The assessment for a local improvement, the direct and immediate benefit of which, to the persons assessed, is appreciable in dollars and cents, is not the imposition of a tax in the constitutional acceptation of that word, although the public at large may be evidently benefited by such improvement. *The State* v. *The New Orleans Navigation Company*, 11 M. R. 324. *Worsly et al.* v. *The Second Municipality of New Orleans*, 9 R. R. 333. *Lafayette* v. *Orphan Asylum*, 4 An 2. *Cawley* v. *Copley*, 2 An. 329. *In the matter of the Mayor, &c., of New York, praying for the enlargement, &c., of Nassau street*, 11 Johnson's R. 79. *In the cases of Owners of Ground, &c.* v. *Mayor, &c., of Albany*, 15 Wendell's R. 376.

The only case decided out of the State, in opposition to the uniform and well settled jurisprudence on this point, is that of *The People, en rel. Post and others* v. *The Mayor, &c., of Brooklyn;* but this decision cannot be invoked as authority, for it was reversed by the Court of Appeals, whose judgment is in conformity to correct principles. See the same case, 4 Comstock's R. 419. And the solitary opinion pronounced in this State, is that of a bare majority of the court, in the *Benton street case.* And it is to be observed, that that case has been overruled in the case of the *Municipality No. 2* v. *John Dunn*, 10 An.

III. The incorporation of the Draining Company for the purpose of draining the swamp and marshy lands, within the corporate limits of the city of New Orleans, is the exercise of the police power, and not that of taxation or of eminent domain.

Bryon, for opponents:

I maintained in my first argument these propositions:

That government can take of the property of the citizen, only under the right of eminent domain and the right to tax, except it may be for crimes and misdemeanors, and in the way of penalties and confiscations.

That the right of eminent domain and the right to tax, rest on the same basis, and are co-extensive, and their exercise is depending on the one and the same plea—of public necessity.

So that when government under the right of eminent domain, takes the property of the citizen, and makes compensation therefor, because of the unequal public burthen that would otherwise be imposed upon him; so too when government, under the right of taxation, takes the property of the citizen, it must take in like manner of the property of all of the citizens—otherwise it will be taking the property of one or certain citizens, for the benefit not of themselves only, but of all, which is alike unjust and unequal, and is virtually a taking of private property without due compensation being made; and amounts to expropriation and spoliation.

That under the right of eminent domain and the right to tax, government can take the property of the citizen only for a public use and purpose. That government cannot of itself, or by its agents, undertake the improvement of the property of the citizen, for his, the citizen's benefit, at the public expense, nor can it improve the citizen's property, out of regard to the public good, and at his, the citizen's expense. But that government when it acts, must act for the public and at the public expense.

I went a step further, and maintained that the power of government, over the property of the citizen, is no greater than it is over his person. That if the public necessity demands it—that government may exhaust the property of the citizen by way of taxation; so too under a like imperious necessity, it may call out its citizens by hundreds and by thousands, and send them to subdue an insurrection, or repel an enemy from their shores. But as when the necessity has passed, the citizen returns to private life and becomes again his own master, government cannot say to him that he shall follow this or that occupation, because the government thinks that it will be either for his own, or the public good. So too government cannot say to him, that he shall invest the wages of his labor in either one thing or another, on the plea that it will be for his own good, and for the public good, either, only in the way of taxation and in the manner already expressed. For as he who must labor at the will of another is a slave—so no less so, is he who must dispose of the wages of his labor at the will of another.

The application of these principles to this cause, is plain and simple: as will appear on the reading of the charter of the Draining Company. It will

be found, that the Legislature of Louisiana created this company. That it contracted with it, thereby making it its agent, to drain some two thousand acres of land, cut down the woods, &c., belonging to these defendants, and situated within what the company designate as the second draining section. That the Legislature made this contract without being moved thereto by the owners of the lands, or without counseling, or consulting with them, in any manner whatsoever. That the Legislature assumed the position of owner and gave the right of draining these lands, and cutting down the woods, to the company alone—and to the exclusion of the owners of the lands—as will be seen even by reference to section 15 of the amended charter, which alone favors a contrary idea. That it stipulated with the company the price they should be paid for their labors; it agreed that the company might employ negroes on the work at certain and fixed wages, and charge on the amount, at the end of every month, ten per centum interest, as well as on all sums, from the time of their disbursement.

Thus far, the contract seems even between the two contracting parties. But when the company ask who is to pay them for their labors, the reply is strange, taken in connection with what had already taken place between them.

The answer is that these defendants shall pay them. The company might well have answered that the defendants were not parties to the contract. But either this not occurring to them, or more probably relying on the omnipotence of the Legislature, the company consents to the arrangement, provided that they shall have a mortgage paramount to all other liens whatsoever, on the lands in question, for such sum as it may deem necessary, to comple the works, and in anticipation of any work done, or money expended.

True, the Legislature does not say that the company shall have recourse to the property of the defendants lying without the draing section, but it gives it the right to take every foot of land they may own, lying within it. At the same time the Legislature declares, that it has this work done for the public good—for the good of the city, and the State.

The power exercised by the Legislature in this matter, over the property of the defendants, is boundless and omnipotent. It virtually divests the owners of their property, and gives it into the hands of this company.

We said to this honorable court, that the Legislature had transcended their authority in the premises, and it sustained our position, on the ground that the work was done for the public good, and therefore the public should pay for it.

But the plaintiff is dissatisfied with the judgment, and has asked for a rehearing, which this honorable court has seen fit to grant.

And the distinguished counsel for the plaintiff say:

First. That according to the principles recognized by the majority of this honorable court in the Benton street case, the decision ought to have sustained the constitutionality of the charter of the Draining Company.

And what was the principle decided in the Benton street case? It was, that taxation should be equal. One would have supposed that the establishment of such a rule for the government of States and cities, would have given universal satisfaction. It would be hailed with exclamations of delight, by many people in many lands—a few alone would complain, and that because, that hereafter, they would have to bear their share of the public burthens. Inequality of taxation has been the great instrument of tyranny, and oppression in all times, and under all governments; for where taxation is equal, it is not likely to be excessive, for all have an interest in keeping it within the bounds of moderation. But where the rich and powerful and ruling classes are exempted, as is the case in most countries, then their interests become distinct, and the tax payers groan under burthens imposed by those whose interest is in having them increased, rather than diminished.

But such is not the condition of these free States. Our country began its career among the nations under happy auspices—with States equal in rank and honor—with citizens, equal in rights, privileges and exemptions—so that equal right, equal privileges, and equal exemptions, may be said to be the birthright of an American citizen.

These things then belong to the citizen, and will still belong to him, until it shall appear that he has voluntarily parted with them, and this cannot be taken for granted from mere silence, but it must appear to have been done, on due deliberation, and in an open and public manner.

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If these things be so, what mattered it, that the Constitution of 1812, did not, in so many words, prohibit unequal taxation. Such a prohibition was not necessary, because, unequal taxation is antagonistic to the foundation principles of our government.

For if there be any foundation principle to the government of the United States, and the governments of the several States, it is the principle of equality.* That is the corner stone of the grand edifice of American freedom. If that shall be removed, the whole structure would be broken up, to assume new forms, and new principles.

To say, therefore, that a State had formed a government on the principle of equality, and had at the same time incorporated into it the right to tax a certain kind of property in the hands of one citizen for the benefit of the State, the exemption of the same kind of property in the hands of others, or one portion of a city, or of the State, to the exemption of other portions, is an absurdity, and a contradiction on the face of it.

For what do men form governments, unless it be to secure their lives and fortunes. And yet, if they form a government with power to take one man's property for the public use to the exemption of other men's property of a like kind, thereby imposing the whole burthen upon him, and making him in reality a slave--then in truth they have formed a government to take property, rather than to secure it; and are worse off than before they bound themselves in a government compact, because, before they were free, and had the right to defend themselves, and property as best they could.

Should the general government impose direct taxes on the States? Should she impose one per cent. on Massachusetts, and two per cent. on Georgia, would Georgia submit to it? Would she not say to the government, I am the peer of Massachusetts, and not her bondsman; what she pays, I will pay, and no more.

As the States stand to each other, so stand the different portions of the same State to each other, and so stand the citizens; the one is the peer of the other. And there is no power in the general government, and no power in the State governments to make it otherwise, and it cannot be changed but by revolution.

But it may be said, that there is a compact expressed between the States--true there is, but it was made to fix the basis of representation, and because there were certain persons and property abounding in some of the States, more than in others, and the representation being fixed, taxation must follow it, according to the theory of our government.

Again, according to the principles of our government, the States retain such powers as are not granted expressly to the general government, and in like manner, the citizen retains such rights and powers as are not granted to the State governments.

Therefore, it is that in order to exercise the power of unequal taxation, a special grant of such power should have been made in the Constitution.

Is it to be supposed that the powers of the Constitution of 1812, and the citizens who voted to accept it, believed for one moment, that they had adopted a government possessed with absolute and despotic powers over their property. Yet, such was the case, if the construction contended for on the part of the plaintiff be correct.

There appears no restriction of the power of taxation, or the exercise of the right of eminent domain in the Constitution of 1812. The Legislature then could impose at will, all the public burthens on the city, or on the country—it could make one parish pay the debts of another—it could make one portion of a parish bear the taxations of the whole—it could go farther and say, that one class of citizens should bear the whole burthen of taxation.

And under the exercise of the right of eminent domain, the Legislature could take the lands of the citizen for roads, streets, or any other public purpose, without making compensation therefor. It could go still further. It could expropriate the property of A, and give it to B, or declare it vested in the State.

Yet, this same Constitution prohibits the Legislature from passing any *ex post facto law*, or law impairing the obligation of contracts, or prohibiting emigration from the State. Yet, the things prohibited, and thereby protected, important as they are, are of small moment in comparison with equality of

taxation, and the right of compensation when property is taken under the right of eminent domain.

The framers of the Constitution, therefore, must have considered that there was this difference between them, that the former being opposed to the very character of a free government, and indeed to the very purposes for which all governments are formed, was beyond the power of the Legislature, and therefore, there was no necessity of providing against it—while the other, not reaching to the essence and frame work of government, was a matter within the scope of legislative power, deemed it proper to throw around the citizen, the protection of the Constitution, lest in times of great internal commotion, the Legislature might be tempted to pass some *expost facto law*, or in some great break up in monetary matters, it might be led to pass some law impairing the obligation of contracts; and again, in times of war or insurrection, it might prohibit citizens from emigrating from the State, as might be the case, in order to escape the consequent duties and burthens.

It will not avail to say that these suppositions are extravagant, and could never become realities under our representative government. In regard to taxation, there is a show of probability in the suggestion, for the whole community is interested to resist, and the ballot box gives it the power. Yet, some noted instances have occurred of gross inequality of taxation under legislative acts; but when you turn to the exercise of the right of eminent domain, there is no such protection, the individual citizen stands alone on one side, with the whole power of the government on the other.

I say, therefore, it is not credible, that the framers of the Constitution of 1812, or the people of the State who adopted it, believed that they were leaving the rights, which are so dear to every freeman, to the ignorance or caprice, passion or corruption of their Legislatures.

But let us change the picture a little—let us suppose that in harmony with the construction of the Constitution of 1812, claimed on the part of the plaintiff, that articles had been submitted to the convention, empowering the Legislature to tax unequally the individual citizens, and the different portions of the State, and to take the property of the citizen under the right of eminent domain, without due compensation being made. Think you, if there had been a member of that convention, either bold or simple enough to offer such articles to be engrafted into the Constitution, that he could have found another, bold and simple enough to second them. No, sirs, there was no such man in that convention, nor in any other, composed of men equal to each other, and representing citizens equal in like manner. There is no man living in the State today, of any weight of character whatever, who would dare make such a proposition. And yet, they would have us believe, that the convention, by its silence in regard to these matters, and the people of the State at large, intended to give such powers to the Legislature.

The dangers to society at large, and to personal and private rights in the times we live in, are not in open violence and outrage, as in days gone by, when the weaker submitted to, and served the stronger, but in sly, secret and insidious encroachments, and under the plea of the public good, and good to the individual. This is the wolf in sheep's clothing, which is the plague of civilized and christian countries in our times.

It is under this plea, that cunning and designing men, avaricious of gain, and ambitious of power and notoriety, accomplished their purposes, oftentimes at the public expense, but more commonly, at the expense of a small minority of the public, but under the public sanction and authority.

They cry out upon the streets and highways, that such a work or enterprize will be of great public utility and benefit—that it will benefit every body, and therefore, every body must go for it. That it will cost the public nothing, as a certain small portion of the city, parish or State, will be more especially benefited, and therefore, that portion must pay the cost of it. So, too, fanaticism under the plea of philanthrophy and the public good, is ready to purge and renovate society—revolutionize governments, and reconstruct the world according to its new ideas, provided that the cost and the consequent pain and sufferings, shall be borne by its beneficiaries.

Let us test the working of the Constitution of 1812, under the construction contended for on the part of the plaintiff, for the question now under discussion is, what were the powers of the government under that Constitution?

Suppose the government wanted a square of ground in New Orleans, for a

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State House, hospital, or for some other public purpose. It selects the square, and finds it owned by a number of individuals. It says to the owners, I will take the square, and give you so much a lot for it. The owners say no. We do not want to part with our property, and if we did, what you offer for it, is not the half of its value. The government answers, I will take the square, and what I have offered is all that I will give for it. Could the government go and take this property; or, when the agents or employees of the government begun to pull down the houses of the proprietors, they should appeal to this court for protection, and to have them enjoined, would the court grant their prayer? Or would it say to them, that hard as was their case, that it had no power to act—that the government was absolute and supreme in such matters—that they had better take what government offered them—for government had the power to take what property it pleased belonging to the citizen, and pay him what it pleased, or even nothing at all?

In most countries in christendom, probably the courts would interfere in a like case. This thing, probably, could not have taken place in England, since the days of King Alfred, unless in times of civil war and revolution. The boasted omnipotence of Parliament, never reached that far, and if it had, Lord Coke says, the courts would have restrained it.

The nearest approach to it recollected in its history, was the confiscation of the estates of the church in the times of Henry the 8th, and that was a revolution in religion—a throwing off of allegiance to a foreign potentate—besides, the property possessed a public character.

Great injustice was frequently perpetrated under writs of attainder—with loss of life and estate, but the injustice consisted in the falsehood of the charge and the wicked means by which it was substantiated.

But let us take a case which has happened, in the place of one supposed.

The Legislature in 1832 passed an Act in regard to the opening and widening of streets, and the laying out of public squares. It provided that commissioners should be appointed, who should take into consideration the lots and squares lying adjacent to the contemplated street or square, and should estimate the damages that will follow from the improvement, over and above the benefits, to any of the property, and all of the costs, including commissioners' fees, court costs and damages, and paying for the land taken, etc., they shall place upon the balance of the property lying along and adjacent to the street, as equally as can be done according to the benefits.

The commissioners are not permitted to estimate the benefit to each lot, and assess that lot that much, which would look more like justice—the public at large paying the balance—but this property must bear the whole burthen, although in the estimation of the commissioners, and in truth, the property is not benefited, if at all, not one-tenth of the amount imposed upon it. But the Act goes on and provides that in case the proprietor within a certain time does not pay the amount assessed upon his property, to the city government, that execution shall issue, and it shall be sold for what it will bring, and although it may not bring the amount assessed upon it—(which has happened in two instances which have come to my knowledge)—this is called a local assessment for the benefit of property.

Take the example of opening a public square, under the law of 1832. I will suppose that some citizen owning several squares in a part of the city not yet built up;* that he had designed one central square to be kept forever open for the benefit of the adjacent squares, and as he sold lots fronting on this square, he granted to the purchasers and their assigns the right to use this square in common, for pleasure and recreation, with the proprietors of the lots fronting on the square, at the same time making some equitable arrangement for keeping it in good order and condition. After a time, the City Council determines to take this square for the public use. The law requires that the value of this square shall be assessed on the adjacent lots, and it is to these lots that it already belongs, in equal and just proportions, so that the commissioners, in accordance with the fact, can only report to the court that the matter is finished to their hands—that there are no damages to be assessed, for that they rest already on the property required by law—and in like manner the benefits belong to the property designated by the law, and that the square is well fenced and in good condition. The only thing for them to do is to assess, on the adja-

*I presented a similar example in my original brief, but not in the same connection, and erred then from inattention in confounding together the laws in regard to opening and paving of streets

cent lots, their fees, etc., and the court costs, and the only thing for the court to do, is to decree that this square, which belongs to the owners of the adjacent lots, and for which they have not received one cent, is no longer their property, but the property of the corporation of New Orleans, and that they shall pay the costs. DRAINING Co. PRAYING, &c.

Such is the working of the law of 1832, under the Constitution of 1812, as it has been hitherto interpreted, and if the taking of property in the opening of a street be called taxation, which it really is, or an assessment for a local benefit, in either case, the operation of the law is unequal and unjust, tyrannical and oppressive, and no man deserves to be free, who, after understanding well its workings, will submit patiently to it.

And in the case supposed of opening a public square—a case by no means insupposable, as such squares are common in many cities—the taking of the property, is a taking under the right of eminent domain, and without any compensation being made.

Here, then, is the government of Louisiana, judging of the necessity of taking the property of the citizen, and at the same time judging of the compensation to be made for it—which two things cannot be united in any government, no matter what its form or name, without making it despotic.

Despotic governments in former times, when they wanted to commit an act of tyranny and aggression on the property of a citizen, would have them charged with some great public crime, such as treason or blasphemy. Your Honors will recollect well in Bible history, the history of Ahab and his wife, Jezebel, and Naboth and his vineyard. How that Ahab wanted Naboth's vineyard for a garden to raise herbs in, "and Ahab spake unto Naboth, saying give me thy vineyard, that I may have it for a garden of herbs, because it is near unto my house: and I will give thee for it a better vineyard than it, or if it seem good to thee, I will give thee the worth of it in money."

"And Naboth said to Ahab, the Lord forbid it me, that I shall give the inheritance of my fathers unto thee."

At this Ahab was heavy and displeased, at which Jezebel inquiring the cause, comforts him, by promising him the vineyard of Naboth; and her manner of bringing this to pass, was to have Naboth charged with blasphemy against God and the King. She wrote letters in the King's name, and had a fast proclaimed, and she suborned two men, sons of Billial, to testify against him, in the assembly of the people. "And they witnessed against him, even against Naboth, in the presence of the people; saying Naboth did blaspheme God and the King. Then they carried him forth out of the city, and stoned him with stones that he died."—See Bible, 1st book of Kings, chap. 21.

We may comfort ourselves that we are better off than our forefathers, in that a way has been devised, whereby governments can take the property of the citizen, without first taking his life; in that at least we show some progress in the science of government, and the State of Louisiana, it may be, is entitled to as much credit in this matter, as any other.

Had Ahab and Jezebel understood this business as well as we do, had they had our Constitution of 1812, our Legislature, Common Council, Commissioners, etc., Ahab could have easily gotten the vineyard of Naboth, without taking his life, and with a less responsibility, and thereby have saved himself and Jezebel from that terrible curse, which was uttered against them, and their posterity, and shortly after executed.

There is one other consideration which I will bring to the notice of the court, under this branch of the subject.

It is that according to the theory, history and principles of our government, taxation and representation go together. The history of this principle is undoubtedly familiar to your Honors.

"The maxim that there can be no just taxation without representation, was asserted in Magna Charter. Afterwards, more fully and comprehensively in the statute called *confirmatio chartararum*, in the twenty-fifth year of Edward II, which abolishes "all aids, tasks and prices, unless by common consent of the realm, and for the common profit thereof," and having been at times the subject of contention between the crown and the people, it was finally, in that revolution, which cost Charles his life, and established the liberties of England, again declared in the Petition of Right, which has ever since been regarded as part of the organic law, "that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like, without common consent by act of Parliament."

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We know that taxation has been the most efficient instrument of tyranny, at all times, and under all forms of government. The history of the resistance of the people to its unjust exercise, would be a history of the progress of liberty. Our national history commenced with such resistance. It was not the amount involved in the *tea tax* and *stamp act* which aroused our forefathers to resistance to the mother country—but it was the principle that taxation and representation should go together—a principle made dear to Britons, by centuries of resistance against its infringement, and finally forever established on a firm basis, through revolution and blood.

Now, it is evident that taxation and representation cannot be said to go together in any just and proper sense—only in cases, where those who impose the tax, bear each their portion of it. So, that when a State government imposes a tax, as every portion of the State is represented in the government, so the tax must be imposed on every portion of the State—and so too of a parish or city government.

The State cannot impose a tax on a small portion of the State for the benefit of all of it. For although it may be said that that portion is represented in the government, yet, it is in a minority, and the other portions of the State would occupy the position of a stranger and master, in imposing taxes on it, of which they pay nothing. Their interest being to make the taxed portion pay as much as possible, as what it pays accrues to the benefit of the whole State. For the same reason, the whole State cannot tax a portion of the State for its own benefit.

To illustrate this matter, the case before the court is a case in point.

For the government of the State have imposed on something like two thousand acres of land, the taxation necessary to pay for an improvement, which the government declares to be of public benefit to the city of New Orleans and the State at large. While there is no limit to the amount of the tax to the benefit received, or of what part of the land may be taken; so that the entire property may be taken. While this land is but a small fraction of the lands of the State, and the proprietors but a small fraction of the people of the State, and their representation in the government, but as a drop in the Ocean.

But the learned Judge who delivered the opinion of the court in the Benton street case, in the course of his remarks, uses the following language:

"There existed then no constitutional restrictions of the power of taxation, or the exercise of eminent domain, and the validity of the Act of the Legislature, however unjust and liable to abuse, could not have been successfully impeached."

This language, it will be observed on reading of the opinion, was not necessary to the support of the principle decided; for the question was as to the constitutionality of the Acts of 1832 and 1847, in regard to the opening of streets, under the Constitutions of 1845 and 1852, and not under that of 1812. And the Constitution of 1845 and 1852, expressly requiring taxation to be equal, the only question, really to be decided, was whether an assessment on the property of the citizen for the expense of opening of a street, was a tax or not. The court declared it to be a tax, on the ground that the streets are opened for the public use and benefit. And if the public should pay for it, it would do so in the way of taxation, and the shifting of the whole burthen on a few citizens, or on the property of a few citizens, will not change its character—if it would be a tax if the public paid it, it will be a tax still if a small portion of the public pay it.

So, that the assessment being declared a tax, there was an end of argument, for the new Constitution settled the manner in which it should be paid beyond cavil. Therefore, the powers of government under the Constitution of 1812, not being under discussion, nor within the proper scope of the argument, the language of the learned Judge referred to, cannot be said to be a judicial interpretation of such powers.

I close this branch of the argument, by reading from 3 Dallas, 308.

"I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the Constitution or fundamental law of the State. The people of the United States erected their Constitution or forms of government—to establish justice—to promote the general welfare—to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and tenor of the

social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power, will limit the exercise of it. This fundamental principle flows from the very nature of our free republican government, that no one should be compelled to do what the laws do not require; nor refrain from acts which the laws permit. There are acts which the Federal or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican government, which will determine and overrule an apparent and flagrant abuse of legislative power; or to authorize manifest injustice, by positive laws, or take away that security for personal liberty or private property, for the protection whereof the government was established. An Act of the Legislature, (for I cannot call it a law,) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of governments established on express compact, or on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or in other words, for an act, when done, was in violation of no existing law. A law that destroys or impairs the lawful private contract of the citizen. A law that makes a man judge in his own case, or a law that takes the property of A, and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with such powers, and therefore it cannot be presumed that they have done it.

The genius, the nature and the spirit of our State governments, amount to a prohibition of such acts of Legislation, and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for its citizens in future cases—they may command what is right, and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property.

To maintain that our Federal or State Legislatures possess such powers if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

I read again from 4 Hill, 144:

"Under our form of government, the Legislature is not supreme. It is only one of the organs of that absolute sovereignty, which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State, who transcends his jurisdiction, are utterly void."

Mr. Justice Story, says: (quoted from 2 Peters, 657.) "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no Court of Justice in this country, would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles and civil liberty—lurked under any general grant of Legislative authority, or ought to be implied from any general expression of the will of the people."

"The security of life, liberty and property, lies at the foundation of the social compact; and to say that this grant of Legislative power includes the right to attack private property, is equivalent to saying that the people have delegated to their servants, the power of defeating one of the greatest ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion, that the clause under consideration, had clothed the Legislature with despotic power."

Thus, far removed from local strifes and passions, the great national tribunal has discoursed upon the powers of our governments, the rights of the citizens, and the rights of property: and after this manner has it continued to discourse, upon that and kindred subjects, as far as my reading extends, from the beginning to the present.

Therefore it is that I come to the conclusion that according to the true theory of our government—that the Legislature is not absolute and despotic—that in certain things it would have power were it not restrained by the Constitution, because they are within the natural scope of legislative powers—that in other things, it has no power, though the Constitution is silent respecting

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them—and an express grant could alone give the power. And of this character is the taking of the property of the citizen; it cannot be taken for private purposes, but only under the public necessities and for public uses. And as the principle of equality lays at the foundation of our free republican governments—that citizens are alike entitled to equal rights, equal privileges, and equal exemptions. So government cannot lay the whole burthen of the State upon one citizen, or on a few citizens, to the exemption of others, or on one portion of the State, parish, or city, to the exemption of other portions. It cannot take the property of the citizen, under right of eminent domain, without first making compensation, because it would be unequal and unjust, and would virtually degrade such citizen to the character of a bondsman—working for the commonwealth at large. And for the same reason, it cannot take the property of one citizen in the way of taxation, to the exemption of other citizens, or of one portion of the State, parish, or city.

For the only or main difference in the taking of the property of the citizen for public use under the right of eminent domain, and the right to tax, (for the power is the same in both cases,) is, in the first case, the government judge of the necessity of the taking, but not of the value of the property taken—but as to price; governments submit that question to a Court and jury, or to sworn and disinterested commissioners, while in the other case the government is judge of the necessity of the taking and also of the consideration to be given: that is, it determines the subject, to which it is proper to appropriate the revenues raised by taxation.

But the Legislature of Louisiana, in authorizing the Draining Company to do certain works on the lands of defendants, situated in the second draining section, for the benefit of New Orleans and the State at large, and to pay for the expense of said works (whatever the same may be), to assess a tax on said lands, and collect the same, to the exemption of every other portion of the city or State—the said lands being but a fraction of the lands of the city and State—violated thereby the fundamental principles of our free republican governments—

And, therefore, the majority of this Honorable Court was right in declaring said authorization of the State Legislature of the said company in their charter, was unconstitutional, null and void.

But on the supposition that the position I have taken on this point is not tenable, but that under the Constitution of 1812, the power of the Legislature was omnipotent, over the property of the citizen—what is the position of the parties?

The counsel of the company contend that, "the rights of the Draining Company had been acquired and been completely vested on the 18th of October, 1845, by the judgment of the Parish Court decreeing "that each portion of the property situated within the section shall be subject to a first mortgage, in favor of the Draining Company, for the sum of eighty thousand dollars." "The Constitution of 1845 was not adopted and did not go into operation until January, 1846."

But the company now claims, instead of the $80,000, of which it says that it obtained a mortgage, $326,000, and more than two years interest on the same, at 10 per centum, making at least $400,000.

Surely a mortgage inscribed for $80,000 will not vest a right to $400,000 by any rules of calculation yet discovered—so that if the company has any rights vested under the Constitution of 1812, they cannot amount to more than their mortgage of $80,000, and what interest may have accrued on the same, according to the terms of the charter.

I examined this point at some length in my original brief, to which I beg leave to refer your Honors, page 37, and will only remark in addition to what I have said, upon the question of notice—

It was said "this judgment was rendered in contemplation of law, contradictorily with all the owners of property within the limits of the section, for the previous publications in the newspapers, according to the charter, stand in lieu of citations, as in the proceedings for the collection of taxes, or the monition in admiralty."

There is a marked difference between notices published in the newspapers, in regard to the collection of taxes and monitions in admiralty, and this case.

There is a difference between what we call in law private and public statutes—the Courts will take notice of a public statute, without reference being made

thereto in the pleadings—not so in regard to private statutes—but they must be specially plead by the party relying on them. Now, acts in relation to taxes are of a general nature, and so is the law, or rule in regard to monitions in admiralty. But this charter of the company is a statute of a private character, so far as these defendants are concerned, and they cannot be expected to take notice of it, or have notice of it, unless it is brought to them in the ordinary and legal mode. It will not do for the Legislature to make a special rule for this case—for that is liable to the same objection of being a private statute. Now, unless it shall appear that the defendants had notice, by some means, of which there is no proof, it cannot be said that "this judgment, in contemplation of law, was rendered contradictorily with all the owners of property within the section."

I come now to the second proposition of the learned and distinguished counsel. That "the advertisement for a local improvement, the direct and immediate benefit of which, to the persons assessed is appreciable in dollars and cents, is not the imposition of a tax, in the constitutional acceptance of that word, although the public at large may be incidentally benefited by such improvement."

I examined this matter at considerable length in my original brief, beginning at page 5, to which I solicit your Honor's attention, and though I might add something, perhaps, to what is there said, yet as nothing new has been urged against my positions, except a citing of authorities, I shall pass it with some few remarks on some of the cases cited.

But I will say that as the proposition is stated, it is not applicable to this case. There is no evidence in the record, to enable the Court to estimate, in dollars and cents, the benefit done to the lands of defendants in the second section by the work of the company, nor is the matter susceptible of proof, for every witness brought to say it was a certain sum, another could be brought to contradict him. It is very difficult to find men agree on the value of property situated as this is—for improved property is easily valued, and so is unimproved property situated in close proximity to improved. But when you come to estimate property, which in all human probability will not produce an interest on any investment that may be made upon it, for the next ten or twenty years, and the same all the time paying the heaviest taxation at the highest market valuation, of the most excited and inflated times—it will be very difficult to get men to agree, for while one man of large hope and sanguine temper will look upon the property as extremely valuable, another of an opposite temperament, will look upon it as worthless, and would not pay the annual taxes upon it, for t. So too, in estimating the causes of its increased value, for there is no doubt the lands are worth more than they were in 1845. But individuals will ascribe the rise in different proportions to the different causes which have had their influence in rising the value of this out-side kind of property. See *Mr. Beard's* testimony, Printed Evidence, page 14.

No better illustration of the uncertain value of this property can be made than the case cited by the counsel of plaintiff. The sale of the property by the *Madame Pontalba* took place in the spring of 1853: price $125,000. With the exception of two squares, the property, having passed from the original purchaser into other hands, was sold at public auction within the last five months for the sum of $63,565.

The claim of the Draining Company is now, probably, over $35,000. So, if, as the counsel says, the land was only worth $5,000 before drainage, the increase, measured by the above data, will not be very great for the period of over seven years, since which time the drainage has been completed.

The first two cases referred to by the counsel in support of this second proposition, are, the *State* v. *The New Orleans Navigation Company*, 11 M. R., and *Worsley et al* v. *Second Municipality of New Orleans*, 9 R. R. The purpose of the first suit was to avoid the charter of the Company. The Navigation Company was organized, among other projects, with a view of clearing out and rendering navigable the bayou St. John, and extending its navigation by means of a canal, and having done this, its charter authorized it to collect certain tolls for its use; but this, it was contended, was in contravention of the Act of Congress, which stipulated not only for the freedom of navigation, but also for an exemption from any impost, tax or duty therefor.

The other one involved the question of the right of the Municipality to

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charge wharfage for the use of the wharves along the river, which wharves belonged to her. And the Court very properly decided, that tolls and wharfage are not taxes. In most cities wharves are private property, and the owners charge for their use; and it is difficult to see why such charge should be called a tax, any more than the money paid for the use of a house should be called a tax, rather than rent. And so of a canal, or stream, which has been made navigable—why should the sum paid for their use be called a tax, any more than that paid for the use of a railroad for freight or passage? It is true, we might call every payment, made for any purpose whatever, a tax; but our language is not so poor; therefore we call the money paid for the use and occupation of houses, rent; that paid for the use of money, interest; that for carrying us to and fro, whether by stage, railroad, or vessel, passage money; that for transporting our goods, freight; that for the use of canals and bridges, tolls; what we pay for labor, we call wages, and for professional services we call fees. And so on, we have a name for everything of the kind, which is more exactly appropriate than any other. But when the government asks money of the citizen, in any manner whatever, except for the use of government property, such as buildings, roads, bridges, canals, &c.,—in which matters the government is in relation to the community like any of its citizens,—we call it taxation. This is the generic term of all money received from the citizen, except for crime and in the way of penalties. There are the different modes in which these taxes are imposed and gathered, and these modes receive their specific names, such as duties, imposts, &c., but taxation is the great term, which embraces and comprehends all. These views I maintained in my original brief, beginning at page 7.

But I can see but little parallelism between these cases and the proposition of counsel. In the one case, a company make a canal, and deepen and clear out a bayou, and it charges a toll on those who find it convenient to use them, and if the same company had invested their money in any other enterprise—the running of steamboats, or manufacture of cotton, they would have received something from those who traveled on their boats, or who purchased their goods. In the other, the city government makes wharves on her own property, and charges something for their use. She may make the wharves or not as she sees fit. But it is a very different thing when government goes upon the lands of certain citizens, and for the public use opens a street, and makes them pay the whole cost of it. To make the cases at all parallel, it should make all who use the street pay something, and those only pay wharfage, or tolls, who use the wharves, or navigate the canal and bayou.

So too, in regard to the case before the Court. The government by its agent, goes upon the lands of defendants, and does certain things which it declares to be done for the public good; but it charges the whole cost on the defendants, who are a few individuals. Whereas, in order to be consistent with the cases cited, it should be on the public at large, because all are benefited. It comes to this then, that the city and company improved their own property for the direct purpose of getting an income from it, and incidently to benefit the public; and the government made an improvement on the lands of certain citizens, not for their own good, which it could not do, but for the public good; but tax the whole cost on these few citizens. In the first case, those only pay who are benefited—while in the latter, only a small fraction of those who are benefited, are made to pay at all.

But the case of the *People* v. *Mayor of Brooklyn*, 4 Comstock, 419, and cited by counsel, is altogether at variance with this second proposition.

The Court says, "that private property may be taken for public use in two modes—that is to say, by taxation, and right of eminent domain."

"The validity of the assessment in question, therefore, cannot be maintained as an exercise of the power of eminent domain, and it cannot be maintained at all, unless it be a legitimate mode of taxation. See page 425. It goes on and controverts the opinion of Chief Justice Savage, quoted by counsel, in 18 Wendell, R., and all other cases of like import, decided in New York, and fully sustains the opinion of the majority of this honorable Court in the Benton street case, in regard to the question, whether an assessment made on adjacent property to pay the expense of a street, be a tax or not.

Thus, has this question been put at a rest, we may hope, at least, in Louisiana.

It has been settled at last, by simple recurrence to first principles—by

inquiring what were the powers of government over the private property of the citizen—for what purpose it might be taken, and in what modes.

It is true, that the Court, after declaring the assessment to be taxation, also declared it to be a legitimate mode of taxation under the Constitution of New York, which, as interpreted by the Court, gives unlimited power to the Legislature, over the citizen's property, in the mode of taxation.

It is evident, that the manner in which these cases were decided, never gave public satisfaction, else, suits involving the same principle would not have been so constantly before the Courts. There is no man, probably, who ever had this method of taxation applied to himself, who did not feel that there was great injustice in it, although he could not, perhaps, explain it.* And the Courts themselves, if we could judge by the language and tone of their decision, where not much better satisfied. They seem to have felt, that their judgments rested on an uncertain foundation, for they assert no fixed and distinct principles—they see and feel its injustice and inequality, and they apologize for it—some in one way, and some in another. One says "that the system of paying for local improvements out of the general treasury, is inequitable, will result in great extravagance, abuse and injustice. (See dissenting opinion in Benton street case.) And if it will be inequitable to pay for an improvement, made at the will and demand of the public, out of the public treasury, will it be more equitable to put the whole burthen on one or a few citizens. If injustice and oppression are to result from an act of the government, I say let not their weight be felt by every citizen, and then it may be that such act will not be rep ated. The converse of the propositions stated by the learned Judge, should be true, el-e our governments are bad in practice, if not in theory; for where all bear equally the public burthens, all are interested in restraining extravagance, and correcting abuse and injustice. It is because the public pay nothing for these local improvements, which they, the public, have made, for their own convenience—that they are always so ready to have them undertaken. The great public stands aloof with folded arms, and say to a few individual citizens, you shall do this, or do that, and they are powerless to resist. For it is the weakness and misfortune of our governments, that the individual is powerless, when his rights and the public interests, or prejudice, are opposed.

For what can he do, standing alone before the great Lord and master—the public—eager for his life, or his property? His only hope is in the judiciary—and if it fall into the popular current, although unconsciously, it may be, like as a ship at sea, falls in with those silent and unseen currents in the ocean, which bear the unconscious mariner far away from his latitude and longitude—his case is hopeless, he will be sacrificed to the insatiate multitude.

But if individuals are powerless, men associated in bonds of interest are mighty, they can control the legislative department of government at their will. In a great sister State, the railroad corporations have but to unite, and they can give such character to the Legislature as they choose.

As an evidence of it, most of their charters contained when granted, some limitations and restrictions in favor of the public, or State, these have, one by one, been removed, under the potent power of united interest and action. In truth it must be acknowledged, sad and humiliating as the acknowledgment is, that the great operators of that State make a convenience of their Legislature, in the accomplishing of their purposes; and while this is the case, it will be found difficult to impose constitutional restrictions upon legislative power, in the taking of the private property of the citizen.

Thus it is, that it is so dangerous to the rights of property, this practice—for principle it is not, for all true principle is against it—of taxing upon one citizen, or a few, the entire cost, of any work done at the will and demand of the government, or public at large.

The third and last proposition of the distinguished counsel is, that "the

* Were I called upon to explain the reason of the passage and toleration of such Acts, as the charter of this company, and the Acts of 1832, in regard to the opening of streets, I should say, it was because few ever feel practically, the injustice and inequality of their operation—for few new streets, comparatively, are ever opened in a city, and few sections of land drained. And human nature is such, that men are willing to see others suffer injustice, or will, at least, remain passive if so be, that they are to be benefited thereby individually, or as a part of the public. Moreover, under our form of government, the people are not so jealous of their government, as under more strong and absolute governments; in such governments, when an act of aggression is committed on a citizen, all are alarmed, and they stand together as against a common enemy.

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incorporation of the Draining Company, for the purpose of draining the swamp and marshy lands, within the corporate limits of the city of New Orleans, is the exercise of the police power, and not that of taxation, or of eminent domain.

Sir William Blackstone in his Commentaries on the common law of England, divides wrongs into private and public; and it is from this source that we get our police and criminal jurisprudence. And if the lands of defendants, situated in the second section, were a wrong to private citizens, or the public at large, they must fall under some head, of one or both, of these divisions, and I can find none to which they with any propriety can be said to belong, except it may be nuisance—so I shall examine the matter under that head. Under the head of private wrong, chapter 13, book 3, the great commentator first opens upon this subject. He defines a private nuisance to be, "any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another." He then divides nuisances into such as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal. The examples he puts are undoubtedly familiar to your Honors—they are, in short, if a man builds his house so near mine as to throw the water from his roof on to mine—if he erect a building so as to obstruct my ancient lights, and so if he keep his hogs so near my house, that the stench incomodes me, and renders the air unwholesome, and so of trades which are offensive. But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like, this is no injury, and is therefore not an actionable nuisance. So, also, if my neighbor ought to scour a ditch, and does not, whereby my land is overflowed, this is actionable; so is the stopping of water that used to run to another's meadow or mill, or to corrupt or poison the water course by erecting a dye house or lime pit, upon it.

As to incorporeal hereditaments, if I have a way annexed to my estate across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance. So if a ferry is erected so near an ancient ferry as to draw its custom away, etc.

In treating of public wrongs, the commentator speaks of common nuisances under chapter 13, Book 4, sec. 5: "Common nuisances are a species of offence against the public order and economical regimen of the State, being the doing of a thing to the annoyance of all the King's subjects, or the neglecting to do a thing which the common good requires." And therefore, he says, "they are indictable only, and not actionable, as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects." Of this nature are, 1. Annoyances in highways and bridges and public rivers. 2. All those kinds of nuisances which, when injurious to a private man are actionable, are when detrimental to the public, punishable by public prosecutions, etc.

As to the remedies—the great remedy for private nuisance, is action on the case, by which the party recovers damages, but cannot thereby remove the nuisance.

Let us suppose that some citizen had brought an action against these Defendants, before these lands were drained, for damages, because of their being a nuisance, and, in addition, to have the nuisance abated, by draining them and cutting down the woods; on his part, he should bring witnesses to show the damage to his hereditaments; what progress could he have made. The defendants would have replied, that these lands are in the condition of nature; these forest trees, many of them, have stood where they now stand for a thousand years, long before the continent was discovered by Europeans; the waters have flowed or stood as they now do, beyond the memory of man. You say the waters are offensive and unwholesome; if so, it is not our fault. The waters that you see, fall from the clouds or flow up fresh from the lake, except such as drain over and through them from the city lying between them and the river. If they are poisoned at all, it is in part by your own fault and filth. Our lands do not drain on to yours, but yours drain on to ours. Where is the limit to the injury? Here are something like two thousand acres of land; what part of it injures you, or does it all? If so, where will you stop, for these lands are but a fraction of the lands situated in like manner; on every side, except toward the river, they extend miles and miles away? Where are your authorities to support, or even to give countenance to your case? It what case has it been adjudged that parties owning a large body of lands, situated as these are, in the simple condition of nature, should pay damages to an individual on account of their being and remaining in such condition? or in what case have they been ordered to be

abated as a nuisance? If you have no adjudged case, where is your ordinance, either legislative, or municipal, declaring these lands a nuisance, and ordering the owners to drain them and cut down the woods? And if you have no adjudged case, nor ordinances, your case must fail; because "where there is no law there is no sin." The Attorney General, I take it, would have fared no better, had he framed an indictment against the defendants, on the ground of a public wrong.

I cannot, therefore, understand, how these defendants can be implicated in the way of police, in regard to the lands situated in the second section.

For, in matters of crime and police, the citizen is enjoined to do some particular thing, the neglect of which will subject him to an action for damages, or an indictment, or both, or else he is enjoined not to do some particular thing, which, if he does do, will subject him to like contingencies. Now, these defendants are not in either category. They have not been enjoined to do anything to these lands, or to refrain from doing anything whatsoever, by either State or municipal ordinances. Nor have these lands ever been declared a nuisance by any legislative or judicial decree—which would certainly be new and extraordinary if it had been done—for, as I have heretofore said, a nuisance is something brought about by the action of man, and not by the hand of the Creator. The only action taken by any department of the government in regard to these lands, is contained in the charter of this Company, by which it alone is authorized to drain them and cut down the woods. Therefore, it is clear, that defendants are not in default in any manner; that there is no law against them, and, therefore, that they cannot be made to suffer any *penalties or make any reimbursements.*

I do not deny that the power of government to drain these lands is properly placed, under the head of police. In truth, my language upon the subject was, that "if there be authority at all existing in government, either State or municipal, to compel the owners of swamp lands to drain them, and to cut down the woods and timber which may be growing on them, it exists under the head of police.

But this is the first time that the learned counsel, to my knowledge, have placed it upon that ground. We heard nothing of it in the lower court, for the burthen of argument consisted in showing what great benefits this Company had conferred on the defendants. But it matters little about that—however it sounds a little strangely to hear one talk of police regulations, enforced in the way of penalties and damages to the parties, and at the same time of great benefits. I have never denied the right of the government to have these lands drained, etc., for the public welfare—but what I have denied is, that these few defendants can be compelled to pay the entire cost of it. I have never admitted that these defendants could have been compelled to do it; but I admit and contend that, if they could have been compelled to do it, it was under the police power of the government. But I say the government could not compel the owners to do it, or forfeit their property to the public. Such a decree from a government would not be legislation, but a species of judicial decree, and without warrant or parallel in legislation in free governments. The counsel ask, if the owner of a city lot, below the level of the city, could not be compelled to fill it up. I grant he could; but what similarity is there in the condition of this lot and these lands? None whatever. Not near so much as there is between this lot and any plantation along the coast; for they, are alike in this, that both have been taken out of the *condition of nature.* This lot has no longer its natural drainage, by means of the filling of the surrounding grounds. The city has the right—more, it is her duty, to look to the drainage of lots and streets as they are built upon; because the common welfare is concerned in it. But when has it happened that the owner of a lot so situated has been compelled to pay for the filling of it up, when done by the employees of the city government, when there was no ordinance ordering it to be done, and he had no notice to do it?

So it is in regard to making and repairing of levees, and building of frame houses within certain districts. There must be some law before there can be a default or penalty. I do not deny these great powers of government; and the learned counsel does me injustice in saying that I maintain "the unrestricted freedom of every citizen to do with his property just what he may think proper, except so far as restrained by the right of eminent domain and the taxing power."

My language at page 32 is, The owner of property has a right to use it in such manner as he pleases, so that he does not violate *such police regulations* as are made for the preservation of *good order and neighborhood.*

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But while I admit these powers, I claim an *equal* and just exercise of them. Government cannot say to you, fill up your lot, and to me, who have a lot alongside of it, you may let yours remain—to you, you cannot build a frame house at such a place, while it allows me to build one in close proximity to it. No one will probably deny this, yet why should inequality not exist in these matters, as well as in the payment of taxes?

It appears to me, that the State have taken the remedy in this matter into their own hands, and is in the condition put by Mr. Justice Blackstone, (if it be possible to implicate these defendants in this matter under head of Police, which I deny), when speaking of remedies, he says: "Also, if a man hath abated or removed a nuisance which offended him, (as we may remember it was stated in the first chapter of this book, that the party injured had a right to), in that case he is entitled to no action. For he had choice of two remedies: either without suit, by abating it himself, by his own mere act and authority, or by suit, in which he may both recover damages and remove it by the aid of the law; but having made his election of one remedy, he is totally precluded from the other."

There is another consideration which is alike fatal to the pretensions of this company. The company says that it was created under the police power of the government, and for police purposes. If it be so, how is it that the government could authorize this company to intermeddle with the police affairs of New Orleans, for the Constitution of 1812, and those which have succeeded it, have given the choice of police officers and agents to the citizens of New Orleans. Now if this company was chosen to exercise police functions within the limits of the city of New Orleans, it may properly be styled an officer of police—(its being a corporation can make no difference, for a corporation is simply a union of several persons, empowered by law, to act as one). Thus it will follow that such choice, and authorization on the part of the Legislature, was null and void, and the acts of said company, under their charter, so far as these defendants are concerned, are of no binding effect whatever; and it will not do to say, as in the language of the learned Judge who gave a dissenting opinion in this cause, that "the citizens of New Orleans have not been deprived, by these acts, of any of their rights, with regard to the election of public officers thus guaranteed to them." For it cannot be said that the citizens of New Orleans had anything to do in the choosing of this company, in the sense of the Constitution, and it will not vary the position, because the city owns a large portion of the stock, "and acquiesces in the constitutionality and binding force of the acts." The rights of individual citizens, under the Constitution, cannot be impaired by the action of the city in the premises.

Again, the charter of the company gives it the exclusive police power, (since you choose to call it so), in the premises—the exclusive right to drain the lands, and thereby remove the evils complained of—how can these defendants be charged with neglect in not having done—not only what there was no law requiring them to do, nor no notice given—but what the government has put it out of their power to do. These defendants cannot be made to pay damages and penalties under such circumstances—nor compelled to make reimbursements to another, for having done, under the authorization of government, what they, by the same instrument, were not permitted to do. Such a thing would be an anomaly in the history of the law—and too gross an outrage on the common sense of mankind to be for a moment tolerated.

But you will say—it has been said already—that the work could never have been done by the proprietors—and in this consideration, an apology is sought for the high handed usurpations of this charter. Of that, there is no proof—the evidence is the other way. For amongst the proprietors in this section, are *Madam Pontalba*, who the Counsel say, is a millionaire, *John McDonogh* and *L. Millaudon*, either of whom, could have done all the work which has been done, without great difficulty, and probably, at less than half the cost. At least, they would have saved themselves some $29,000 for salaries, and many other items. But besides these, there are very many of the defendants of abundant means, to have paid their quota. So, that this apology will not avail, and to have made it good, it would have been necessary to have given them the opportunity by law and notice, and thus have put them in default.

The learned Judge, who delivered a dissenting opinion in this case, can see no analogy in this case, and the case of *Fletcher* v. *Peck*, 4 Cranch, under the point I made—under that clause of the Constitution of the United States, which

declares that "no State shall pass any law impairing the obligation of contracts."

I did not state at any length the facts of the case cited, because, I supposed them familiar to the Court. I did not state that the lands in question, sold originally by the State of Georgia, had passed from the original grantees, to third parties, and that without any notice of fraud, or defect arising therefrom between the original parties. So, that the parties to the suit, stood before the court in regard to their rights, as if the State had never owned these lands. So, the court say, if the State can divest the title to these lands, and declare them vested in the State, it can do the same thing to other lands. The language of the court is: "Their situation was the same, their title was the same, with that of every other member of the community, who holds lands by regular conveyances from the original patentee."

The court say again, "it is not intended to speak with disrespect of the Legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist; yet, the principle on which alone this rescinding is to be supported, may be applied to every case to which it shall be the will of any Legislature to apply it. The principle is this: that a Legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient."

Again, and in conclusion, the court say, "it is then the unanimous opinion of the court, that in this case, the estate passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles, which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law, whereby the estate of the plaintiff in the premises so purchased, could be constitutionally and legally improved, and rendered null and void.

There are two things to which I wish to call the attention of the court in these extracts—the first is, that the parties in the case cited, and the case before the court, are in similar position in regard to their titles to their land, and that if the government could divest the title in one case, it could do it in another, and *vice versa*. The second is, that the court rest their opinion on the "general principles which are common to our free institutions," as well as on "the particular provisions of the Constitution of the United States." So, that if this cause should not come within the provisions of the Constitution of the United States, technically speaking, it will be embraced by the "general principles which are common to our free institutions."

But you will say that we have not been divested of our lands, or title to them. Is not the mortgaging our lands for $80,000, divesting us of our title, or impairing it; if the mortgage is foreclosed, and the lands sold, will not our title be divested; or if it is not, will it not be because the mortgage is null. Will you say that this mortgage is made for our benefit, with the view to the improvement of these lands, that the government cannot do, nor is it set forth as the motive. Will you say that this was done in view of the public good—then you admit the fact, and it is this which brings this case again in contact with the case cited. The State of Georgia passed the Act to divest the title to the lands in question for the public account. Will it be said that the purpose of this charter was not to divest the defendants of the title to their lands; if that were not the purpose, it can make no difference if such may be the result, and the Legislature did not know, nor does this honorable court know, but that such may be the result. And such being the case, the government cannot make the experiment—it cannot make us run the hazard. But suppose, in the operation of this charter, only one-half or three-fourths of the land should be taken. Should the land be sold by the company, and it should bring more than enough to satisfy the company, would that alter the case at all. Is not the taking of one dollar's worth of this land a divesting or impairing our title; if it be not, how much will be?

It is said that "the regularly constituted tribunals of the country, were required to protect the proprietor from extortion, as well to enforce the equitable right of the company to indemnity in case it succeeded in benefiting the proprietors.

It is true that provision is made in the charter of the company for the courts to do certain things for the benefit of the company—first, to have inscribed a mortgage in its favor, for such sum as the company might suggest to the court, on these lands of defendants. And second, at the monition of the company, to

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enquire whether the company had completed the proposed work, and then to examine their accounts, and see if the money claimed had been expended. It could not inquire whether the defendants had been benefited in the improvement of their lands or not. The lands are bound for the money that has been expended, in case they have not been benefited one dollar, as much so as they would be if their value had been increased four-fold by the labors of the company. But such was the regard manifested in this charter for the rights of defendants, that they could have no suspensive appeal, but were bound to pay the judgment of the lower court. See amended charter, sec. 4.

Much is said of the reasonableness of the provisions of the charter; but the power of parties to contract cannot be measured by the equitable terms of the contract. If the government had the power to bind our property in its contract with the company at all, it could make a bad bargain for us, as well as a good one, and we should be equally bound by the one as the other. If it could allow the company $30 per month wages for its negroes, it could allow $100, and if it could allow 10 per cent. interest on the same, from the end of every month, it could allow 50 per cent., and the courts could not alter or change the terms—for the courts cannot make contracts, but only inquire what the contract is, and enforce its execution.

Therefore it is that the government in this matter has set in judgment in its own case. It has determined the public necessity and benefit in taking our lands, and at the same time the proper compensation to be made us—two things, as I have before said, no government pretending to be free and limited can do. I read from 2 Dallas, 310.

"Where is the security, where the inviolability of property, if the Legislature, by a private act affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another?" The rights of private property are regulated, protected and governed by general, known and established laws, and decided upon by general, known and established tribunals; laws and tribunals not made and created on an instant of exigency; on an urgent emergency to serve a present turn of the interest of a moment. Their operation and influence are equal and universal—they press alike on all. Hence security and safety, tranquility and peace. One man is not afraid of another, and no man afraid of the Legislature. It is infinitely wiser and safer to risk some possible mischiefs than to invest in the Legislature so unnecessary, dangerous and enormous a power as that which has been exercised on the present occasion; a power that, according to the full extent of the argument, is boundless and omnipotent. For the Legislature judged of the necessity of the case, and also of the nature and value of the equivolent. Such a case of necessity, and judging too of the compensation, can never occur in any nation."

"Shame to American legislation! That in England, a limited monarchy, where there is no written Constitution, where the Parliament is omnipotent, and can mould the Constitution at pleasure, a more sacred regard should have been paid to property than in America, surrounded, as we are, with a blaze of political illumination, where the Legislatures are limited, where we have republican governments, and written Constitutions, by which the protection and enjoyment of property are rendered inviolable."

At a preceding page of my brief I remarked as follows: There are some things which cannot be done without a concert of action among a number of individuals, such as the opening of streets and highways, and the draining of swamp lands. It would be useless for one proprietor to open a road on his lands if it was not extended through those of his neighbors. So it would be useless for one to attempt to drain his land, when it was surrounded on all sides with other lands on the same level. But, owing to the ignorance of some, and the pertinacity of others, it is difficult to find any great number of individuals who will unite in a concert of action to accomplish any of these objects. To remedy this, the Legislature in most of the States, in regard to roads, and in Massachusetts and Connecticut in regard to swamp lands, have provided by statute that a majority, or a majority of two-thirds or three-fourths, shall control the action of the remaining minority. To this there can be no objection. It is perfectly in harmony with the rights of private property, which will be secure under such a procedure. It is leaving private rights to be controlled by those concerned, as much as the necessity of the case permits."

To this the learned and accomplished Judge, who delivered the dissenting opinion in this case, says: "But looking at it in the light of principle, it seems to

me that the legislation of those States is liable to all the objections, so far as the dissenting minority are concerned, that are urged with so much vigor against our own. If it is tyranny for the Legislature to do this thing, it is tyranny for a majority of proprietors to do it, under legislative sanction."

These remarks by the learned Judge lead me to believe that I have not been understood by him. For, to my judgment, the difference is very broad, and the lines marked and distinct. In the case I put, the majority and minority stand upon the same basis. The majority pay for the draining of their lands as well as the minority, and in the same ratio. They have, therefore, a community of interests; they are, to use a familiar expression, afloat in the same bottom. They have as much a community of interests, and their rights are as well protected, and in a similar way, to those of the stockholders of any banking, or any other like company, whose members vote according to the stock they hold. And I still maintain that this is the proper and legitimate mode of opening streets and paving them, etc., the proprietors paying the cost of them—but protecting the minority by a majority in property of three-fourths; and in cases where the proprietors failed to act, and the public interests and necessities were paramount—such as in opening great avenues through unpeopled districts, and in draining neighboring low lands—the public at large should pay the entire cost.

But how is it on the other side? Is there any community of interests between this company and these defendants? None. The interest of the company is to do as little work for their money as they can, to charge as many days' wages as they can for their negroes, and to multiply offices for their friends, and to give them as high salaries as possible, and for as long a time, and, on all, to constantly add the highest interest.

Is there any community of interests on the part of the government and State? Does the State pay anything? Does any one pay anything, of all those who made this law to bind us defendants? No one. Is it said we are represented in the government? How much are we represented? What part of one representative belongs to us? Not one one-hundredth part.

So we stand alone, powerless to help ourselves, against the whole power of the State; and the government disposes of our property as though we were slaves instead of freemen. On one side, therefore, there is freedom; and on the other despotism. One is as Charles the First, gathering taxes under the authorization of Parliament; and the other is Charles gathering taxes of his own mere will and pleasure.

I have thus examined, in a loose and very imperfect manner, (for the time allotted me has not been sufficient to properly digest and condense the argument) the various questions which have arisen in this cause, and to answer as best I could the points which have been raised by the learned and distinguished counsel on behalf of the Draining Company. The case is important on account of the large amount of property at stake, but more important far on account of the principles involved.

Questions more grave and serious can hardly be found to occupy the attention of the court or commonwealth. In one view of the cause questions arise of the power of government over the property of the citizen. Can government take the property of the citizen except for a public purpose. Can it take it except under the right to tax and the right of eminent domain, except it be for crimes and misdemeanors, and in the way of penalties. Can it take it under the right of eminent domain without making compensation. Can it determine the necessity of taking it, and at the same time determine the amount of compensation that shall be given for it. Can it vary the nature and character of the compensation from the common, known and legitimate standard measure of the value of property—to wit, money. And under the right to tax, can the government place the whole burthen of the commonwealth upon one or certain citizens—on property belonging to them—to the exemption of the same kind of property in the hands of other citizens. Or can it lay the entire burthen of taxation on one part of the State, city or parish. In one word, was the government of Louisiana possessed of absolute and despotic power over the property of the citizen, under the Constitution of 1812, and the Constitution of the United States.

In another view—looking at it as a question of police—questions arise, can the government make a citizen pay damages or penalties where he has violated

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no law or ordinance, either by doing, or neglecting to do, anything prescribed; or can he be made to reimburse another for having done that something which there was no law requiring him to do—but, on the contrary, the only law made in regard to the subject matter prohibited him from doing it.

These questions stand like armed men in the way of the decision of this cause, and judgment cannot be attained to, without first disposing of some, or all of them.

If, in the decision of this cause, the government shall be confirmed in the great and transcendant powers claimed for it over private property, citizens will fear and distrust each other, and fear and distrust their government, because the way will be open to the intriguing, the avaricious and unscrupulous—to the accomplishing of their purposes, through municipal ordinances and legislative grants and charters. On the other hand, if the decision shall be against such pretensions, citizens will have faith in each other and faith in their government, because the rights of each will be protected by the common iterests of all.

I close this already too extended argument by reading a passage from Chief Justice Marshall, 571:

"We cannot resist the conclusion that it would be a violation of the general tenure and spirit of the Constitution for the Legislature to attempt to deprive any citizen of his property, without previously providing compensation therefor. And whenever such Acts are passed, we believe it to be the duty of the judiciary to disregard them and consider them as nullities. We cannot perceive any reason which shall compel the judiciary to obey a legislative Act, at war with the tenor of the Constitution, and the fundamental principles for the preservation of which the government was instituted, that would not apply with equal force to produce obedience to a legislative Act, directly opposed to any one of the positive inhibitions of the Constitution. We grant the representatives of the people are the shepherds of the flock; but they are not exclusively such, although vested with great and extensive powers. If, through inadvertence or design, they should endeavor to sacrifice any one or more as victims, it cannot be done, so long as the judiciary remain virtuous, intelligent and independent. Both departments must concur to work iniquity before the people can be made to mourn, and in bitterness to curse their government."

MERRICK, C. J. (BUCHANAN, J., dissenting.) The application of a few well known elementary principles ought, we think, to decide the principal question involved in this controversy.

The supreme authority in every state must have the power to provide for the general welfare of the inhabitants of such State. One of the main inducements for an organized society is the ability with which the collective power of the whole can be exerted on enterprizes beyond the individual capacity of its citizens.

By the common consent, it is the duty of the government to protect its soil from invasion. It is obliged to administer justice; to protect the inhabitants, as far as possible, from great calamities, such as the overflow of rivers, or the sea, or from famine; to provide for the general health by regulations to prevent the introduction and spread of plagues and contagious diseases, and to drain insalubrious marshes in the neighborhood of great cities, and to abate nuisances. In fine, it has the power, among other things, to adopt all laws and regulations calculated to advance the safety and prosperity of the people, whether it concerns its defence, its health, its commerce, its internal quiet and police.

The power which the State possesses is not wholly confided to the Legislature. A part of this power, guarded by the Constitution, sleeps in the arms of the people, from whence it can be called into activity only by a convention called by themselves. In all other respects the power of the legislative department of the government is supreme. Its only restriction is the Constitution.

The Legislature, therefore, had the power to create the New Orleans Drain-

ing Company, and to confer on it the powers specified in the charter, unless restricted by the Constitution.

If the Legislature had the power to drain the swamp in the rear of the city, directly or by its own agents, it had the power to do it through the intervention of a company created for that purpose.

But it is contended that the Constitution does restrict the legislative power in the very matter before us, and that the Articles of the Constitutions of 1845 and 1852, recited below, have the effect of abrogating the charter of the New Orleans Draining Company. The first, Art. 105 of the Constitution of 1852 and 109 of the Constitution of 1845, is in these words:

"No *ex post facto* law, nor any law impairing the obligation of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility and for adequate compensation previously made."

Art. 123 of Constitution of 1852 and Art. 127 of Constitution of 1845, reads as follows:

"Taxation shall be equal and uniform throughout the State. All property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied. The Legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession."

And Article 124 is in these words:

"The citizens of the city of New Orleans shall have the right of appointing the several public officers necessary for the administration of the police of said city, pursuant to the mode of elections which shall be prescribed by the Legislature; provided that the Mayor and Recorders, Aldermen and Assistant Aldermen, shall be commissioned by the Governor as Justices of Peace, and the Legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor crimes and offences as the police and good order may require."

Let us consider the questions arising under these Articles. We will commence with the last Article.

If the draining of marshes or swamps was a matter of police, within the meaning and provisions of the Article 124 of the Constitution, there would be great force in the objection, for the power conferred upon the Draining Company is certainly more easily classed under the power of police than taxation, but it is not, we think, necessarily classed with either.

But whether referrible to that class of powers or not, we do not think it was embraced by the Article 124 of the Constitution, which was adopted for the purpose of guaranteeing to the city of New Orleans a form of city government and the election of its principal officers, and was not intended to direct the manner in which contractors for works of public improvement should be elected, nor to abrogate contracts already made. The language of the Article does not bear the broad construction contended for: it is only the "right of appointing the several *public* officers necessary for the administration of the police of said city." The kind of officers intended is shown by the proviso. The incorporated company taking a contract for the draining of a swamp cannot be called a public officer necessary for the administration of the police of said city.

We conclude, therefore, that Article 124 of the Constitution, independent of the rights reserved in the schedule, is not in conflict with the powers conferred

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upon the Draining Company, and if the charter of the company has been abrogated, it is by one of the other Articles specified. We will consider Art. 123 of Constitution of 1852, and Art. 127 of the Constitution of 1845.

If the Act incorporating the Draining Company is unconstitutional under Article 123, it is because the Act allows the company to assess upon the property of each person benefited by the draining of the section, his or her proportion of the cost of such work, and therefore it is the taxing of the property of those persons in the immediate vicinity of the work higher than others.

There are many burdens which are imposed by the State upon its citizens which are of necessity unequal, and which cannot be classed under the head of taxes.

Of this kind is the service which the able-bodied man is obliged to render the State, when he is summoned from his employments to attend military musters and drills, or when he is drafted to bear arms in defence of his country, and even labor on fortifications. It cannot be pretended that the small amount of pay which is given while in actual service is an *adequate compensation* to the business man and artizan who have perhaps left lucrative employments in order to serve the country.

In the country parishes the roads are worked by the able-bodied men. The poor man, who is compelled to work for his daily bread, is obliged to labor upon the road, while his rich old neighbor, whose wealth does not happen to consist in men-servants, is exempt from any contribution whatever. In one neighborhood the labor upon the roads may occupy but two or three days in the year; in another, those subject to road duty may be compelled to labor ten or twelve days. With reference to the State at large there is no equality in this.

Take, for example, the levees on our rivers and bayous. The common welfare requires that each proprietor should keep up the levee in front of his own plantation. The government, from which title to real estate under the theory of our laws, emanates, and by which each person who acquires it is guaranteed in the possession of his land, whether he is capable of actually occupying it or not, has the right to impose this condition upon every possessor of land. This, we presume, no one will question. But this service required from the front proprietors is often exceedingly onerous and unequal. One proprietor, whose lands are favorably situated, may be obliged to make his levee only of moderate height, and at a cost only of a few hundred dollars, while his neighbor, who possesses less land than he, may be obliged to expend several thousands. This is unequal, yet but few would pretend that it was unconstitutional, and we can see no injustice in the State when it says to each front proprietor: "You shall not be permitted to hold these lands unless you conform to the regulations which I prescribe, and on which the safety of others, as well as your own, depends."

Now, would it be unconstitutional if the Legislature, instead of compelling each proprietor to build the levee, should appoint some officer to make an exact estimate of the cost of the work on each plantation, and compel the owner to pay it to such officer to pay for the work to be done? We think not. This would be but interposing another agent to accomplish the same thing which is now done directly by the owner.

Other examples of the unequal impositions of the burdens of the government might be given, such as the grading of streets in cities, the paving of sidewalks, and the like, and the service of jurors, etc. Enough examples have

been given to show that it could not have been the intention of the people in convention to equalize these sort of burdens by Art. 123 of the Constitution.

What was intended to be remedied by this Article will be apparent by seeing how the taxes were levied for the support of the government at the time the Constitution of 1845 was adopted.

A certain sum was raised on lands, and this was arbitrarily apportioned by the Legislature among the different parishes.

Slaves were taxed one dollar each, whether worthless or valuable, old or young.

Horses and horned cattle were taxed so much per head. The billiard-table paid fifty dollars tax.

A tax of ten dollars (afterwards reduced to five) was levied on every four-wheel carriage. The costly carriage paid no more than the most plain and unpretending vehicle. It was to correct these evils in collecting the revenues for the purpose of the government that the Article was introduced into the Constitution, and it ought not to be extended to cases not within the mind of the lawgiver when it was framed.

Assuming that the Legislature had the power to cause the swamps to be drained, we find nothing unconstitutional in the manner in which the cost of the work is to be reimbursed. It was within the power of the Legislature to require, if possible, the proprietors themselves of these marshy lands to drain them. It had the power also, for sufficient causes, of which the Legislature alone was the judge, to cause the work to be done and charged to the proprietors, respectively, and all this was not the levying of a tax in the sense of that word, as used in the Constitution. The money was not intended to go into the treasury and become subject to the rules by which alone it could be appropriated annually.

Having satisfied ourselves that the Constitution has not abrogated the charter of the Draining Company so far as it refers to the manner of assessing the cost of the work, we come now to consider how far it is affected by Art. 105 of the Constitution.

We have not understood from counsel that there are any cases in which the property has not been so far benefited by the work done, as to be increased in value more than the cost of the work assessed. Were not this the case, the property of each proprietor, to the extent of the difference between the increased value and the cost of the work assessed to him would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of the provisions of Article 105 of the Constitution.

There can be no question that the purposes and objects recited in the preamble of the Act of 1835, (see page 67) were clearly of such public utility as would justify the Legislature, if need be, to appropriate the land for the public benefit. And had any of the proprietors chosen to abandon their lots to the company, we would have directed an estimate of the value of these lots before they were drained, and this amount to be paid to the proprietor and the residue awarded the Draining Company to whom the lots were so abandoned.

But as no such complaint is made to us, we have no sufficient showing before us from which to infer that the property of any one of these proprietors will be taken for the public use without an adequate compensation.

See case of *Yeatmen* v. *Crandell*, 11 An., decided since the preceding portion of this opinion was prepared.

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Having thus disposed of the main difficulty, let us proceed now to the consideration of the other questions presented by the parties on the re-hearing of this case.

1st. It is objected "That if the company can recover at all, it cannot recover more than the estimated cost, to-wit: $80,000; for that is the only legal lien upon the property in the second section. If it has expended more, it has done so without giving notice to the proprietors and the public, such as the charter contemplated, and as a consequence must suffer the loss."

An examination of the statute does not bear out the construction here contended for. It is true that the estimate of the probable cost of the work was required to be made previous to the commencement of the proceedings, to obtain the decree subjecting the property to the first mortgage and privilege in favor of the Draining Company, but this estimate formed no part of the decree itself. It stood in the same relation to the decree that the plan and statement of the probable duration of the work did. Even the plan was not required to be recorded in the registry of mortgages; a copy was required to be deposited only with the Recorder for *his information;* doubtless to facilitate him in making a certificate of mortgages.

It will appear by the eighteenth section of the Act of 1835 and the first section of the Act of 1839, amendatory thereof, that the intention of the Legislature was to give the Draining Company a superior mortgage and privilege upon the lands drained for the whole cost of the draining of the section.

By the first section of the Act of 1839 the Court were to decree "That each portion of the property situated within the said limits, is subject to a first mortgage and privilege in favor of said Draining Company for such amount as may be assessed on it for its proportion of the whole cost of the draining of the said section."

By the same section it was made the duty of the Recorder of Mortgages, whenever required to deliver a certificate of mortgages of any property embraced within the said section, "to mention therein that said property is subject to a privilege and first mortgage in favor of said Draining Company, for such a sum of money *as will hereafter* be assessed on said property for the draining thereof."

The same section of the Act continues, "The said privilege and first mortgage shall take precedence over all mortgages whatsoever, whether conventional, tacit, legal, or judicial, and shall attach to said property until the amount which will be assessed on it, and the notes which may be given for said amount, as provided in the 5th, 6th, 7th and 8th sections of this Act, shall have been paid in full."

The law does not require the *estimate* to be recorded in the office of the Register of Mortgages, and if it did, in reference to these provisions of law, we should be compelled to hold that it could have no more effect upon the privilege created in favor of the Draining Company, than the recording of the tutor's bond has on the extent of the tacit mortgage in favor of the minor. The statute did not require the decree to be recorded in the name of each proprietor in order to give it validity as a mortgage. The section to be drained was described, and the plan furnished the Recorder, with the subdivisions and names of the proprietors, as far as practicable. The statute was permissive to the Draining Company to record the decree against each, not imperative.

This view of the case disposes of the obligations of such opponents as have

become third possessors of the property during the progress of the work. They are purchasers with notice.

2d. But it is objected that the decree could not bind the holders of property in the section to be drained, because a notice published in the newspapers was not a notice to the proprietors. It is in the power of the Legislature to determine in what manner parties may be brought into court, and we have recently decided in regard to the city taxes, that a decree rendered upon such notice is obligatory. See *The City* v. *Cordeviolle & Lacroix*, 10th An., p. 732.

3d. It is further contended that the estimate made was not in conformity with the charter; that it was not intended as an estimate of the cost of a complete drainage, and, therefore, the company cannot recover. This objection is inconsistent with the objection that the estimate was binding on the company, and that they cannot recover beyond it. But if it were irregular, as alleged, the irregularity has been cured by a judgment of a competent tribunal, which has not only become final, but has been acquiesced in by these parties who have daily seen the work upon their land in progress, and who have made no objection or remonstrance.

4th. The next point is, "That the company cannot recover for any work or labor done or money expended on said Section No. 2, after the 1st of January, 1849, for then, according to their own showing, (by their own engineer) the draining of the section was completed, and ought to have been, according to the intent and meaning of the charter, turned over into the hands of the city."

The Judge of the lower court, after a careful examination of the testimony, came to the conclusion that the work ought to have been delivered to the city by the 10th of May, 1849, and ordered all charges after that date, whether occasioned by the crevasse or attributable to the remaining in possession after that day, such as charges for salaries, office hire, expenses for running the engines, &c., to be stricken from the account. The amount of these rejected charges, with two items withdrawn by the company, is $58,800 45.

The principle on which this large sum has been rejected is that the Act of 1839 required the Draining Company to proceed to the draining of the section with all possible expedition; that by the 10th of May, 1849, the work might have been completed and delivered to the city; that had it been so delivered, the loss occassioned by the crevasse would have fallen upon the city and not upon the Draining Company, and consequently the property holders.

It is by no means clear that the failure to deliver at that time, has not benefited the property holders by the more perfect condition in which the works were subsequently delivered, and that the facilities possessed by the Draining Company, during that time, to re-open the canals, did not contribute to an earlier possession of their property than would have been the case if this heavy labor had fallen upon the city.

Still the testimony gives rise to so much doubt that we do not feel authorized to disturb the judgment of the District Court in this respect.

5th. But whatever may be our views as to the rejection of the foregoing items, we think the District Judge erred in refusing, on the same grounds, to the Draining Company, interest on the sums of money expended by them previous to the 10th of May, 1849, during the period which intervened between that date and the surrendering of the section to the city on the 20th of January, 1851.

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The statute gives the Draining Company interest on the money expended, and we know no principle upon which we can interfere with a right given by a statute on a subject entirely under the control of the Legislature.

The judgment must therefore be so amended, as to allow the Draining Company interest at the rate of ten per cent. per annum, on $191,504 28, from May 10, 1849, to January 20, 1851, to wit, $32,449 32.

6. It is further objected, that if the company was delayed and hindered in the prosecution of the work by want of means, that they cannot recover for any more than the work would have cost, if the company had ample means and good credit, and had pushed forward the work in an expeditious manner.

We do not discover such delay in the operations of the company, as to entitle the property holders to any further deduction, and it is by no means certain that the gradual manner in which the work was actually accomplished, was not less expensive than it would have been had a larger force and more expensive means been used at the commencement, and before the soil had acquired firmness by the joint action of the atmosphere and drainage.

7th. It is further objected, that section number two has never been completely isolated, and that it receives the drainage of all that portion of the city of New Orleans between St. Peter and Julia streets.

It could not have been in the contemplation of the Legislature to require the company to isolate the section from that portion of the city naturally draining on these inferior lands, which owed such servitude to the superior portions of the city. On the contrary, the object was to drain the inferior section, notwithstanding such additional labor imposed upon the company by throwing off the water falling upon a larger area.

8th. In regard to the rejection of the items of expense for the cutting of the wood and timber standing upon this section, we think there is no error in this part of the decree of the District Court. It was made the duty of the Draining Company to charge the expense of cutting, removing, and selling the timber to the proprietors of the "wooded land," and to credit them with the proceeds. Not having done so, the Draining Company cannot recover the cost of cutting the wood as a general charge against all the proprietors.

9th. The appellees further object, that the charge of interest up to the time of closing the general account and then charging of interest upon all the items, is interest upon interest, which is prohibited by law.

The anatocism results from the manner in which the company are directed to keep their accounts. By the second section of the Act of 1839, they were directed to open an account with the section of the swamp to be drained, and charge it with all the expenses incurred for the draining thereof, and it further provides that on every charge in said account, interest shall be calculated at the rate of ten per cent. per annum from the time it is made.

The third section provides, that as soon as the draining of the section is completed, the company shall make out a general account.

The fifth section of the Act provides, that the amount due upon each property for the draining thereof, as settled by the confirmed tableau, shall be payable in cash, with ten per cent. interest from the day in which the aforesaid account of the Draining Company shall have been closed.

We think these provisions fully justify the manner in which interest has been charged.

10th. In regard to the mode in which the assessment has been made, it is true the statute leaves great discretion in the appraisers, as respects the principles upon which their assessment is to be made. But this want of specific direction to these officers, does not render their acts void, or deprive the courts of power to approve such as they may think equitable and just. There is nothing in this record which satisfies us that the District Judge has adopted an erroneous basis upon which the assessment is directed to be made. We think it is supported by the testimony, or at least we have no data before us by which we could change it in one particular, with certainty that we were not doing a greater injustice to another class of the proprietors.

Whilst we feel the almost impossibility of doing exact justice among so many persons with conflicting interests, we are satisfied that whether we adopt the area or value of the lots, as the plan upon which the assessment is to be made, it will approximate the right so nearly, that less injustice and injury will be done by adopting either, than by sending this case back for prolonged litigation and further proof upon this question.

The principal that it cost as much to drain one foot of land of little value as it did to drain an equal area of land more valuable, and that both were alike benefited, prevailed as to all the lands below the ordinary level of high water, in the lower court. This seems to be recognized by the third section of the Act of 1839, which directed the appraisers in making the distribution, to take into consideration principally "the extent of the individual properties."

The large portion of the expenses which, by this view, is thrown upon the city for the streets, meets in some measure that equity which has been urged upon our consideration, that as this work has been undertaken for the public good, the public ought to bear the charge of it, notwithstanding the benefit to the owners of the soil.

It is therefore ordered, that the judgment of the Supreme Court heretofore rendered in this cause, be set aside and annulled. And it is now ordered, adjudged and decreed, that the judgment of the court below be avoided and reversed; and proceeding to pronounce such judgment as should have been rendered by the lower court, it is ordered, adjudged, and decreed, that the amended account D, filed on the 24th of February, 1854, be amended by adding thereto, as a credit to said New Orleans Draining Company, the sum of $32,449 32, on the interest account, and that said account thus amended, be homologated. And it is further ordered, adjudged and decreed, that the tableau marked A and B, filed on said 24th day of February, 1854, be also homologated, and the objection to said account D, and tableau A and B be overruled. And it is further ordered, adjudged and decreed, that there be judgment in favor of said New Orleans Draining Company, for the sum of $259,957 32, with ten per cent. interest per annum thereon, from the 10th day of January, 1851, until final payment, and that said New Orleans Draining Company recover said sum and interest by an assessment of four mills and 16,597–100,000ths of a mill, together with ten per cent. interest thereon, from 21st of January, 1851, on each superficial square foot of ground English measure, shown upon the plan book on file, excluding therefrom the portions of ground exempted from contribution, shown by said schedule A and B, and rating three superficial feet of high land as equivalent to one foot for the purpose of contribution, and that the payment of said contribution in principal and interest, be secured by a first mortgage and privilege upon the lands upon

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which the same are assessed. It is further ordered, adjudged and decreed, that the appellees pay the costs of the appeal.

SPOFFORD, J. I concur in the decree. For my views upon the constitutional questions, I refer to the dissenting opinion which I gave upon the former hearing of this cause.

BUCHANAN, J., dissenting. I still adhere to the opinion, read in May last, as that of the majority of the court, in this case.

The court, as then constituted, held, that the forced contribution imposed upon the lands lying in the rear of the city of New Orleans, but within its municipal limits, and within the limits of the operations of the Draining Company, according to the Act of 20th March, 1839, and the Act of 19th March, 1855, for the purpose of defraying the expenses of the operations of said Draining Company, with interest, and various other charges in said Acts specified, was a violation of the 123d Article of the Constitution, inasmuch as the drainage of the swamps in the rear of New Orleans is a work tending to the salubrity and benefit of the *whole* city of New Orleans, and is declared by the preamble to the said Acts of the Legislature to have been undertaken with that view. Further reflection has confirmed me in the correctness of the opinion thus expressed.

I will add that it appears to me no less clear, that the power conferred by the Act of 1839, upon the Draining Company, of assessing upon a portion of the lands embraced within the municipal limits of the city of New Orleans, a contribution for the reimbursement of expenses incurred for drainage, with interest, including the amount of contracts paid therefor, machinery, damages paid, labor of the company's slaves at thirty dollars per month each, and salaries of officers,—is, in fact, a power of taxation, which it is unconstitutional for the Legislature to delegate to a joint stock company, and is inconsistent with the taxing power vested in the municipal corporation by the various Acts incorporating the city of New Orleans, which are not repealed.

The inscription, by anticipation, of a mortgage and privilege for an undefined amount, in favor of the Draining Company, against each and every proprietor of land embraced within the company's operations, strikes me as amounting to a divestiture of vested rights, because it must render all property thus situated unsaleable, in the interval which elapses between the inscription of the decree creating the mortgage and privilege before the work is undertaken, and the homologation of the assessment and tableau of contribution after the work is completed.

The superiority which is given by the Act of 1839 to the mortgage and privilege of the Draining Company on the lands embraced in their operations, over all mortgages whatsoever, whether conventional, legal or judicial, is a provision divesting vested rights and impairing the obligation of contracts.

But this unconstitutional feature of the law, and the one immediately preceding, will be, perhaps, more properly examinable, when the consequences of the exorbitant privileges conferred upon the Draining Company shall be developed in their application to individual cases.

JUSTINIAN F. DAVIS *v.* CHARLES OAKFORD.

Answers by garnishees, which are manifestly evasive, ought not to be amended—such a practice might lead to frivolous delays. But where an answer is really responsive to the question, though it might be more comprehensive, it is within the discretion of the court to allow the garnishee to answer more fully, in cases where the questions propounded admit of a truthful, but at the same time of an unsatisfactory answer.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Smiley & Perrin, for plaintiff and appellant. *Bonford & Finney*, for defendant. *Durant & Hornor*, for garnishee.

LEA, J. In this case, a judgment creditor seeks to recover from a garnishee the amount due to him by his judgment debtor, on the ground that the garnishee, in whose hands a seizure under execution had been made, has made no direct, good, or sufficient answers to the interrogatories propounded to him under the process of garnishment. The whole issue between the parties has reference to the sufficiency of the answer to the first interrogatory propounded to the garnishee.

To the question "What property, goods, rights, credits, chattels and effects have you in your possession or under your control, belonging to the said defendant, at the service hereof, and to the time of filing your answer? Was not the value thereof sufficient to satisfy the said judgment, interests and costs? Give the particular kind and value of such property, effects, &c."—the answer is: "He says there is in their office a small lot of furniture consisting of a cotton-table, chairs, &c., the value of which does not exceed fifteen dollars, which is the private property of the defendant *Charles Oakford*, but which are in use in their business."

Now it may be assumed that this is not as full and complete an answer as the garnishee might have made to the questions such as they are.

The garnishee might have added that the property designated in the answer was all that he had in any manner under his control. Such a designation, however, may have been intended, and in the case at bar (as appears from other proceedings) no doubt was intended, to be a complete and truthful answer to the interrogatory propounded. We are not prepared to say that when question and answer are taken together, the answer is of that evasive character which would justify a judgment *pro confesso*. Answers which are manifestly evasive ought not to be amended, such a practice might lead to frivolous delays in the administration of justice; but where an answer is really responsive to the question, even though it might be more comprehensive, we think it is within the discretion of a District Judge to allow a garnishee to answer more fully, in cases where the questions propounded admit of a truthful, but at the same time, of an unsatisfactory answer; and we are not prepared to say that the action of the court in this case exceeded the limits of a sound and reasonable discretion.

Judgment affirmed.

NATHAN R. STRATTON *v.* LUBINS F. ROGERS.

If the heirs of full age, the estate being solvent, and no separation of goods applied for, have as heirs accepted the succession, purely and simply as to release its debts, the subrequent appointment of an administrator cannot revive them.

Parol evidence is inadmissible to explain a patent ambiguity in a marriage contract.

If the intention of the parties to a marriage contract cannot be discovered by the ordinary rules of interpretation, the contract must be declared void for uncertainty.

The meaning of Article 1738 of the Code is this: if the donor has made a donation to his wife simply of future property, and he survives her, the donation will fail, although there was issue of the marriage.

Construction of a marriage contract.

Code, 1728, 1730, 1737.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Magne, for plaintiff. *Durant & Hornor*, for defendant and appellant.

MERRICK, C. J. On the fourth day of May, 1853, the defendant being about to marry *Miss Emma Ann Shaw*, entered into a marriage contract with her, which contained the following provisions, viz:

"Art. 1. The said *Mr. Rogers* hereby declares that, after his debts and obligations, of whatever kind, are paid, he is worth, free of the world, more than the sum of $10,000, and that having neither ascendant, or descendant relatives, he, hereby, as a marriage present, *gives to the said Miss Emma A. Shaw, his future spouse, the sum of ten thousand dollars cash; which said sum of money the said future husband to the said future wife has, in cash, and in the presence of the undersigned notary and witnesses*, well and truly paid, the receipt thereof is hereby acknowledged, and full discharge and acquittance therefor granted. And it is hereby declared and understood, that this donation is made *inter vivos*, gratuitous and irrevocable, and that in case of the decease of the said *Mr. Rogers* before his said future wife, *without issue from the said marriage, that the said act of donation shall be a first lien and privilege on the property and effects* belonging to the said *Mr. Rogers*, and shall be first paid out of the property of his succession, Art. 2. This donation shall not act as a bar to the claim which, in case of his death before the said future wife, she may have on his estate and succession for the one half of the acquets and gains that may accrue during their married life."

The parties were married on the twelfth day of May, 1853, and lived together until the 20th day of February, 1855, when the wife died, without issue surviving her.

The mother and a major brother of the deceased promptly released the defendant from any obligation arising from the act of donation.

The plaintiff, a brother-in-law, caused himself to be appointed administrator of the succession of the deceased *Mrs. Rogers*, and has brought the present action in that capacity, to recover of the defendant the ten thousand dollars donated by the marriage contract to *Mrs. Rogers* by her intended husband; it being alleged in the plaintiff's petition, "that the ten thousand dollars were actually paid to her in cash, and then by her replaced in his hands and possession as her own (his wife's) property, and for which he acknowledged himself liable, as will more fully appear by a duly authenticated copy annexed to and filed with the present petition."

The defendant contends that neither he, nor his wife, knew the legal effect of the instrument they signed, and that the instrument was fictitious, that no money was paid, and that the sole object of the act was to secure to his said wife ten thousand dollars as a first privilege in the event she survived him.

The estate of *Mrs. Rogers* was solvent, and we discover no reason why the heirs of full age could not release their proportion of a supposed debt due to the succession. A subsequent administrator can only receive the succession in the legal condition in which he finds it; and if the heirs of full age, the estate being solvent and no separation of goods applied for, have so far accepted the succession, purely and simply as to release its debts, we do not know how the subsequent appointment of an administrator can revive them.

The plaintiff having successfully excluded all testimony explanatory of the intention of the parties to the marriage contract, that instrument must be considered as it stands, connected only with the fact that the parties were married, and that having lived together, subsequently the wife died. The case cannot be strengthened by the allegations in defendant's answer, unless they are all taken together, and then it would be of no advantage to plaintiff's case.

It must be admitted that the instrument sued upon is somewhat ambiguous, but that ambiguity is patent and does not justify the introduction of parol proof to explain it. It is the duty of the court to construe the instrument as a whole, ascertain the intent of the parties, and if possible, give effect to the same; but if such intent cannot be discovered by the ordinary rules of interpretation, the instrument is to be declared void for uncertainty. Speaking of this kind of contract, Troplong says: "Nul ne demande plus *de certitude*, de publicité et de solennité: il n'est pas seulement une règle pour les deux familles qui s'unissent et pour la famille nouvelle qui va sortir de cette union; il est encore une loi pour les tiers et la base du crédit des futurs époux."

The instrument before us can have but one meaning. To ascertain that, let us consider first the construction placed upon it by the plaintiff. He contends that the instrument was the donation of ten thousand dollars present property, which the donor then had in his possession. And he deduces from it this important consequence, viz: that such a donation shall not be deemed to be on condition of survivorship, unless the same be expressly mentioned. C. C., 1737. Now if this be assumed as the fact, the same instrument shows that this sum of ten thousand dollars was actually paid in cash to *Miss Shaw* eight days before the marriage, which receipt *was duly acknowledged and full discharge and acquittance therefor given*. Here then, according to the plaintiff's rule of interpretation, is a donation—*but it is paid and accomplished.*

In order therefore to recover, it is essential that the plaintiff should show that *Miss Shaw*, who had received and acquitted the ten thousand dollars paid her by her intended husband, delivered to him, in the interval of the eight days or after the marriage, the like sum of money. There is no proof to this effect. We have the contract, the marriage of the parties, and the death of the wife from which to infer this essential fact. They are clearly insufficient, and plaintiff's action fails according to his own interpretation.

But let us look at the whole instrument and see if it is not susceptible of another meaning, and if that other meaning is not the true one.

We find the two clauses just adverted to, extinguish each other. By the one payment is promised: by the other it is acknowledged to have been made. But there is a third clause which looks to the future and gives tone and charac-

ter to the whole instrument. It is in these words: "And it is further declared and understood, that this donation is made *inter vivos*, gratuitous and irrevocable, and that in the case of the decease of the said *Mr. Rogers* before his said future wife, without issue from their said marriage, *that the said act of donation shall be a first lien and privilege on the property and effects belonging to said Mr. Rogers, and shall be first paid out of the property of his succession.*"

The second article of the marriage contract also provides:

"That that this donation shall not act as a bar to the claims which, *in case of his death* before her, the said future bride may have *on his estate or succession, for the one-half of the acquets and gains* that may accrue during their married life."

The intent of the whole instrument we think was to secure to *Mrs. Rogers* at the death of her husband, out of his succession if she survived him, ten thousand dollars. It was not intended to take from his employment or means of living, the amount of money mentioned in the act, and the language used in the two first clauses of the Act which mutually cancel each other, must be considered as a mere form with which the parties chose to clothe their contract. If any bank check was used, the money was not intended to be drawn from bank, but such check to be immediately returned. The payment and receipt were not intended to be real, for the same sum was finally secured to the future wife at the death of the husband out of his succession, notwithstanding such payment and acknowledgment. The life of the instrument is in the clause looking to the future and securing to the intended wife at the decease of her future husband the sums of money promised.

This view is strengthened by these further considerations.

Money has no identity. The ten thousand dollars to be paid were such as *Rogers* should have or could be raised from his estate at the time of his death.

The recital in the act of donation as to *Rogers'* affairs would imply a doubt whether he was really worth, after his debts were paid, the sum specified in the act. The wife brought into the marriage no estate of her own. They lived at the wife's mother and afterwards at a private boarding house from their marriage until the death of the wife. It is but fair to presume, therefore, that the sum donated was considerable, with reference to the remainder of the defendant's estate. Hence it is hardly probable that the intention of the parties was immediately to withdraw from the defendant's means so large a sum, or even to give to the wife the right, any time during the marriage, to exact this sum, and control the same as her paraphernal property.

Again, if the donation had been intended as of present property and not as payable out of the succession of *Mr. Rogers*, the second article of the contract which provided that this payment, out of his succession, should not prejudice the wife's interest in the community, was not only surplusage but irrelevant.

Also, there can hardly be a doubt that if immediately after the instrument had been executed, the question had been propounded to the parties, whether in the event the wife should die first, without leaving children, it was their intention to take from *Mr. Rogers* ten thousand dollars and give it to his wife's relations? the response from both would have been in the negative.

The answer of the law to the same question is also, as we think, in the negative.

We have satisfied ourselves that this donation was really intended as a donation *in futuro* of the sum of ten thousand dollars, payable out of *Rogers'* succession. It was, therefore, the donation of future property. 4 Marcadé, No. 980. This class of donations is provided for by Article 1738 of the Civil Code, which is in these words:

"A donation of property in future, *or of property present and in future*, made between married persons by marriage contract, whether simple or reciprocal, shall be subject to the rules established by the preceding chapter with regard to similar donations made to them by a third person, except that it shall not be transmissive to the children, the issue of the marriage, in case of the death of the *donee* before the donor."

If we recur to the preceding chapter to ascertain what the rules thus referred to are, we find that the donation made by a third person by the marriage contract to either of the spouses, is given upon a condition. The last paragraph of Article 1728 is in these words: "Such a donation, though made for the benefit of the parties to the marriage or one of them, is always in case of the survivorship of the donor, presumed to be made for the benefit of the children or decendants to proceed from that marriage."

And by Article 1734 it is expressly provided that:

"Donations made to the husband or wife on the terms of Articles 1728 and 1730, fall, if the donor survive the *donee and his or her posterity*."

The meaning of Article 1738 is, therefore, this: If the donor has made a donation to his wife, simply of future property, and he survives her, the donation will fail, although there was issue of the marriage.

We attach no importance to the word irrevocable, used in the instrument. At most, it could only mean irrevocable by the acts of the donor. It could not be intended to imply that the instrument should not be revocable by the act of God, (the death of the wife) and the condition imposed by law upon the donation.

We think that the donation is revoked by the intention of the parties and the operation of the laws. We feel ourselves therefore relieved from the necessity of affirming the judgment which our brother of the District Court rendered with so much reluctance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower Court be avoided and reversed, and that there be judgment in favor of the defendant and against the demand of the plaintiff, with costs of both courts.

Succession of Daniel D. Vancourt.

D. D. V. jr., son of D. D. V., the deceased, mortgaged a house to G. The mortgage contained the pact *de non alienando*. G. transferred the mortgage, by public act, with subrogation to V., and afterwards D. D. V. jr., sold the property to his father, who died; and the property was duly inventoried as belonging to the succession. The succession property was ordered to be sold. The house was accordingly sold, and bought by M. In the meantime V. obtained an order of seizure and sale, under which the house was sold and V. became the purchaser. On a rule taken by the administratrix to raise the mortgage, it was *Held:* That the mortgage of V. was superior to the title of the

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deceased; and as the mortgage contained the pact *de non alienando*, V. had the right to pursue the property by executory process, not only in the hands of the administratrix, but against any purchaser of the property at the sale of the property of deceased.

APPEAL from the Second District Court of New Orleans. *Morgan*, J. *Culbertson* and *Le Gardeur*, for *Vasserot*, appellant. *Michel* and *Lemley*, for administratix.

MERRICK, C. J. On the eighteenth day of November, A. D. 1854, *Daniel D. Vancourt, Jr.*, the son of the deceased, *Daniel D. Vancourt*, mortgaged a house and lot in the Fourth District of New Orleans, to *E. G. Gottschalk*. The mortgage contained the pact *de non alienando*.

Gottschalk, by notarial act, transfered the mortgage to *Chaffrey Vasserot*, and subrogated him to his rights.

Daniel D. Vancourt, Jr., sold the mortgaged property to his father.

Daniel D. Vancourt, Sr., died, and the property mortgaged by his son was inventoried as belonging to his, the father's estate.

On the 16th day of November, 1855, an order of sale, issued from the Second District Court, for the sale of the property of the succession, and on the 22d day of December, of the same year, the house and lot in question were sold as the property of *D. D. Vancourt*, deceased, and bought by *A. A. Mellaerto* for $1,300. *Vasserot*, in the meantime, viz: on the 24th day of November, 1855, obtained an order of seizure and sale against *D. D. Vancourt, Jr.*, the mortgagor, for the sale of the mortgaged property. On the 12th day of January, 1856, the property was sold at Sheriff's sale, *Chaffrey Vasserot* became the purchaser for the sum of $1,350.

The administratrix of *D. D. Vancourt* took a rule upon *Vasserot* and other mortgage creditors, to show cause why the mortgages should not be erased and cancelled.

The rule was opposed by *Vasserot*, among other reasons on the ground that the Court had no right in this proceeding to deprive him of the benefit of his mortgage and purchase.

The District Judge was of the opinion that although he could not do away with any of the mortgagee's rights, he could order the sale of property within his jurisdiction and thereupon he made the rule absolute, but reserved to the mortgagees the right, if any they have, to claim the sums due them out of the proceeds of the sale, in the hands of the administratrix.

Vasserot appealed.

The District Court has fallen into error in not distinguishing, between the creditors of the intestate and those of a previous holder of the mortgaged property. *Vasserot* was not a creditor of *D. D. Vancourt*, deceased; hence he could not be compelled to appear in the *concourso* and contest his rights to the proceeds with the mortgage creditors of the intestate.

Vasserot's mortgage was superior to the title of *D. D. Vancourt*, deceased, his debtor was a former holder of the property, and having his mortgage protected with the pact *de non alienando* he had the right to pursue the property by his executory process, not only in the hands of the administratrix, but against any purchaser of the property at the probate sale of *D. D. Vancourt*, deceased. *Offut et al* v. *Hendsley et al*, 9 L. R. 14.

This is sufficient to dispose of the rule taken in this case, and it is unnecessary to pass upon any other matter discussed by the litigants.

It is, therefore, ordered, adjudged and decreed by the court that the judgment on the rule taken by widow *C. Vancourt*, administratrix, on *Chaffrey Vasserot* and others, be avoided and reversed as to the said *Chaffrey Vasserot*, appellant, and that the said administratrix and appellee take nothing by her said rule as against the said *Vasserot*, and that she pay the costs of both courts.

CHARITY HOSPITAL *v.* B. DE BAR.

The 4th section of the Act of 12th March, 1838, re-enacted in 1855, which provides that managers and lessees of theatres shall pay $500 per annum for the benefit of the Charity Hospital, is not unconstitutional; nor is it repealed by the Act of 1853, taxing managers and lessees of theatres $300.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Tappan & Holt and *T. J. Semmes*, for plaintiff. *Gould & Stansbury* for defendant.

VOORHIES, J.* The present action is founded on the 4th section of the Act approved the 12th March, 1838, which provides that the managers and lessees of theatres in New Orleans shall pay $500 per annum for the benefit of the Charity Hospital.

The plaintiff's claim is resisted by the defendant and appellant on two grounds. "First, that it is contrary to the Constitution of the State; and, second, that the law which gave to the plaintiff this source of revenue has been repealed."

We consider the question thus presented for our solution as already settled by the decision of our predecessors in the case of the *Charity Hospital* v. *Stickney*, 2 A., 551. Article 123 of the present Constitution is identical with Article 127 of the former Constitution, under which that decision was given. The provisions of the Act of 1853, taxing the managers or lessees of every theatre $300, are not, in our opinion, contrary to, or irreconcilable with those of the Act of 1838, re-enacted as one of the revised statutes. Hence, it follows, that the latter statute cannot be considered as repealed by implication.

According to the opinions of our predecessors, in which we concur, the price of the license for theatres is not, in its proper legal sense, a tax. "This term (taxes) in its most extended sense, says Bouvier in his Law Dictionary, includes all contributions imposed by the government upon individuals for the service of the State, by whatever name they are called or known." We do not think it can be said with any propriety that this contribution in favor of the Charity Hospital, is, according to the terms of this definition, a contribution for the service of the State.

It is therefore ordered and decreed that the judgment of the court below be affirmed with costs.

*The *Charity Hospital* v. *Diedrick* involved the same question as was decided in this case, and was decided in like manner.

Succession of Widow Victor Lerude.

It is not customary to file answers to oppositions made to tableaux of distribution; such answers being in the nature of replications. Oppositions in such cases are open to every objection of law and fact, such as minority, fraud, simulation, &c. In case of surprise a remedy may be afforded by a continuance, or a new trial.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J. *Filleul* and *St. Paul & Bouny*, for plaintiff and appellants. *Robert* and *Maurian*, for defendant.

Lea, J. This case comes up on appeal taken from the rejection of the opposition made herein by *Clementine Gamon* to the tableau of distribution filed by the administratrix.

The District Judge considered that the several claims set up in the petition of opposition were mere simulations. From a review of the evidence, we think this conclusion is well founded.

But the judgment is based upon evidence to the introduction of which the opponent objected, on the ground that no plea of fraud or simulation was filed by the administratrix. If notice be the object of pleading, the opponent had ample notice of this defence at every step of the proceedings had on the first trial, in which her claim was opposed exclusively on the ground of simulation. It is not customary to file answers to oppositions made to tableaux of distribution, such answers being in the nature of replications; oppositions in such cases are open to every objection of law and fact, such as minority, fraud, simulation, &c. In case of surprise, a remedy may be afforded by a continuance or even a new trial. In this case the opponent had the benefit of a new trial. The administratrix, both in her capacity as heir and as the representative of the creditors, none of whom have been cited as appellees, had a right to contest the validity of the admission contained in the notarial Act, which, it is to be observed, was not a contract, nor an act in any way affecting real estate or slaves, but a mere admission of an alleged pre-existing indebtedness. It was certainly competent for the representative of the estate to contradict by parole the reality of such an alleged indebtedness.

The 2256th Article of the Civil Code is not applicable to such a case. See 2 An. 92, 4 An. 501, 1 La. 239, 8 N. S. 541. On the merits we concur in the opinion of the District Judge, that at the death of Mrs. *Lerude* she was not indebted to the opponent.

Judgment affirmed.

Louis Surgi v. Henry Snetchman.*

An assessment on property in New Orleans, in front of which paving has been done, of a portion of the cost, is not forbidden by the Act of 4th May, 1847, section 1; such an assessment is not opposed to the letter or spirit of Article 127 of the Constitution of 1845, and Article 128 of the Constitution of 1852.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Redmond, for plaintiff. *Duvignaud*, for defendant and appellant.

Slidell, J.† The facts of this case have been stated in the opinion heretofore pronounced overruling a motion to dismiss the appeal.

As the amount in controversy is less than $100, our attention must be confined to the issue touching the constitutionality and legality of the resolution of the Common Council of New Orleans, ordering Louisa Street to be shelled, and the assessment of one third of the expense upon the property in front of which the shelling was done.

It might suffice to say that the resolution of the 28th July, 1853, which is declared by the defendant's peremptory exception to be illegal and unconstitutional, does not of itself appear to have imposed any liability upon the front proprietors, and consequently, the questions which have been discussed at bar do not perhaps strictly arise upon the pleadings.

But if the questions were fairly presented, we should be of opinion that an assessment upon the property in front of which paving has been done, of a portion of the cost, was not forbidden by the Act of 4th May, 1847, sec. 1st, Sess. Acts, p. 140. That section merely reiterates, with regard to the municipalities of New Orleans, the provisions of Art. 127 of the Constitution of 1845, relative to State taxation, with the proviso that "nothing contained in the Act shall be so construed as to impair any of the powers vested by existing laws in the General Council of the city of New Orleans." This section evidently refers to ordinary taxation for the purpose of filling the common treasury of each municipality. An Act of March 20th, 1840, p. 57, declared that "whenever the owner of any property in front of which paving shall be done by order of the Council of the Municipality within which it is situated, shall fail to pay the third part of the cost of said paving, *as he is bound to do by the existing laws*, such Municipality shall have a special privilege on said property for the reimbursement of one third part of the sums expended on such paving, which shall entitle it to be paid in preference even to a previous mortgage thereon." Bul. & Cur. Dig., 131. And by the Act of March 18th, 1850, sec. 8, p. 130, it was provided "that the Councils of said Municipalities shall have the right of laying special taxes for local improvements, when the owners of property thereby benefited are liable to be specially taxed conformably with existing laws, for the whole or a portion of the expense incurred for such objects. And whenever it shall be deemed necessary to make a new paving in any street or footway already paved, the owners of property fronting said street or foot-way shall also be liable to be specially taxed in the proportions established by existing laws; provided, a fair and adequate allowance be first made in their favor for the value of the materials of the old paving."

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* *Surgi* v. *Batalord*, decided at the same time as this case, involved the same question.

† Buchanan, J. took no part in this decision.

By the 22d section of the Consolidation Act, approved Feb. 23d, 1852, p. 43, all the powers, rights, privileges and immunities of the three Municipalities were vested in the city of New Orleans as at present organized.

It is a fair inference that in 1853, the power of imposing a special assessment upon the front proprietor to cover a portion of the costs of paving, which conferred a particular benefit upon his property, was by law vested in the City Council.

And we are of opinion that such legislation was not opposed to the letter or spirit of Article 127 of the Constitution of 1845, and Article 123 of the Constitution of 1852.

Our views upon this subject have been expressed in the recent cases of *Yeaman* v. *Crandell*, and *The New Orleans Draining Company*, praying for the confirmation of a tableau.

The other points made in the appellant's brief are not put at issue by his peremptory exception, save by a vague allegation that the resolution of the Common Council was "contrary to the law of the Legislature approved March 16th, 1850." This objection is too loosely pleaded to be noticed.

The judgment is therefore affirmed with costs.

WILLIAM FLORANCE *v.* MRS. SUSAN W. HILLS AND HUSBAND.

The licitation of property to effect a partition may be ordered, on proof by witness of its necessity, as well as upon the report of experts.
Code 1261.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Benjamin, *Bradford & Finney*, for plaintiff. *Goold & Stansbury*, for defendants and appellants.

MERRICK, C. J. The present is an action of partition.

The record presents the single question, whether the Judge may order the licitation of the property to effect a partition, on the simple proof of its necessity by witnesses, or whether the appointment of experts is not an indispensable prerequisite to such an order.

The appointment of the experts to make a report upon the practicability of making a partition in kind, and the calling witnesses to depose to the same matters, have the like object, viz: to inform the court of the feasibility of a partition or the necessity of a sale.

Of these two modes of proof, that by witnesses is often superior to the report of experts, for the number of the witnesses may be indefinitely increased and their testimony fully established by the test of a thorough cross-examination. Hence, in several instances, the reports of experts have been overruled after hearing witnesses.

In the case of *Millaudon* v. *Percy et al.*, 5 N. S. 555, it was decided that witnesses might be heard, in an action of partition, to contradict the report of experts upon the question—whether property was divisible in kind, without injury or not.

Article 1261 of the Civil Code, evidently contemplates that evidence may be administered in such cases, in any of the legal modes. It says: "When

the property is indivisible by its nature, or where it cannot be conveniently divided, the Judge shall order, at the instance of any one of the heirs, *on proof* of either of these facts, that it be sold at public auction, after the time of notice and advertisement prescribed by law and in the manner hereinafter prescribed."

In the case of *Kohn et al., Syndics*, v. *Marsh*, (an action of partition,) it was held, that the court might rescind the order appointing experts and resort to testimonial proof, in order to ascertain the necessity for a sale. 3 Rob. 49–50.

The report of the experts, when appointed, appears to possess but little value, unless it states all the facts upon which the opinion is based. 7 Ann. 530.

The cases cited by defendants' counsel, are not in conflict with the case of *Kohn et al., Syndics*, v. *Marsh*, 3 Rob. 49. In the case of *Placencia's Heirs* v. *Placencia*, 8 L. R. 576, Judge Bullard was speaking only of the necessity of proof when he remarked, that: "The sale must depend upon the fact that the property cannot be conveniently partaken in nature, which, according to the Louisiana Code, must be made to appear by the report of experts." In the case of *Lecarpentier* v. *Lecarpentier*, 5 An. 499, Judge Rost, after citing the preceding case, says of the matter before him: "In this case no experts were appointed, and *no evidence* of that fact (the indivisibility of the property in kind) was adduced," thus recognizing both modes of making the necessity of the sale to appear. The syllabus to the case does indeed state the law as contended for by the defendant, but the text does not warrant so broad a conclusion.

The necessity of the sale in order to effect a partition, sufficiently appears from the testimony of the witnesses, and the judgment of the lower court must be affirmed.

Judgment affirmed.

AUGUSTUS W. WALKER, Curator, *v.* J. W. GOSLEE.

The delivery of the effects of a deceased passenger to the agent of the administrator appointed in Massachusetts, before the appointment of a curator here, will discharge the master.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Miller, for plaintiff and appellant. *Thomas Hunton*, for defendant.

BUCHANAN, J. The evidence fails to make out a case of liability on the part of defendant for the effects of *Elias Jenkins*, left on board the steamer George Collier, at St. Louis, when *Jenkins* was taken to the hospital. The only witness on the subject is *L. McDonough*, who was clerk of the boat, and who declares that he took possession of those effects on his own responsibility, and without being authorized or directed thereto by defendant. In this respect, the present case differs essentially from that of *Malpicu* v. *McKown*, 1 L. R. 248, relied on by plaintiff. In that case, the effects of the passenger were inventoried after his death in the presence of the captain, who delivered them to another person.

Again, it is admitted, that the effects of *Jenkins*, taken possession of by *McDonough*, were all handed and delivered to *W. L. Cushing*, as the agent of *Nathaniel Jenkins*, of Boston, prior to the appointment of plaintiff as curator of *Jenkins*,* to wit, on or about the 30th October, 1852. The delivery would exonerate defendant from liability to plaintiff, even supposing defendant to be responsible for *McDonough* in the premises. For it is proved that *Nathaniel Jenkins* was appointed administrator of *Elias Jenkin's* estate, by the Court of Probates of Suffolk county, Massachusetts, on the 20th of September, 1852, and that he made his power of attorney to *W. L. Cushing*, on the 21st of September, 1852, authorizing him to collect and receive the effects belonging to said estate. The plaintiff was only appointed curator, by the Fourth District Court of New Orleans, on the 24th of May, 1853.

Judgment of the District Court affirmed, with costs.

MERRICK, C. J., with whom concurred VOORHIES, J. Without expressing an opinion on the point whether an administrator appointed in another State has the right to collect assets belonging to the deceased through an agent here, I think there was no want of care or diligence on the part of the defendant in depositing the goods with *Cushing*. They could not be kept upon the steamboat, and there is nothing in the record to show that *Cushing* was considered at that time, dishonest or untrustworthy.

I can concur therefore on this ground.

POLICE JURY OF WEST BATON ROUGE *v.* MARCELINE BERGERON, Curatrix, &c.

It is the effect of the inscription, and not the effect of the mortgage, which ceases at the expiration of ten years, unless there be a reinscription within that time; and hence the reinscription after ten years has effect only from the date of the reinscription.
Code, 3383.

APPEAL from the District Court, Sixth District, parish of West Baton Rouge, *Robertson*, J. *Favrot*, for plaintiff and appellant. *Herron*, for defendant.

VOORHIES, J. On the 5th of April, 1839, *François Bedat* mortgaged a tract of land, of eight arpents front on the Mississippi river, to secure the payment of a loan of $3200, obtained by him from the plaintiff as trustee of the legacy, under the will of the late *Julian Poydras*, in favor of the indigent girls of the parish of West Baton Rouge.

He stipulated, among other things, to pay annually ten per cent. interest on the loan, which was to be reimbursed after his death, or during his lifetime, at his option. On the 5th of September, 1842, he sold to *Daniel Contini* five of the eight arpents thus mortgaged, and the latter assumed his obligation to pay the loan.

Contini died without having discharged the obligation, and all the property of his succession, including the land conveyed to him by *Bedat*, was adjudicated to his wife, *Marceline Bergeron*. On the 26th of October, 1852, the land thus conveyed to *Contini* was sold by the Sheriff, under an order of seizure and sale, for the price of $1860 66¾, leaving a balance then due to the plaintiff, as seiz-

ing creditor, of $1853 66¼, with interest thereon at ten per cent. per annum until paid.

After the death of *Contini*, his widow, *Marceline Bergeron*, was married to *François Bedat*, who died seized as owner of the remaining three arpents of land thus mortgaged to the plaintiff. At the judicial sale of the property and effects of *Bedat's* succession, represented by the defendant as curatrix, said land was sold for the price of $1500, which the plaintiff claims to be applied by preference to the payment of said mortgage loan.

The general issue, and the prescription of five and ten years, are the only pleas contained in the answer.

The question presented to our consideration is the same as that decided in the case of *Sheppard* v. *New Orleans Cotton Press Company*, 2 An., 100, in which our predecessors held, in an elaborate opinion, since affirmed, that under Article 3333 of the Civil Code the effect of the inscription, and not the effect of the mortgage, ceased at the expiration of the ten years, unless reinscribed within that period; and hence the reinscription, after the expiration of the ten years had effect only from the date of such reinscription. In the present case, it cannot be pretended that the principal obligation is extinguished by prescription, and the reinscription of the mortgage, as its accessory, must, therefore, have effect from the date of such reinscription.

As the appellee has not filed an answer to the appeal praying for the reversal of the judgment rendered against her personally, it is not in our power to relieve her.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, except against the defendant personally, that the plaintiff recover of said defendant, as curatrix of the succession of the late *François Bedat*, the sum of fifteen hundred dollars, with preference upon the proceeds of the land, to bear date from and after the 24th of July, 1849, the date of the reinscription, to be paid in due course of administration, the costs of appeal and of the court below to be borne by said succession.

Gray, Macmurdo & Co. v. Lowe & Pattison et al.

An injunction issued to restrain the negotiation of a bill of exchange, which being dissolved, this suit for damages was brought on the injunction bond. *By the Court:* The rule of damages would seem to be that the probable loss sustained by a party in consequence of having been deprived of the free disposal of his own property should be the true standard; in other words, he should be placed as nearly as possible in the situation in which he would have been if the disturbance had not taken place. Consequential or vindictive damages cannot be allowed.

Plaintiff is entitled to recover lawyer's fees actually expended by him to obtain the dissolution of the injunction.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Elmore & King, for plaintiffs. *Goold & Stansbury*, for defendants and appellants.

Voorhies, J. This is an action for damages. *Gray, Macmurdo & Co.* were the holders of a draft of $5000, drawn by *Alexander Pattison, Jr.*, to the order of and endorsed by *William H. Pattison*, of the firm of *Lowe & Pattison*,

GRAY v. LOWE.

the drawees and acceptors thereof. On the 20th of October, 1851, *Lowe & Pattison* brought suit against *William Partee & Co.* and *Gray, Macmurdo & Co.* to recover the draft, on grounds which are concisely stated in the opinion of our predecessors; (7 An., 465) and to restrain its negotiation, sued out a writ of injunction. On the 26th of November, 1851, *Gray, Macmurdo & Co.* brought suit on the draft against *Lowe & Pattison.*

Both actions were then consolidated, and terminated in a judgment whereby the injunction was dissolved, and *Gray, Macmurdo & Co.* recovered of *Lowe & Pattison* the sum of $5254, being the amount of the draft, with damages at five per cent., and the cost of protest, with five per cent, interest from the 14th of November, 1851, until paid. The injunction bond therein given by *Lowe & Pattison*, with *Fearn, Donegan & Co.* as sureties, for the sum of $2000, forms the basis of the present action.

The damages of which the plaintiffs complain are alleged to consist in lawyers' fees, which they were compelled to pay to have the injunction set aside, and in the trouble, labor and annoyance to which they were subjected in attending to the defence of the case, and also damages which resulted from the inability to negotiate the draft in consequence of the injunction.

The defendants answered separately by pleading the general issue.

The cause was tried by a jury, who found a verdict in favor of the plaintiffs against the defendants for the sum of $2000, the full amount of the bond. After an unsuccessful attempt to obtain a new trial, the latter appealed from a judgment thereon rendered against them.

In cases of this kind, we think the doctrine as to the standard of damages is well settled under our jurisprudence. It is clear that consequential or vindictive damages cannot be allowed. The rule would seem to be that the probable loss sustained by a party in consequence of having been deprived of the free disposal of his own property, should be the true standard; in other words, he should be placed as nearly as possible in the situation in which he would have been if the disturbance had not taken place. 6 L. R., 169; 11 R., 146.

It is not pretended by the appellees that they have not realized the full amount of the draft, damages and interest, as awarded by the judgment in their favor. But even if it were, we think their objection on the trial below to the admission of proof of the payment of that judgment, coupled with the other circumstances, would afford a sufficient presumption of such payment. In *Hutchinson* v. *Sparks*, 3 An., 548, it was held that the withholding from the party the evidences of debt upon which he desired to raise money should not induce a more rigorous measure of damages than withholding a like sum of money, and in such case the measure of damages would be interest. On this score it is, therefore, clear that the plaintiffs are not entitled to any damages.

But it is urged that the appellees are entitled to recover as special damages the amount paid by them for professional services rendered in the injunction suit. In the case of *Jones* v. *Doles*, 3 An., 388, an action for damages on a sequestration bond, it was held that, in the assessment of damages, the reasonable expense of counsel employed in the former suit was allowable. But we understand the rule to be with the qualification as laid down in the case of *Penney* v. *Taylor*, 5 An., 714, which was also an action for damages on a sequestration bond, in which it was held that the plaintiff, who had paid his counsel $250 for their professional services in the suit, was entitled to recover as damages the portion thereof fairly due for the services relating to the release

of the vessel from the sequestration. In all cases quoted, in which counsel fees were allowed as damages, such fees appear to have been for services rendered in relation to the release of the property. It follows, therefore, that the plaintiffs can only recover as damages such amount as they may have expended for professional services relating to the dissolution of the injunction.

The sum of $500 appears to have been paid by them for professional services rendered by *Messrs. Elmore & King*, in the case of *Lowe & Pattison* v. *Gray, Macmurdo & Co.* The record of that case shows that a rule was taken by the counsel to set aside the injunction on the ground of the insufficiency of the affidavit and bond; and the rule was discharged without prejudice to the rights of the parties.

We think, under the circumstance, the sum of $100 would be a just and equitable allowance as damages for the services relating to the injunction. It is obvious from the evidence that *Lowe & Pattison* had reasonable grounds to believe that they had a good cause of action, and were not prompted by malice in the institution of their suit against the plaintiff. In the legitimate exercise of their regal rights they cannot be considered in fault, and hence they are not bound to repair all the damage which the plaintiffs may have sustained thereby. 14 L., 50; 11 ibid, 238.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, that the plaintiffs recover of the defendants, *in solido*, the sum of one hundred dollars, and that said plaintiffs and appellees pay the costs of this appeal.

Bazilie Fuselier, Wife, &c., v. J. D. Babineau.

Equity will not permit the plaintiff and her husband to obtain a judgment against the surety of the tutrix, without accounting for so much of the funds of the plaintiff as were diverted to pay the individual debt of the tutrix and her husband to the plaintiff's husband. The husband is a co-plaintiff in this suit, and it has been shown that the funds of the minor have been received by him in payment of a debt due to him individually by plaintiff's tutrix and her husband.

The judgment against the principal debtor has not the force and effect of the thing adjudged against the surety. It is *prima facie* evidence against him, but the surety is at liberty to show errors and mistakes in the judgment, as well as to show that it was obtained by fraud.

APPEAL from the District Court, Fourteenth District, Parish of St. Martin.

Simon and *Mouton*, for plaintiffs. *Olivier* and *De Blanc*, for defendants.

Merrick, C. J. The plaintiff is the granddaughter of *Julie Ozenne*. Her father died in the year 1837, having survived his wife, *Melanie David*, the daughter of *Julie Ozenne*, who had *Simon David* for her first husband. In the year 1838, *Julie Ozenne*, who had, after the death of *Simon David*, married *Ursin Ozenne*, was appointed tutrix to the plaintiff. She gave bond in the sum of $30,000, with the defendant and *Antoine Beauvais* as her sureties.

The plaintiff having married *Gabriel Fuselier*, who appears to have been the cousin of the plaintiff, and being thereby emancipated by marriage, instituted her action against her grandmother and *Ursin Ozenne*, to compel them to render an account. The suit was brought in the parish of Pointe Coupée, and was not defended on the part of the grandmother and her husband further than

to sign a general denial, which was prepared for them by the plaintiff's counsel in that case, and filed by him as answer to the suit. The plaintiff, on the *ex parte* trial thus obtained, had judgment for $27,072 83. Having made only $18,984 09 on execution against her grandmother, she brings this suit against the defendant, as surety on the bond of the tutrix, to recover of him the remainder of the judgment.

In the interval between the appointment of *Julie Ozenne* as tutrix and the institution of the suit against her to compel her to render her account, she and her husband being embarrassed, placed in the hands of *L. Janin*, the attorney of the tutrix of *Gabriel Fuselier*, the plaintiff's husband, he then being a minor, certain claims due the plaintiff, which were to be collected by *Janin*, and appropriated to extinguish a debt due by *Ozenne* and wife to *Gabriel Fuselier* and certain other creditors of *Ozenne* and wife. Accordingly *Mr. Janin* having collected, among other assets, in 1833, for *Mrs. Ozenne*, as tutrix of the plaintiff, $2484 51, applied it to the notes which *Ozenne* and wife individually owed to the minor *Gabriel Fuselier*, who afterwards became the plaintiff's husband.

Judgment was rendered in the lower court against the defendant in this suit, allowing him, however, a credit on account of commissions due the tutrix, and for the maintenance of the minor, which had not been allowed in the judgment against the tutrix, and also allowing a credit for the amount made on execution. By reference to the pleadings filed since the judgment was rendered against the defendant, and by the execution issued since the devolutive appeal was taken in this case, there is great reason to think that *Julie Desire Beauvais*, wife of *Hiliare Gradnigo*, and sole and unconditional heir of *Antoine Beauvais* the co-surety of the defendant, together with her husband, is the proprietor of this claim now in suit against *Babineau*. If such is the case, it is evident that a portion of plaintiff's demand has been extinguished by confusion.

The testimony of *L. Janin*, although not referred to in the minutes of the testimony, has been used by counsel on both sides, and referred to in their briefs, and we have considered it.

We do not think that equity will permit the plaintiff and her husband to obtain judgment against the surety of her tutrix without accounting for so much of the funds of the plaintiff as were diverted to pay the individual debt of the tutrix and her husband to the plaintiff's husband. He is a party, as plaintiff, in this suit, and it is shown, as we think, by the testimony, that the funds of the minor have been received by him to pay a debt due by persons who had no just right to make such an appropriation.

It is true that this appropriation was made by the intervention of others, but that does not change its character. The fund, by the acts of *Gabriel Fuselier's* agents, is in his hands, and he ought to be held to account for it to his wife as having received so much of her estate. He, so far as the record informs us, administers his wife's estate, and we see no reason why he should not be treated in this respect as an administrator of a succession who is indebted to it.

An administrator is not compelled to collect the debt of himself, which would be absurd; but he is charged directly with so much money in his hands due the estate, and so we think both the wife and third parties, who have the right of subrogation to her rights, are authorized to consider the husband who has funds belonging to her. We cannot stand by and see the funds belonging to minors and creditors misapplied to the prejudice of sureties, particularly where

we have the parties benefited by such misapplication before us jointly in the demand against the surety.

It has been objected that, in the absence of any charge of fraud, there are no sufficient allegations in the defendant's answer to justify the court in inquiring into the basis upon which the judgment against *Ozenne* and wife was rendered. It is true there is no charge of fraud made in the answer, but it is alleged that the judgment was rendered *ex parte*, and for a much larger amount than plaintiff is entitled to. We do not understand the judgment against the principal debtor to have the force and effect of the thing adjudged against the surety. It is *prima facie* evidence against him, but the surety is at liberty to show errors and mistakes in the judgment as well as to show that it was obtained by fraud.

We think that justice requires that this case should be remanded, and that leave should be granted to the defendant to amend and claim a credit for such sums as *Gabriel Fuselier* has received by the transfer of claims from, or by collections on demands belonging to the estate of his wife under the administration of her tutor, and also leave to allege and prove any confusion which may have taken place by the purchase by *Mrs. Grudnigo* of the plaintiff's demand. We leave open for a new trial the plea of *res judicata*, set up by the defendant as to *Mrs. Ozenne's* interest in the succession of *Judge Adolphe Fuselier*, deceased.

It is, therefore, ordered, adjudged and decreed by the court that the judgment of the lower court be avoided, reversed and annulled, and that this cause be remanded for a new trial, with leave to the defendant to amend in conformity to the views herein expressed.

STATE *v.* JOHN SHIELDS.

On a trial for murder the Judge told the jury that "murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict in order to deter others from crime." *By the Court:* Such a charge was calculated to impress upon the minds of the jurors that in all cases of murder they were not at liberty, or, at least, could not with propriety exercise that discretion which is expressly conferred by the statute of 1846, which declares that in *all cases* where the punishment demanded by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, "without capital punishment." We think the discretion of the jury should not have been trammelled by instructions which were not only calculated to secure an unqualified verdict, but might have been construed by the jury into an intimation of the opinion of the court as to the guilt or innocence of the prisoner.

APPEAL from the First District Court of New Orleans, *Robertson*, J.

Moïse, Attorney General. *J. Q. Bradford* and *Field*, for appellant.

LEA, J. *John Shields*, having been found guilty of murder, is appellant from a sentence of death rendered in accordance with the unqualified verdict of the jury.

One of the grounds relied upon for a reversal of the decree does not differ materially from that which has already been considered in the case of the *State* v. *Obregon*, in which the prisoner was accused of arson.

On the trial of that case in the court of the first instance, the District Judge

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instructed the jury "that it was their duty to find an unqualified verdict if the case was clear." This charge was held to be erroneous, as being "tantamount to an instruction that if a person was found guilty of arson he should always be punished with death, for, unless the case was clear beyond all reasonable doubt, they could not find the prisoner guilty at all."

In the case at bar the charge of the court was similar in meaning and in its necessary effect upon the minds of the jury. The court remarked to the jury: "Murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict in order to deter others from crime."

Such a charge was calculated to impress upon the minds of the jurors that in all cases of murder they were not at liberty, or, at least, could not with propriety exercise that discretion which is expressly conferred by the statute of 1846, which declares that in *all cases* where the punishment demanded by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, "without capital punishment."

We think the discretion of the jury should not have been trammelled by instructions which were not only calculated to secure an unqualified verdict, but might have been construed by the jury into an intimation of the opinion of the court as to the guilt or innocence of the prisoner.

It is ordered, that the judgment of the District Court in the case of the *State* v. *John Shields* be reversed, and the verdict of the jury set aside, and that the cause be remanded for a new trial according to law.

THOMAS AND CATHARINE FITZGERALD *v.* ROBERT FERGUSON.

Where a person is injured by the carelessness of a slave, the lessee of the slave is the person first liable to respond in damages, under Article 2299 of the Code.

Where a slave occasions injury to any one by his negligence, and the lessee has not induced it by any want of vigilance or care on his part, the lessee may recover against the owner of the slave an indemnity for such damages as he may have been obliged to pay third parties.

C. F. was injured by the carelessness of a slave in driving a carriage; the slave was hired to defendant, but the title was in B. Plaintiff obtained a judgment for damages, and B. abandoned the slave, who did not bring enough to satisfy plaintiff's judgment, and the balance was claimed from defendant—*Held:* that in the particular case, both the owner and the lessee were relieved by the abandonment. *By the Court:* Whether there may not be cases where the parties would not be permitted to relieve themselves from a responsibility by a surrender of the slave as in those cases where particular skill and experience are required, and an incompetent slave is employed as a workman, it is not necessary for us to determine.

Code 180, 181, 2300.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Cotton & Dorsey, for plaintiffs. *Hunton & Bradford*, for defendant and appellant.

MERRICK, C. J. *Robert Ferguson* was the lessee of a slave, hired to him by *René H. Brunet*, in whom the legal title to the slave was vested, although *Brunet* held the slave for the benefit of some person in England, and hired out the slave as agent of such person.

While in *Ferguson's* employment, and driving a one horse carriage belonging to the defendant, the slave negligently and carelessly drove against the plain-

tiff, *Catharine Fitzgerald*, as she had alighted from an omnibus, and was crossing to the side-walk. The plaintiff was thrown down by the force with which she was struck by the horse, and she and her child were run over by two of the wheels of the vehicle, she being permanently injured, as testified by the physician.

The action is brought to recover damages for the injuries sustained by her. *Brunet* is also made a defendant. The District Court gave judgment against the defendants *in solido* for one thousand dollars, and *Ferguson* has appealed. The defendant, *Brunet*, within three days after the decree, surrendered the slave in satisfaction of the judgment rendered against him, under an *ex parte* order of the Judge, who had pronounced the decree. Since the appeal has been taken in this case, the slave has been sold, and the proceeds are in the hands of the sheriff, awaiting the decision of this case by consent.

We think the proof of the injuries sustained by *Mrs. Fitzgerald* justified a judgment for some amount of damages. Whether for the exact amount rendered, it is unnecessary to inquire.

The questions therefore presented by the case are, is the lessee responsible for the act of the slave? If so, has he or the person injured any further recourse against the owner? And if he has, will the abandonment of the slave by the owner, relieve both from any further responsibility, or one only?

In considering these questions in their order, we remark that the employer is responsible for the negligence or carelessness of the workman or servant in his, the employer's, ordinary business, even though that servant or workman be free.

In the case before us, if the defendant, *Ferguson*, had employed a white person as his carriage driver, and the accident had occured under precisely the same circumstances, that is from mere carelessness, and without any wilful intention of doing injury on the part of the driver, he would have been responsible for the act. We can see no reason why, therefore, he should not be responsible in like manner when he employs a slave. In the case of an injury occasioned by the servant who is free, the party injured has his remedy against either the servant or employer. In the case of the slave, the first person to respond for the injury under Article 2299 of the Civil Code, would seem to be the person who has the slave immediately under his control, and who commands his services and obedience as master for the time being, and so it has been expressly ruled in the case of *Gaillardet* v. *Demaries*, 18 L. R., 492. In the 2d Annual, 406, in the case of *Collingsworth* v. *Covington*, it is said: That Article 2299 does not refer to slaves. This is true in the sense intended in that case, which was an action directly against the owner for the injury done by his slave to the plaintiff, his overseer. That case was correctly decided by Articles 180, 181 and 2300 of the Code, which alone were applicable. But when the suit is brought against the lessee of the slave, it may happen that the owner will not be liable at all, whilst the lessee ought to be held responsible for the whole damage done. Suppose, for instance, a slave is hired as a field hand, and the lessee makes him his carriage driver, or sets him at some mechanical employment, by which an injury is occasioned by his want of skill and negligence. Here it would be evidently unjust to hold the owner responsible, and it would be equally unjust to allow the party to escape who has occasioned the injury by setting at a difficult employment, a person manifestly incompetent. We think, therefore, the lessee must be held responsible.

If the person who does the injury is not the slave of the *lessee*, he is, as to the relation between them, in every sense of the word, a servant, which is not prevented by being the slave of another.

It is also apparent from what has just been said that the owner of the slave ought not to be held responsible for the merely negligent acts of his slave, unless the slave has been employed in business to which he has been accustomed, and for which he was hired. Where he is so employed and occasions an injury by his negligence, and the lessee has not induced it by any want of vigilance or care on his part, we think the lessee may recover against the owner of the slave, an indemnity for such damages, as he may have been obliged to pay third parties. In the case of a free servant, the employers could recover against the servant for such damages as he had been obliged to pay to a third person on account of the carelessness of the servant, and we can see no good reason why the owner, who hires out his slave for a particular employment, should not be responsible if he does not possess the requisite skill or intelligence for that employment.

The parties, lessee or lessor, stand in such a case as to third parties as defendant and warrantor.

Now, in the case before us, had *Ferguson* been the owner of the slave, he would have had the right to abandon him in satisfaction of the judgment, within three days after its rendition. It must follow that *Brunet*, the legal owner, has the like right to relieve himself from his responsibility as warrantor, for the acts of his slave.

The next question is, does the surrender of the slave, release *Ferguson* as well as *Brunet?* The reason to doubt is that *Ferguson* is not the owner of the slave, and had it been a white servant who had occasioned the injury, the employer, in case of responsibility, would have been bound absolutely for any amount.

On the other hand it seems inequitable that the master should be able to free himself from responsibility by a surrender of the slave, and that the lessee who has only a temporary interest in the services of the slave should be held, as in this case, for two or three times the value of the slave by the surrender of which the owners had been released.

The *actio noxalis* for the injuries done by slaves, and *actio de pauperis* for injuries done by animals were both *quasi* actions *in rem*. Omnis autem noxalis actio caput sequitur. Nam si servus tuus noxam commiserit: quamdiu in tua potestate sit, tecum est actio. Si autem in alterius potestatem pervenerit; cum illo incipit actio esse. At si manumissus fuerit; directo ipse tenetur et extinguitur noxae deditio. Ex diverso, quoque directa actio noxalis esse incipit. Nam si liber homo noxiam commiserit et is servus tuus esse coeperit (quod quibusdam casibus effici primo libro tradimus) incipit tecum esse noxalis actio quæ ante directa fuisiet. Just. 4, 8, § 5. 7 L. R., 590.

We think so much of this character of the original noxal action may be supposed to remain as to relieve, in the particular case before us, both the owner and lessee by a surrender of the slave.

Whether there may not be cases where the parties would not be permitted to relieve themselves from responsibility by a surrender of the slave, as in those cases where particular skill and experience are required, and an incompetent slave is employed as a workman, it is not necessary for us to determine. The fact that the slave had taken two other negroes in the vehicle to ride with him

accounts for his want of attention in driving, at the time of the accident. There is nothing in the record to show that he was incompetent as a driver, or that he was employed about a business for which he was not hired.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment appealed from be amended by adding thereto the condition that said sum of one thousand dollars and costs, shall be discharged and satisfied by the delivery or surrender of the slave *Davis*, or his proceeds to the sheriff within three days after the judgment of this court shall be ordered to be executed by the lower court, of which notice shall be given the defendants; and it is further ordered that the judgment so amended be affirmed, the plaintiff and appellee paying the cost of the appeal.

MARCEL DOUATT *v.* AUGUSTE LOUGE.

It is incompetent for a maker of a promissory note, secured by authentic act of mortgage, in which the note is said to be given for money borrowed of payee—to prove by parol, especially against a third person, not a party to the mortgage—that the payee had acknowledged that no consideration had passed for the note.

APPEAL from the Second District Court of New Orleans, *Morgan*, J. *Magne*, for plaintiff and appellant. *Tissot*, for defendant.

BUCHANAN, J. The plaintiff relies upon two bills of exception. The first is to the rejection of parol evidence to prove fraud and simulation, in a notarial act of mortgage, and that the payee of the promissory note of plaintiff, secured by said mortgage, had acknowledged that there was no consideration given for said note.

The party who offers this evidence is the very party who is said to have committed the simulation. For this suit is an injunction of executory process issued upon a promissory note of plaintiff, secured by mortgage by authentic act, in which plaintiff (the mortgagor,) declares the note to have been given for money borrowed of the payee.

It was incompetent for plaintiff to make proof, atleast by parol, and more especially against a third holder of the note, who was not a party to the act of mortgage. See *Labadie* v. *Poydras*, 3d Annual, 154, and the cases there cited.

The second bill of exceptions is to the admission, on the part of defendant, of a notarial act of subrogation of the right of mortgage made by the payee of the note in question to defendant. The ground of plaintiff's objection to this act of subrogation, is stated to be that the act contains declarations which are not binding on plaintiff, who was no party thereto.

The Judge below did not err. The act was a necessary part of defendant's proof, and could not be divided. The essential fact which it established was the transfer of the original mortgagee's rights to the defendant. And as to the declarations of which the plaintiff complains, it may be observed, that they are but recitations of other authentic acts, to which the plaintiff was a party.

No affidavit was necessary for obtaining the executory process. *Roulette* v. *Shepherd*, 7 N. S., 516.

Judgment of the District Court affirmed with costs.

Robert Flemming *v.* P. Rotchford et al.

The removal of a mortgaged slave from Louisiana to Alabama, and his subsequent sale there, cannot be set up in this State as a bar to the mortgage existing prior to his removal.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Rawle, for *Crain*, appellant. *E. A. Bradford*, *Durant & Horner*, *Rozier* and *Penrose*, for different defendants.

Merrick, C. J. A motion to dismiss the appeal in this case was overruled in May last. See 10 An.

The case, upon its merits, has turned principally upon the effect to be given to a private act of sale (which purports to have been passed in the State of Alabama) of the slave in controversy.

The plaintiff contends that having bought the slave of *John Ward*, in Alabama, where he alleges the slave then was, he acquired him as personal property, free from incumbrances, and that he is so entitled to hold the slave here.

The slave having been subject to the judicial mortgage in favor of *E. A. Bradford* against *George P. Bowers*, at the time of the sale from *Bowers* to *Crane*, the plaintiff must take his title subject to the incumbrances which existed upon it at the time his vendors acquired title to it in Louisiana. The subsequent removal of the property from Louisiana to a common law State, and a sale of it there, could not be set up in this State as a bar to the judicial mortgage existing upon it prior to its removal.

It is proper to add, that none of the transfers in plaintiff's chain of title were recorded, and *Bradford* was not bound to notice them in the proceedings under his judgment.

It has been recently decided by this court, that a judgment by confession, when duly recorded, operates as a judicial mortgage.

Judgment affirmed.

John Maginnis *v.* Henry C. Crosby.

A partner whose interest in the partnership is for two-seventeenths of the profit and loss, is liable in that proportion to one of his copartners who extinguishes this liability to third persons, whether by payment or novation.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Emerson & Huntington, for plaintiff. *Rand*, for defendant and appellant.

Spofford, J. The plaintiff, the defendant, and others, were formerly partners in the True Delta newspaper establishment, under the style of *John Maginnis & Co.* The main object of the partnership was the publication of the newspaper, but, as usual, there was connected with it the business of job printing.

The defendant becoming dissatisfied, sought and obtained a dissolution and liquidation of the partnership, before the First District Court of New Orleans, at a time when that court had jurisdiction of civil causes.

The establishment was sold, and the liabilities were found largely to exceed the assets.

The plaintiff, alleging that he had paid the entire balance of the indebtedness, which had not been satisfied by the assets distributed under the orders of the First District Court, afterwards sued the defendant in the Sixth District Court for a contribution of two-seventeenths of said balance, that being the proportion of the defendant's interest in the partnership.

The plaintiff had a verdict and judgment for $2,563 02, and the defendant has appealed.

1. We regard the point concerning the correctness of the Judge's charge as to the mode of attacking the judgment of the First District Court between the same parties, to be immaterial, under the pleadings. That judgment was unappealed from and was *prima facie* correct. If it could have been attacked by the defendant in this suit, it was not attacked by any such averments or evidence as would authorize the court to question its correctness.

2. The same remarks apply to the position, that the judgment of the First District Court could form no suitable basis for this action, until a year had expired from its date, because the parties had that time within which to prosecute an appeal. No exception was taken on this score in the defendant's pleadings in this suit, nor was the correctness of the judgment impeached by any evidence.

3. The defendant contends that he and the plaintiff were not commercial partners; that therefore they were not bound *in solido* for the debts of the partnership, but only jointly; and that, as the sole basis of the plaintiffs' demand is the supposed legal subrogation which arises from the payment alleged to have been made by the plaintiff of the partnership debt, the action must fail, inasmuch as the plaintiff was not bound *for* or *with* the defendant, and so had not an interest in discharging the defendant's share. C. C. 2157.

It is not material to decide whether this was a commercial or a particular partnership. The doctrine of subrogation has nothing to do with the plaintiffs' right of action, as no liens, mortgages or privileges, are claimed by him. His right to recover, rests upon the position that he has done the defendant's affair, by paying the defendant's debt. If they were commercial partners, they were bound *in solido*, for the debts which the plaintiff says he has paid; if they were ordinary partners, the defendant was bound (towards the creditors) for his virile share, in proportion to the number of partners, which far exceeded what he would owe his partners on a settlement *inter se*, since his share of profit or loss was limited to two-seventeenths of the whole.

If the plaintiff has paid the whole amount of the partnership losses, he has a right to claim a contribution of two-seventeenths from the defendant, even if they were ordinary partners. This is an inference of law from the terms of the partnership agreement.

4. The only remaining question is, has the plaintiff satisfied the debts of the firm of *John McGinnis & Co.*; for it is not denied that the alleged indebtedness really existed. The appellant argues that some of these debts have been novated merely by the substitution of the plaintiff's individual obligations for the extinguished partnership liability. We deem this immaterial, for if the

McGinnis v. Crosby.

defendant has been discharged from an absolute pecuniary liability, he has been benefited to that extent by the plaintiff's act, and he is liable to reimburse him, in the ratio of two-seventeenths of the entire balance of the indebtedness of the partnership, after deducting all its assets. The proof is sufficiently clear of the amount of that balance, and that the partnership has been discharged from liability for it, by the act of the plaintiff. For this service, he is entitled to an indemnity.

Judgment affirmed.

ROBERT B. WOODWORTH, for the use of WARREN STONE and ALEXANDER GRANT, *v.* LEVIN J. WILSON.

Plaintiff was liable on certain notes on which M. was primarily bound. M. died; and plaintiff having applied for the curatorship of M's estate, was induced to withdraw his application at the instance of defendant—who having an interest in the estate of deceased—agreed to deliver a certain quantity of lumber to plaintiff, at certain designated times, equal to the amount of the notes. *Held:* there is nothing immoral in such a contract; and defendant having failed to deliver all the lumber within the stipulated period, his liability to plaintiff is absolute for the amount of the notes, less the value of the quantity of lumber actually delivered.

Quære. Whether it is not against the policy of the law to enforce any contract which directly or indirectly has for its consideration the withdrawal of the applicant for the office of Executor, Curator, or Administrator of a succession, in order to secure the appointment to another?—MERRICK, C. J.

APPEAL from the First District Court of New Orleans, *Buchanan*, J. *Bartlette* and *Clack*, for plaintiff and appellant. *Roselius*, for defendant.

LEA, J. *Robert B. Woodworth* being the endorser of a note drawn by *S. C. Mauson*, and the drawer of another made for *Mauson*'s accommodation, made application, upon the death of *Mauson*, for the curatorship of his estate. This application was opposed by the defendant, *Levin J. Wilson*, who was the son-in-law of the deceased. For the purpose of inducing *Woodworth* to withdraw his claims to the curatorship, *Wilson* signed the following obligation:

"New Orleans, December 28th, 1841.

"I agree to deliver *to R. B. Woodworth* lumber to the amount of two notes held by *Messrs. Cucullu, Lapeyre & Co.* and *Alexander Grant*, amounting to $2,377 08, in consideration the said *Woodworth* agree to give me the said notes and withdraw all claims as Syndic or Curator of the estate of the late *S. C. Mauson*, the price of lumber to be as follows: prices flooring dressed, $28; weather boarding, $12 50; inch 1¼ flooring, $14; scantling and inch boards, $12 50. The above prices *Mr. R. B. Woodworth* agrees to guarantee and use all diligence to realize a higher price, which if done, he, said *Woodworth*, is to give me strict account of the same. I further agree to deliver to said *Woodworth* the lumber at following time, say, one, two, three and six months, and sooner if convenient, and at New Basin, New Orleans.

L. J. Wilson."

This document is the basis of the litigation between the parties, and upon its proper construction depend their respective rights. The document is evidently drawn up by a person not accustomed to composition, and is expressed in obscure and incorrect language. The circumstances, however, under which it

was executed are so clearly established by the evidence, that we think there is no difficulty in arriving at a correct interpretation of the true intent and meaning of the parties. We think the identity of the notes annexed to the petition with those referred to in the document sued upon, is sufficiently established; and the fact that the stipulations therein contained were acted upon by both parties, we consider sufficient proof of an acceptance by *Woodworth*.

What then was the nature of the obligations which the parties respectively contracted? It has been argued as if it were a contract for the purchase of lumber, deliverable at fixed periods and at certain prices; but we think a perusal of the document itself (to say nothing of the explanatory evidence) will show that it is wanting in the essential ingredients of a contract of sale. It is true *Wilson* agrees to *deliver* lumber to *Woodworth*; but for whose account? clearly for his own. *Woodworth* agrees to sell the lumber; it is true he GUARANTEES to *Wilson* a minimum price, but in the same sentence he agrees "to use all diligence to *realize* a *higher* price," and if successful, "to *give a strict account of the same*" to *Wilson*. This language absolutely repels the idea of a sale. A vendee cannot be accountable to his vendor for the re-sale of the property purchased; far less is he bound to credit his vendor with the proceeds of the re-sale.

It is evident that *Woodworth's* position was that of an agent with an interest in the agency. As we understand the relations of the parties, they are substantially as follows: *Woodworth* was likely to be a successful applicant for the curatorship of *Mauson's* estate; he had an interest in this curatorship, which was, to secure the payment of the two notes upon which he had become liable for *Mauson's* accomodation. *Wilson* had also an interest in the administration, as representing, on behalf of his wife or her children, a residuary interest as heirs at law. Now, it was certainly competent, under the circumstances, for *Wilson* to say to *Woodworth*, as in substance he did say, if you will withdraw your claim to the curatorship, and allow me to administer upon this succession, I will see that these notes upon which you are liable shall be paid; and for the purpose of securing the payment, I promise to deliver to you at stated periods within the next six months "*and sooner if convenient*," a sufficient amount of lumber to enable you by a sale of the same to realize funds to extinguish the notes. You are to deliver to me the notes when paid; you are also "to use all diligence to realize" a high price for the lumber for which you are to render me "*a strict account*," and in no event is the price of the lumber to fall below a fixed sum for which you agree to be accountable. Under this contract, *Wilson* actually did deliver lumber to the amount of $300 in value, but has altogether failed and refused, though thereunto requested, to deliver any more; and he now urges as matter of defence that the contract was immoral, that it involved the sale of a curatorship and ought not to be enforced. We think that under the contract entered into between the parties, *Wilson* undertook to pay the two notes upon which *Woodworth* was liable; and for the purpose of effecting this payment, he also undertook within six months after the date of the contract to deliver to *Woodworth* a sufficient amount of lumber to enable the latter by sales to realize funds to be applied to the payment of the notes. *Woodworth* stands, as respects his liability, very much in the same position as a planter who has promised to make shipments of cotton to meet a city acceptance made for his accomodation. Having failed to deliver the lumber within the stipulated period, his liability on the notes has become absolute, and the plaintiffs are entitled to a judgment for the amount of the notes after deducting a credit of $300 for the proceeds of lumber delivered to *Woodworth*.

We can perceive no legal objection to the substitution of *Stone* and *Grant* as plaintiffs in the case, they being the equitable assignees under a valid contract of *Woodworth's* interest in the subject matter of this litigation,—the defendant not having been deprived of any equitable defence as against *Woodworth*.

It is ordered that the judgment appealed from be reversed, and that *Warren Stone* and *Alexander Grant*, plaintiffs substituted herein, do have and recover of the defendant, *Levin J. Wilson*, the sum of $2,074 08 with interest thereon at the rate of 5 per cent per annum from the 26th day of February, 1845, till paid, with costs of suit in the District Court; and that the costs of this appeal be paid by the defendant and appellee.

MERRICK, C. J. I concur in the construction placed upon the contract by the majority of the court; but I doubt whether it is not against the policy of the law to enforce any contract which directly or indirectly has for its consideration the withdrawal of the applicant for the office of Executor, Administrator or Curator of a succession, in order to secure the appointment of another. See *Gray* v. *Hook*, 4 Comstock, 455. *Marshall* v. *Baltimore and Ohio Railroad Co.*, 16 Howard, 334.

TRIMMEL & BURNETT *v.* MARVEL & IRWIN.

Where a person who was a witness on a former trial, was present at the second trial, it is not competent to show, by a bill of exceptions taken at the previous trial, that he had then refused to answer certain questions, without, at least, first propounding the questions to him.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Ogden & Leovy, for plaintiffs and appellants. *Dugué* and *Roselius* for warrantors.

MERRICK. C. J. The District Court erred in excluding the testimony of *Robt. Mott*. Being the surety of *Creseps* on his administration bond, did not render him incompetent. If he was interested at all, it was against the party calling him. This testimony is in the record, and the cause will not require to be remanded on that account.

There was no error in refusing to receive the bill of exception taken in a former trial, which was offered for the purpose of proving that *Purvis* had declined to answer certain questions propounded to him, and to deduce unfavorable inferences therefrom. *Purvis* was in court and ready to testify. The plaintiff could not offer the bill of exceptions in evidence without at least first propounding his interrogatories to *Purvis* who was present and offered to testify.

From a careful examination of the testimony, we are not prepared to say that the decision of the lower court was erroneous, nor that the testimony of *Mott* in addition to the evidence adduced, would justify us in adopting a conclusion different from that which prevailed.

Judgment affirmed.

Rehearing refused.

City of New Orleans v. George Guth.

Defendant was sued for the cost of a license for keeping a beer-house, &c. He pleaded that he was protected by the statute which provides that "it shall not be lawful for any municipal corporation within this State, to levy any tax on persons engaged in selling articles of their own manufacture, manufactured within this State." *By the Court:* The evidence shows that the appellant keeps a beer-saloon, in which he retails, by the glass, beer of his own manufacture. His manufactory and saloon are both situated on the same lot. It appears to us that the immediate sale of beer from a manufactory, and the retail of it in a public saloon, form distinct branches of business, trade or occupation. We do not think it was the intention of the law-maker to exempt from taxation such articles thus retailed to carry on a public saloon. Hence, we conclude that the appellant, as keeper of a beer-house, or saloon, does not fall within the exemption of the statute.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Hiestand & Levy, for plaintiff. *Phillips*, for defendant and appellant.

Voorhies, J. The plaintiff brought this suit to recover from the defendant the following sums, to wit: $100 as the price of a license fixed by law for exercising or pursuing the trade or business of a beer-house keeper and bottler of malt liquor, and where no spirituous liquors are sold, for the year 1854; $105 as the price of a license for the same business for the ensuing year, and $100 as a penalty for his non-compliance with the provisions of the ordinance of the city.

There was judgment in favor of the plaintiff for the sum of $105, and the defendant appealed.

The appellant claims an exemption from the payment of this tax under the statute of 1853, which provides "that it shall not be lawful for any municipal corporation within this State, to levy any tax on persons engaged in selling articles of their own manufacture manufactured within this State. (Sess. Acts 1853, p. 135.)

The evidence shows that the appellant keeps a beer-saloon, in which he retails, by the glass, beer of his own manufacture. His manufactory and saloon are both situated on the same lot.

It appears to us that the immediate sale of beer from a manufactory, and the retail of it in a public saloon, form distinct branches of business, trade or occupation. We do not think it was the intention of the law-maker to exempt from taxation such articles thus retailed to carry on a public saloon. Hence, we conclude that the appellant, as keeper of a beer-house or saloon, does not fall under the exemption of the statute.

It is therefore ordered and decreed, that the judgment of the court below be affirmed with costs.

Succession of Victor Duclos.

Where witnesses differ as to the charges made by physicians, the correct rule is to allow the lower estimate.

APPEAL from the Second District Court of New Orleans, *Morgan*, J. *Drouett*, for appellant. *Guillet*, *Soulé* and *Lugenbühl*, for opponents and appellees.

Buchanan, J. The deceased, *Victor Duclos*, died of a pleurisy or "fluxion de poitrine." He was ill from the 30th November to the 29th December, 1854.

On the 3d December, *Dr. Anfoux*, who had been his family physician for several years, paid him his first professional visit in this, his last illness, and visited him *several times a day* from that period to the day of his death.

On the 4th December, *Dr. Natili* was called in by the family to consult with the attending physician upon the state of the patient. A consultation took place on that day, and another on the 5th December, at which time, when the consultation was over, *Dr. Natili* told a witness, the deceased's house-keeper, that his services were no longer required, and that he would not return. It appears however that *Dr. Natili* did visit the deceased every day afterwards until his death.

The charge made by these physicians for their professional services to deceased in his last illness, is as follows:

Dr. Anfoux—80 visits, day and night	$175
30 consultations	300
Total	$475
Dr. Natili (without specifications)	$220

The testamentary executor has appealed from a judgment which reduced these charges to $195 severally; and upon a review of the evidence, we conclude that a further reduction ought to be made.

As to the number of visits paid to the deceased during his last illness by these two physicians, the proof is as follows: *Celina Dumas*, the housekeeper of deceased, swears, as already noticed, that *Dr. Anfoux* visited deceased *several* times a day, from the 3d December to the 29th of the same month, inclusive, or twenty-seven days.

Jean Bidegaray proves that he saw the two physicians calling twice on the same day, morning and evening. He saw them come one after the other.

Celina Dumas proves that *Drs. Anfoux* and *Natili* only met together, or called at the same time to visit the patient, five times after the consultation of the 5th December.

Upon this evidence, we fix the number of visits of the physicians as follows:

Dr. Anfoux, twice a day for 27 days, or fifty-four visits.

Dr. Natili, twice a day for 26 days, or fifty-two visits.

Of these visits, only two for each are entitled to rank as consultations, under the *evidence*. As to the pretension that, from the moment more than one physician is called in, and attends regularly upon a case, every visit made by every physician employed, takes rank as a consultation, it cannot be listened to, even supposing that the visits are made at the same hour, so that the physicians

actually meet at the patient's bedside. The difference of the charge for what is technically styled a consultation, and for a simple visit, would make it ruinous to most patients and unreasonably onerous to all, to avail themselves of the lights of more than one of the faculty in time of need.

As to the value of the medical attendance thus proved, there is very considerable discrepancy between the witnesses. *Dr. Joubert* taxes the ordinary visits of physicians to a patient, at two dollars for the first visit, and one dollar for each subsequent one. By *Dr. Daret*, such visits are taxed at three dollars each, without distinction.

For consultations, *Dr. Joubert* allows $10 for the first, and $5 for each subsequent consultation, to each physician assisting. *Dr. Daret* allows $10 for each consultation.

We think the correct rule, as settled by authority, is to allow the lowest estimate. *Villalobos* v. *Mooney*, 2 L. R., 333.

According to this rule, *Dr. Anfoux* will be entitled to sixty-eight dollars, and *Dr. Natili* to sixty-six dollars, for medical attendance on the deceased in his last illness.

There is no proof in support of items 3, 4 and 5 of the appellee *Anfoux's* account, which items were properly rejected by the court below.

The sixth and last item of *Dr. Anfoux's* account is for medicines furnished from *Dr. Anfoux's* apothecary's shop to the deceased, in the year 1854, $180 15 cts. The bill of particulars of this item includes also a balance from the year 1853 of $28 15, and all the remaining charges have no date whatever. They are styled in the account medicines furnished in 1854—not medicines furnished during the last illness. In fact, there is no proof nor even allegation which entitles this apothecary's bill to the privilege given it by the judgment of the District Court. The proof of the correctness of the bill, even as an ordinary debt, is of the vaguest description. The clerk of the apothecary who testifies, came into his employment after *Duclos'* death, and merely proves that the charges were made by a previous clerk, who was dead. Some prescriptions were produced, it appears, on the trial in the court below. But they have not been incorporated in the transcript: and though the witness says the bill was made from these prescriptions, yet there are many things in the bill which could not have figured in a prescription.

We think the opponent has not made out this portion of his account, either as a privilege or as an ordinary claim.

Dr. Anfoux figures upon the executor's account as a debtor of the succession, by note, for two hundred dollars, which is not disputed by the opposition, and must therefore be taken as an admitted fact. We only mention it, that it may not be inferred from our judgment upon the claim of opponent for medical services, that we reject any claim of the succession against him, if any claim should hereafter be sought to be enforced.

Judgment reversing the judgment of the District Court; that the account of executorship be amended, by placing thereon *Dr. Anfoux* as creditor with privilege for services in last illness, for the sum of sixty-eight dollars, and *Dr. Natili* as creditor with like privilege, for sixty-six dollars; that upon *Dr. Anfoux's* claim for medicines furnished from his apothecary's shop, there be judgment of non-suit; and that the costs of these oppositions in the District Court be borne by the estate, and those of this court by opponents and appellees.

JOHN J. ROE *v.* THE CRESCENT MUTUAL INSURANCE COMPANY OF NEW ORLEANS.

Facts warranting an abandonment of a voyage by a steamboat on the Mississippi, and the recovery of freight thereupon, on a policy of insurance.

By the Court: **In steamboat navigation on our rivers, where the trip, as from St. Louis to this city, is made in seven or eight days, and sometimes less, the owner of a boat would not be justified, even where there were warehouses, to detain a cargo a month or six weeks in order to make the necessary repairs, and continue the voyage.**

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Garrett Duncan, for plaintiff. *Cohen*, for defendant and appellant.

MERRICK, C. J. The plaintiff, being the owner of the steamboat Delaware, through his agent, took an insurance of $4000 at the office of the defendant, on charges and three-fourths of the freight of the boat, for a trip from St. Louis to New Orleans.

The boat proceeded on her voyage, and about one hundred and twenty miles below St. Louis struck a snag, or some other obstacle, and was so seriously injured in her timbers as to be unable to proceed without risk of sinking.

The place where the accident happened was in the unsettled portions of the river: there was no warehouse near, where the merchandize could be stored, nor any way of protecting it from the weather or depredation.

A large part of the cargo consisted of potatoes and apples. St. Louis was the nearest port at which the repairs could be made. It was thought that the repairs could not be made under a month. The captain of the boat thereupon concluded to abandon the voyage. He sent forward the merchandize by another boat, the Illinois, at same rate for the whole cargo, $5397 52, deducting $2000 *pro rata itineris* for the freight earned by his own boat. The freight was paid to the steamboat Illinois on the safe delivery of the merchandize in this city.

The Delaware returned to St. Louis, was placed in the dock, and five or six weeks elapsed before her repairs were completed, when she took another cargo, and proceeded to New Orleans.

The plaintiff having brought suit on the policy against the insurance company for the loss of freight, the latter rested the action on the ground that the abandonment of the voyage was not justified by the state of facts then existing, and that it was the duty of the owner of the boat to have repaired and completed the voyage, and earned the freight, and that he was not justified in abandoning it on account of a temporary delay.

There was judgment against the defendant in the District Court, and the insurance company has appealed.

The insurance in the policy was merely upon the freight for the particular voyage.

We think, under the circumstances in this case, that the captain of the boat acted wisely and for the interests of all concerned in abandoning the voyage. He could not have continued it, for his boat was in danger of sinking. He could not have stored the goods, for he was in a wilderness, and moreover a large part of the freight was of a perishable kind. It was evidently the duty of the captain to send forward the freight by the first convenient opportunity.

In steamboat navigation on our rivers, where the trip, as from St. Louis to

this city, is made in seven or eight days, and sometimes less, the owner of a boat would not be justified, even where there were warehouses, to detain a cargo a month or six weeks in order to make the necessary repairs, and continue the voyage. Rae v. Crescent Ins. Co.

The judgment of the lower court ought to be affirmed. *Rogers & Co.* v. *Nashville Marine and Fire Insurance Company*, 9 An., 537; Arnould on Ins., 1136, 1137; *Jordan* v. *Warren's Ins. Co.*, 1 Story; C. C., 342.

Judgment affirmed.

Rehearing refused.

MAD. WIDOW J. F. ROBERT, Testamentary Executrix of LOUIS ALLARD, *v.* ETIENNE ALPHONSE RIDE and ADRIEN MAIROT.

Appeal dismissed for want of proper parties.

The practice of the Supreme Court is to notice *ex officio*, and without any motion to dismiss having been made, the want of proper parties for a final decree.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Tissot and *Filleul*, for plaintiffs and appellants. *Castera* and *Le Gardeur*, for defendants.

BUCHANAN, J. A motion is made to dismiss this appeal, because all the parties to the proceedings, interested in maintaining the judgment of the District Court, have not been made parties to the appeal.

The petition involves two causes of action; one of which is the nullity of a sale of land made by the deceased *Allard* to the defendant *Ride* in February, 1837. The parties originally cited as defendants were *Ride* and *Mairot*, to whom *Ride* is alleged to have sold the land in April, 1853.

By a supplemental petition plaintiff alleges that *Mairot* had sold the land in question to *Lize Pelleton* in May, 1853, and that *Lize Pelleton* had sold to *J. F. Burgnot* on the 6th June, 1853, both said sales being prior in time to the institution of this suit. Judgment is asked as in the original petition, for the rescission of the sale of the land, against *Pelleton* and *Burgnot*, *in solido* with the original defendants.

All four defendants have pleaded to the action, which was decided in their favor by the District Court. Plaintiff appealed by motion, and gave a bond *in favor of Ride and Mariot only.*

It is clear that the other two defendants, *Burgnot*, who is the actual possessor of the land, and *Pelleton*, his vendor, who is cited in warranty to defend his title, have an interest in maintaining the judgment of the District Court appealed from; an interest so much the greater, if the allegations of plaintiff's petition be true, that *Ride* and *Mairot* are absentees, and utterly irresponsible in a pecuniary point of view.

Let the rule be made absolute, and the appeal be dismissed, with costs.

ON A REHEARING.

BUCHANAN, J. We have been requested by counsel on both sides to consider this case as if a rehearing had been granted upon the motion to dismiss the appeal.

ROBERT v. RIDE.

It is needless to inquire whether the motion to dismiss in this case should have been filed within three days after the transcript was brought up from the inferior court, inasmuch as the practice of this court has been to notice, *ex officio*, and without any motion to dismiss having been made, the want of proper parties for a final decree. *Swearingen* v. *McDaniel*, 12 Rob., 205; *Succession of Perry*, 4 An., 577.

The parties mentioned in the appeal bond are alone parties to the appeal; and it is immaterial to inquire who filled up the blanks in the appeal bond. If that was done by the Clerk of the court, he can be viewed in no other light, *pro hac vice*, than as the appellant's agent. *Hill* v. *Bowden*, 2 An., 452.

Let the judgment already rendered remain undisturbed.

GORDON & CO. *v.* GOODRICH & CO.

M., one of the partners, defendants, was the agent of the Bank of Kentucky. Pending this agency, defendants received from S., L. & Co., of Louisville, a consignment of flour, which they were directed to sell and retain proceeds towards payment of a draft drawn by plaintiffs. They sold the flour, and M., acting under instructions from the bank, attached the proceeds. After the attachment, defendant received a despatch from S., L. & Co., directing them to deliver the flour, or its proceeds, to plaintiffs. *By the Court:* The defendants, as factors, and holding the funds as an irregular deposit, ought not to defeat the arrangement of the parties by taking upon themselves the agency of the Bank of Kentucky. The two agencies are incompatible, and having received the consignment of the flour for a particular purpose without objections, and made a sale, they became absolutely the agents of the parties interested in the shipment of which they had notice, and they cannot be permitted to defeat the very object of the consignment of the flour by diverting the proceeds to their individual claims against S., L. & Co., nor by acting as the agent of third parties.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Hunton, for plaintiffs. *Moise & W. M. Randolph*, for defendants and appellants.

MERRICK, C. J. The defendants were the factors in this city of *Messrs. Spratt, Logan & Co.*, of Louisville. On the 12th day of September, 1853, the plaintiffs, for the accommodation of *Spratt, Logan & Co.*, drew a bill of exchange at six months, payable to their own order, on said *Spratt, Logan & Co.* (New Orleans) for four thousand dollars. The draft was accepted, payable at the counting-room of the defendants, and endorsed by the plaintiffs, and negotiated by *Spratt, Logan & Co.*

Spratt, Logan & Co., on the 2d of February, 1854, shipped the defendant 500 barrels of flour. The letter accompanying the shipment is as follows:

"Gentlemen—By the Jas. Robb we ship you 500 bbls. flour, to be sold on our account, and proceeds to be retained towards payment of *Gordon & Co.*'s acceptance of our draft of $4000, due at your counting-room 12th, 15th prox. This lot is in the best possible condition, and we trust you will get a *big* price for it. Your friend,

SPRATT, LOGAN & CO."

The draft accompanied the shipment of flour, and no other similar draft was presented at their counting-house. *Goodrich & Co.* could not have misunderstood the instruction, although the word acceptors was used for drawers and endorsers. The flour and letter were received by the defendants on the 7th of February,

1854. The same day *Spratt, Logan & Co.* delivered to the plaintiff the following instrument:

"Louisville, Feb. 7th, 1854.

Messrs. Goodrich & Co. will deliver to *Gordon & Co.'s* order the five hundred barrels of flour, or the proceeds thereof, shipped to them by the steamer James Robb by us. SPRATT, LOGAN & Co."

Gordon & Co. endorsed this instrument in favor of *Hewitt, Norton & Co.*

On the 10th of February *Spratt, Logan & Co.* notified *Goodrich & Co.* to sell the 500 barrels flour sent by the James Robb, and hold proceeds subject to *Gordon & Co.'s* order, and advise *Hewitt & Co.*

This appears to have been received by *McKnight*, of the firm of *Goodrich & Co.*, the 13th of February, 1854, at 10 o'clock, A. M.

W. Logan McKnight, of the firm of *Goodrich & Co.*, acted also as agent of the Bank of Kentucky, under an agency which had existed for some time. He received, on the 12th day of February, a dispatch in those words:

"To *Wm. Logan McKnight:*

Your dispatch received. Do not pay anything on my account. Attach for the bank the two thousand dollars in your hands, and any other assets you can find. No security be had here. V. MCKNIGHT."

On the 13th day of February, the same day the dispatch was received from *Spratt, Logan & Co.*, *W. L. McKnight*, as agent for the Bank of Kentucky, gave bond and sued a writ of attachment against *Spratt, Logan & Co.*, and had the same served upon himself, and received notice of the same as a member of the house of *Goodrich & Co.* It appears also, that although the dispatch of *Spratt, Logan & Co.* was received by *Goodrich & Co.* at 10 o'clock on the 13th of February, that *W. Logan McKnight* was not advised of it at the time of the attachment, and he had no notice from any one respecting the flour or its proceeds except the letter accompanying the bill of lading.

The defendants, as factors, and holding the funds as an irregular deposit ought not to defeat this arrangement of the parties by taking upon themselves the agency of the Bank of Kentucky. The two agencies are incompatible, and having received the consignment of the flour for a particular purpose, without objections, and made a sale, they became absolutely the agents of the parties interested in the shipment of which they had notice, and they cannot be permitted to defeat the very object of the consignment of the flour, by diverting the proceeds to their individual claims against *Spratt, Logan & Co.*, nor by acting as the agents of third parties. Story on Agency, Nos. 206, 210, 217. See also the case of *Dwight Durkee & Co.* v. *Price, Frost & Co.*, 11 An., 333.

The judgment, which was for $3363 23, the proceeds of the sale of the flour, must be affirmed.

Antoine Truxillo et al. v. Manuel Truxillo.*

A judgment homologating an administrator's account and discharging the administrator, rendered upon publications made pursuant to Art. 1172 of the C. C., is not *res judicata* as to the heirs. The form of notice prescribed by that Article is meant merely for creditors. The heirs should have been cited.

Plaintiffs, heirs of A., in an action against his administrator to recover their share of the succession, in their petition, declare their heirship to be derived through their ancestor B., a predeceased brother of A.; and, in the same connection style themselves "*heirs*" of B. *Held:* That under Art. 982 of the C. C. this was equivalent to an express acceptance of the succession of B., though that succession was not the subject matter of the litigation.

Representation is a legal fiction, the effect of which is to put the representative in the place, degree and rights of the party represented. It is true, a person may represent one whose succession he has renounced; but that is not the case of plaintiffs, *who declare, in their petition, that they are the heirs of the party whom they represent.*

A petition is a judicial proceeding in the sense of Article 982 of the Code.

Plaintiffs claim nothing in the succession of B. They refer to him merely to show, that through him, they are entitled to inherit from his brother A. It is with respect to the succession of the latter only that they assume the quality of heir, in the manner intended by Art. 982 C. C. Spofford, J., with whom concurred Lea, J., dissenting.

This article was taken from Art. 778 of the Code Napoleon, the commentators upon which generally recognise the distinction upon which this case should turn, a distinction pointedly made in *Anderson* v. *Cox*, 6 An. 13. Spofford, J., with whom concurred Lea, J., dissenting.

APPEAL from the District Court, Fifth District, Parish of Assumption, *Cole*, J. *C. A. Johnson*, for plaintiffs. *Mailhot & Mills*, for defendant and appellant.

Buchanan, J. This is a suit by heirs against an administrator for an account.

The defendant pleads that he filed an account of administration as far back as 1847, which was notified in the manner required by law, and after the legal delays was homologated, and the administrator discharged from his trust by the judgment of court: which judgment he pleads as *res judicata.*

He pleads further that a large portion of the assets placed upon the inventory of this estate, consisted of notes of the administrator himself, which are more than five years past due and are now extinguished by prescription.

Further, that the ancestor of plaintiffs, by representation of whom they claim as heirs of the deceased, was indebted to said deceased by judgment in the sum of $769, with interest; which judgment constituted an item in the inventory, and is due by plaintiffs to the estate.

Defendant annexes to his answer an estimate of moneys received and disbursed by him as administrator, to serve as an account of administration in case the court should be of opinion that he was bound to render another account.

The record shows that *Joseph Truxillo* died on the 19th September, 1846, intestate. The defendant obtained letters of administration. The inventory amounted to $2,569, composed principally of three notes, due by the administrator himself, and of a judgment obtained many years previously by the

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* The judgment originally pronounced in this case was rendered Feb. 12, 1855; present Slidell, C. J., Voorhies, Buchanan, Ogden, and Spofford, JJ. A re-hearing was granted by the Court as thus organised. Pending the re-hearing, Slidell, C. J., and Ogden, J., resigned their seats on the bench, and their places were supplied by Merrick, C. J., and Lea, J.

deceased against his brother, *Juan Truxillo*, who died before *Joseph*, and by representation of whom the plaintiffs claim as heirs for one third of the estate of *Joseph Truxillo*. On the 5th May, 1847, defendant filed his account of administration, in which he charged himself with everything in the inventory, except the judgment against *Juan Truxillo*, and credited himself with funeral expenses, costs of court, and commissions. He also claimed to be a creditor of deceased for thirteen years boarding, at $10 per month. There was a balance, according to this account, in favor of the administrator, of $24 39 100.

The account was published by posting notices at the court house door (there being no newspaper published in the parish,) during ten days, and, no opposition being made, was homologated, and judgment entered, discharging the defendant as administrator.

There is no doubt that this judgment of homologation is not *res judicata* against the heirs. The form of notice pursued was in accordance with Article 1172 of the Code, which has reference merely to creditors.

The defendant invokes Article 1057, which mentions legatees in connection with creditors, and argues from thence, that heirs are synonimous with legatees, and that the law contemplates the same kind of notice to both. The argument is fallacious. There was, in this case, no will, and consequently no legatee. To bind the heirs, under the circumstances disclosed by this case, they should have been cited. The evidence shows that they were all residents of the parish. See *Millaudon* v. *Cajus*, 6 L. R., 222; *Baldwin* v. *Carleton*, 11 Rob.

The only serious question in this case, in our opinion, is the right of the defendant to offset the judgment against *Juan Truxillo*, to the share of plaintiffs in the inheritance of *Joseph Truxillo*. The counsel of plaintiff contends that the former having died before the latter, was never the heir of the latter, but that plaintiffs have inherited directly from their uncle. The plaintiffs came to the succession of their uncle concurrently with an aunt and several cousins, by representation of their father, *Juan Truxillo*, the judgment debtor of their uncle. Representation is a legal fiction, the effect of which is to put the representative in the place, degree and rights of the party represented. It is true, a person may represent one whose succession he has renounced; but that is not the case of plaintiffs, who declare in their petition that they are *the sole heirs of Juan Truxillo*. The case of *Destrehan* v. *Destrehan*, 4th N. S., is not analogous to the present case. The claimants in that case, had not only renounced the succession of the party whom they represented, but their relationship to the deceased was in the direct descending line, and the decision turned entirely upon peculiar provisions of the Code applicable to that relationship alone, in connection with the subject of collation.

We are of opinion that the administrator has the right to oppose the judgment against *Juan Truxillo* to the claim of plaintiffs in the inheritance of *Joseph Truxillo*. That judgment was for $769, and bore 5 per cent. interest from October, 1853. At the time of the death of *Joseph*, it amounted, including 23 years interest, to..... $1,658

The plaintiffs, being heirs of *Joseph*, for one-third, the judgment was extinguished at the death of *Joseph*, to the extent of one-third, by confusion, say..... 551

Balance due on judgment..... $1,102

The amount of *Joseph's* inventory was, as we have seen	$2,900
Add 23 years interest on the judgment against *Juan Truxillo*, of which the capital ($769) is inventoried	884
Gross amount of *Joseph Truxillo's* estate	$3,433
Deduct charges included in the account of administration rendered by defendant in 1847, which are admitted by plaintiffs to be correct	273
Nett amount to be divided among the heirs	$3,160
Of which one-third belongs to plaintiffs, say	1,060

The plaintiffs had nothing to claim in the estate of their uncle, as the evidence shows. There is, therefore, no reason for charging the defendant with the expense of this suit.

The judgment of the District Court is reversed; and the judgment of this court is in favor of defendant, with costs in both courts.

C. A. Johnson, for plaintiff, applied for a re-hearing:

The conclusions of the court, if we have rightly understood them, amount substantially to finding that plaintiffs have made themselves the heirs, pure and simple of *Juan Truxillo*. The evidence to sustain them is the declaration made in our petition, that we were the sole heirs of *Juan Truxillo*. The part of the petition in which this declaration occurs, is here copied in full.

"That your petitioners are entitled each to one-sixth of the said estate for this—viz: That the said *José* left no heirs of his body, and that his legal heirs were his sister, *Marcellina Truxillo*, widow of *Domingo Acosta*, of the parish of Assumption, for one-third; and the children and representatives of the late *Antoine Truxillo*, brother of the deceased, for one-third; and the children and representatives of the late *Juan Truxillo*, also a brother of the deceased, for the remaining third; that the representatives of said *Juan Truxillo* are your petitioners, *Antoine*, son of said *Juan* and your petitioner, the widow *Domingo Truxillo*—the said *Domingo* being, together with said *Antoine*, your petitioner, the only children and sole heirs of said *Juan*, deceased; and the said *Domingo* having died intestate, leaving for his sole heirs his children, *Philogene* and *Jean Baptiste*, sole issue of the marriage of said *Domingo* with your petitioner, his widow; and the said *Philogene* and *Jean Baptiste* having since died intestate and without heirs of their body, whereby your petitioner, their mother, became their sole heir, and is sole entitled to their rights."

We say the conclusions of the Court are based upon the finding that the plaintiffs have made themselves the unconditional heirs of *Juan Truxillo*, inasmuch as the judgment has, by giving effect to the offset pleaded, applied our funds to the payment of the debt of *Juan*. No other theory of the case adjudged by the court, is admissible. It cannot, for instance, be maintained that the debt of *Juan* has been extinguished by funds belonging to his estate, for *Juan* died before *José*, and this share in the estate of the latter, which has been applied by the court to the extinguishment of *Juan's* debt, thus never made a part of *Juan's* estate. In other words, our funds, derived from a source foreign to the estate of *Juan*, have been made use of to pay the debt of *Juan*. To our minds, this is nothing more or less than a condemnation of the plaintiffs as unconditional heirs of *Juan*; and the warrant to this judgment is the language used by us in the extract from our petition above given, which the court seems to consider as an express acceptance of the succession of *Juan*.

I. The first question which we submit then is, whether the court have not given to the declaration referred to, a meaning and effect which do not belong to it. Though the opinion of the court does not cite any law applicable to the above state of facts, it is plain that its conclusion, if legitimate, must rest upon Art. 982 of the Code, which is in these words:

"C. C. 982. The simple acceptance may be either express or tacit. It is

express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding."

Now a most obvious limitation in the interpretation and application of this article, a limitation inherent in the very nature of the case, at once suggests itself; and that is, that the public or private acts or the judicial proceedings spoken of in the Article, must be such as have, for their subject matter, the succession with reference to which the quality is assumed, or at least, some right or thing supposed to depend upon it. Such was expressly held to be the rule in *Anderson* v. *Cox*, 6 A. R., 13.

"All law, 'says the court' must receive a reasonable interpretation. The judicial proceedings meant by Art. 982, are those in which the heir appears to claim as such some right in the succession."

So Marcadé, in treating particularly of the "acceptation expresse" and of the "qualification d'héritier," even in acts pertaining to the things or rights with respect to which the quality has heen assumed, uses the following emphatic language:

"De même, ce sera uniquement la manifestation d'une intention certaine qui pourra constituer l'acceptation expresse; et il ne suffirait pas toujours que le successible eût pris dans un acte la qualité d'héritier. En effet, le mot héritier non pas seulement dans le monde, mais dans le Code lui-même, signifie tantôt celui à qui l'hérédité est irrévocablement acquise, tantôt celui-là seulement qui est appelé à la recueillir et qui est libre de l'accepter ou de la répudier, tantôt même celui qui a formellement déclaré n'en pas vouloir; c'est ainsi que l'art. 790, nous parle des 'héritiers qui ont renoncé.' S'il en est ainsi, il est bien impossible de prétendre que j'ai accepté par cela seul que je me suis qualifié d'héritier.' Vol. iii. pp. 149, 150.

"L'acceptation d'une succession," says the same author, *loc. cit.* "n'est et ne peut être rien autre chose que la manifestation de la volonté d'être héritier; mais il faut que la volonté soit certaine et indiquée de manière à ne laisser aucun doute."

But this degree of certainty can only exist when in the acts or judicial proceedings specified by our article, something depends or is supposed to depend upon the assumption of the quality. To the same effect we quote Marcadé again, who sums up a verbal criticism of the structure of the corresponding Article of the Code Nap. with this sententious but comprehensive and accurate paraphrase of the Article itself:

"Notre article devait donc se contenter de dire que l'acceptation résulte de tout fait on de toute déclaration écrite manifestant d'une manière certaine l'intention d'agir en maître de la succession."

Now, in the case at bar, the assumption was, of the title of heir of *Juan Truxillo*, in an action instituted by us to assert, not any right or claim to his succession, or anything supposed to depend upon it, but in an action to obtain our share in the succession of *José:* in which action no demand was made or matter presented for argument by us, which could be held in any degree to turn upon the question, whether we were or were not the heirs of *Juan Truxillo*, in the technical sense in which the court has interpreted our assumption of that quality. In short, the declaration in our petition, that we were the sole heirs of *Juan Truxillo*, was language of description merely, used to set forth the affiliation or relationship of plaintiffs to *José Truxillo*, and, except for that purpose, having no place or significance in the instrument of pleading in which it is found. It was tantamount to declaring *Juan Truxillo* to be our "author" in respect of the rights of heirship claimed by us in the succession of *José*, but nothing more, it was the equivalent of the words "successible" or "habile à succéder" in the examples put by Marcadé. *Ibid.* 150.

The subject matter of our action being, not the succession of *Juan*, but that of *José*, to sustain which, we sought only to trace title through *Juan*, it certainly cannot be maintained that the use of the language in question amounts even to an act of heirship, much less to an express acceptance of the succession of *Juan*. It is not such an assumption of the quality of heir in a judicial proceeding as is contemplated by Art. 982, and can only be consigned to the same class with the cases supposed by Marcadé, in the passage first cited from that author, and, equally with them, would justify his emphatic language, "il est bien impossible de prétendre que j'ai accepté par cela seul que je me suis qualifié d'héritier."

Two cases from our own reports having been cited by defendant, viz: *Lecesne* v. *Cottin*, 2 N. S. 475, and *Frazier* v. *Hills*, 5 A. R. 114, it is only necessary to state, that in both of them the subject matter of the "judicial proceedings" was the succession with reference to which the quality of heir had been assumed and that in neither, was there any room to doubt of the intention of the party, "d'agir en maitre de la succession." In short, the state of facts was just what we contend that it must be, to give rise to the application of Art. 982.

We submit then that the court has inadvertently given to the declaration relied on, taken in connection with the instrument of pleading in which it is found and weighed with reference to the object and purpose of our suit, a meaning and effect which do not belong to it; and that the court has evidently been led into that error by the state of facts developed by the defense with which our action was met and resisted."

A re-hearing having been granted, the judgment of the court was pronounced by

MERRICK, C. J. (SPOFFORD, J., and LEA, J., dissenting.) The plaintiffs, not content with describing themselves in their petition as children and representatives of *Juan Truxillo*, deceased, further aver, that they are "the only children and sole heirs of said *Juan*, deceased." This allegation was no doubt introduced out of abundant caution, and to strengthen the plaintiffs case not only on the ground that they, the plaintiffs, represented *Juan Truxillo*, but because they were *also his heirs*.

Article 982 of the Code declares, that the simple acceptance of a succession may be either express or tacit; that it is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding. We understand a petition to be a judicial proceeding, and think the expression referred to was intentionally introduced into plaintiffs petition at the time it was drafted, but perhaps without a very accurate knowledge of the condition of the succession of *Juan Truxillo*, deceased.

La loi considère également comme une acceptation expresse le fait du successible qui prend, d'une manière même purement énonciative le titre d'héritier dans un acte, soit authentique ou *sous seing privé*, soit judiciaire ou extra-judiciaire. 2 Zachariæ, sec. 611. Sirey, 33, 2. 349 Limoges, 19 February, 1831.

We attach no importance to the exception filed by the defendant, 21st of March, 1853, that the plaintiffs had not accepted the succession of *Joseph Truxillo*.

It is therefore ordered by the court, that the judgment heretofore pronounced in this case, by this court, remain undisturbed.

SPOFFORD, J., with whom concurred LEA, J., dissenting. A closer examination of the petition has led me to the conclusion, that the plaintiffs have not therein assumed the quality of heirs of *Juan Truxillo*, in such an "unqualified manner" as to denote their acceptance of his succession as heirs pure and simple.

Their language, it strikes me, is that of description merely, used only for the purpose of tracing their rights to inherit from *José Truxillo*, through his predeceased brother *Juan*. The succession of *Juan* does not seem to have been in their thoughts.

In *Anderson* v. *Cox*, 6 An. 13, it was held "that the *judicial proceedings* meant by Article 982, C. C., are those in which the heir appears to claim, *as such*, some right *in the succession*." This means, of course, some right in the

succession in regard to which he assumes the quality of heir. Now, the plaintiffs claim no rights to the succession of their ancestor *Juan;* they refer to him, only to show that, through him, they are entitled to inherit from his brother *José;* it is *José's* succession alone of which they assume the quality of heirs in the manner intended by Article 982 of the Louisiana Code.

This article was taken from Article 778 of the French Code: and the commentators upon that code, generally recognize the distinction upon which it seems to me this case should turn, a distinction pointedly made in the case of *Anderson* v. *Cox.*

Thus, Zachariæ (tome ii, § 611) says: "Bien qu'en général, tout acte instrumentaire dans lequel un successible a pris, d'une manière énonciative, le titre d'héritier, emporte virtuellement acceptation expresse de l'hérédité, il en serait cependant autrement * * * s'il résultait évidemment des circonstances que le terme héritier a été employé comme synonime de *successible* ou *d'habile à se dire héritier.*"

So Touillier (tome ii, Deuxième Partie, No. 325): "Le titre d'héritier n'en imprime donc pas irrévocablement le caractère; il ne constitue l'acceptation que lorsqu'il a été pris par un habile à succéder, *dans l'intention* d'accepter *la* succession et de s'obliger aux charges qu'*elle* impose."

So Rogron, commenting upon Article 778 Code Civil: "On peut quelquefois prendre cette qualité sans avoir voulu accepter."

And Marcadé, in his lucid commentary upon Article 778, is still more emphatic: "De même, ce sera uniquement la manifestation d'une intention certaine qui pourra constituer l'acceptation expresse; et il ne suffirait pas toujours que le successible eût pris dans un acte la qualité d'héritier. En effet, le mot *héritier*, non pas seulement dans le monde, mais dans le code lui-même, signifie tantôt celui à qui l'hérédité est irrévocablement acquise, tantôt celui-là seulement qui est appelé à la recueillir et qui est libre de l'accepter ou de la répudier, tantôt même celui qui a formellement déclaré n'en pas vouloir; c'est ainsi que l'Art. 790, nous parle des '*héritiers* qui ont renoncé.' S'il en est ainsi, il est bien impossible de prétendre que j'ai accepté, par cela seul que je suis qualifié d'héritier; et la première partie de l'article est encore plus mal rédigée que la seconde." Tome iii, No. 204. Again: "Notre Article (778) devait donc se contenter de dire que l'acceptation résulte de tout *fait*, ou de toute *déclaration écrite*, manifestant d'une manière certaine l'intention d'agir *en maître de la succession.*" Tome iii, No. 205.

This being a mixed question of law and fact, it is proper to observe that *Juan Truxillo* died on the 23d of February, 1843, that the petition in this case was filed on the 10th of March, 1853, and that nothing else is relied upon to show that the plaintiffs have accepted the succession of *Juan* purely and simply, but the descriptive words in this petition, the sole object of which is to claim a portion of the succession of *José Truxillo*, through the deceased *Juan.*

It appears to me, moreover, that the defendants are estopped to say, that the plaintiffs have expressly accepted *Juan's* succession in their petition, because, on the 21st of March, 1853, they filed an exception, in which they averred that "the plaintiffs having always refused to accept the succession of their uncle, *José Truxillo*, and the said succession having been duly settled and administered, they have no right to institute this action before legally declaring their

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intention to accept said succession, *and to incur all liability as said heirs by representation of their father, Juan Truxillo.*"

I therefore think that the judgment should be set aside.

M. C. LISK *v.* M. A. MATHIS.

Action of damages for a malicious arrest and imprisonment. Damages disallowed.

APPEAL from the Fourth District Court, of New Orleans, *Reynolds*, J. *Wolfe & Singleton*, for plaintiff. *Race & Foster*, for defendant and appellant.

BUCHANAN, J. This is an action sounding in damages for a malicious arrest and imprisonment, upon the following affidavit:

"Before me, *Elihu Terry*, a Justice of the Peace in and for the parish of Carroll, State of Louisiana, on this 25th day of January, 1853, personally appeared *Marshall A. Mathis*, who being first duly sworn, says, that a man named *Manly P. Lisk* is fraudulently and unlawfully in possession of the wreck of the steamboat Western World, at the foot of Island No. 93, in the Mississippi River, and that the said *Lisk* is engaged, contrary to law, in removing the cargo and other property from said wreck. Deponent further says, that he is the duly authorized agent of the several Insurance Companies interested in said wreck, and cargo, and that the said *Lisk* persists in holding possession of said cargo, contrary to the wishes of deponent, and in defiance of law, and is fraudulently and feloniously carrying away and removing portions of the freight, &c, from said wreck."

Upon this affidavit a warrant was issued for the arrest of *Lisk*, and he was brought before the magistrate, who, after a full examination of the witnesses, bound *Lisk* over for his appearance before the District Court of Carroll Parish. He remained one night in prison, before giving the bail required by the magistrate, which was three hundred dollars. A bill of indictment was laid before the Grand Jury at the next term of the court, which ignored the same.

Plaintiff alleges that the allegations in the affidavit contained are utterly false; and that defendant knowingly and with malice availed himself of the forms of law, to persecute plaintiff, to break him up in a rival business, and to deprive him of his liberty. He claims ten thousand dollars damages.

The answer of defendant denies malice, asserts that there was probable cause for the prosecution of *Lisk*, and sets forth in detail the facts, as they were afterwards established by proof on the trial.

The jury gave five hundred dollars damages to plaintiff; and defendant appeals.

The evidence shows that the steamboat Western World was sunk in the Mississippi River about the middle of December, 1852. The wreck lodged or grounded on a bar near Island 93, where she was covered with water by a rise in the river. The Western World and her cargo were insured in various offices in New Orleans and St. Louis; and the defendant *Mathis* was authorized by all the underwriters of the vessel and cargo to take possession of and save what could be saved from the wreck, for their account. We must suppose that the

insured had abandoned, and that the abandonment had been accepted. The underwriters were therefore the owners of the sunken property, and had the right to dispose of and control it; and defendant, who is a proprietor of diving bells, and follows the business of wrecking, was their duly authorized agent in the premises. Having this authority, defendant presented himself at the scene of the accident, ascertained the position of the wreck, (then under water), fixed land marks pointing out that position, and went down the river for his diving bell boats, with which to commence operations; leaving a person residing in the neighborhood in charge for him. A few days after defendant's departure, the plaintiff, who is also a wrecker by profession, came to the place with a diving bell boat, and inquired for the situation of the Western World, telling defendant's agent that he (plaintiff) wanted to *wreck* her. Defendant's agent inquired of plaintiff where defendant was, and was answered by plaintiff that defendant's boats were *destroyed*, and that defendant was not coming back to the wreck. Defendant's agent then inquired of plaintiff if he was authorized to take possession of the wreck, and was answered that he was; whereupon the agent showed plaintiff the landmarks of the wreck, and plaintiff anchored his boat over it. Some days after this, defendant returned and claimed possession of the wreck, but was set at defiance by plaintiff, who no longer pretended any authority from the owners, but placed himself upon a pretended custom of wreckers, as being the first in possession. Defendant then went before a magistrate and made the affidavit for plaintiff's arrest. The officer who arrested plaintiff proves that in quitting his diving bell boat, he told his crew that they were anchored over the Western World, and to hold possession until his return.

Under these circumstances, we view this as one of the most unfounded claims for damages for a malicious arrest, that has ever come before us. The plaintiff, by false statements, obtained possession of property which was in the charge of defendant for its lawful owners. The defendant, instead of resorting to violence to regain possession, a course of proceeding unfortunately too common on our western rivers, testified his respect for the laws by resorting to the aid of the magistrate against a trespasser and a wrong-doer. For the plaintiff has not even attempted to prove that he had any authority from the owners of the property sunk. His counsel have argued the case upon principles which only apply to property derelict and abandoned; which was not at all the case in reference to the property in question.

It is needless that we should cite the authorities which declare that malice and want of probable cause are indispensable prerequisites to recovery in this sort of action. The petition contains allegations of malice and want of probable cause; but the proof is more than deficient; it is contrary to these allegations. It is true, plaintiff had not yet taken out any of the cargo of the Western World at the time defendant made his affidavit. But his acts and his declarations alike rendered it positive that he was about doing so. He had made all his preparations for the purpose. And there can be no doubt that the only thing which prevented its accomplishment, was plaintiff's arrest. It would be of the worst example, to punish this defendant for resorting to law for the protection of his rights, rather than taking the chances of a resort to arms, or tamely abandoning the field to an usurper.

Judgment reversed; and judgment is hereby rendered for defendant, with costs in both courts.

City of New Orleans v. B. Saloy.

Suit for taxes. Defendant excepted that he had been cited as *B. Salay*. Exception overruled, and citation ordered to be amended *nunc pro tunc*. *By the court:* In a matter of taxes where the party appears, as in this instance, and admits he is cited, we think the court might well order the correction of the name, where merely inaccurately spelled, instanter, and proceed with the cause. The case might be different where judgment was taken in a proceeding of this kind against a party, in his absence, by a wrong name.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *G. & C. E. Schmidt and Hiestand & Levy*, for plaintiff. *Saloy*, for defendant and appellant.

Merrick, C. J. This suit is brought to recover city taxes. It was commenced by publication in the newspaper, in conformity to the thirty-fifth section of the Act of 1852, p. 52.

In the lower court, the defendant filed an exception which commences in these words, viz:

"The defendant, *B. Saloy*, excepts to the proceedings in the above suit, and says that he has not been properly cited, inasmuch as the official tax list in which the names of delinquent tax payers are advertised, *cites him to appear by the name of B. Salay*, whereas he avers that his real name is *Bertrand Saloy*."

The court overruled the exception, ordering the citation to be amended *nunc pro tunc*, and that the name be considered *B. Saloy* in conformity with the petition filed.

The defendant appeals from the final judgment condemning him to pay $304 taxes.

The exception shows that the defendant was not misled by the error in the name as published. He only complains that he was cited by a name which was spelled wrong. In a matter of taxes where the party appears, as in this instance, and admits that he is cited, we think the court might well order the correction of the name when merely inaccurately spelled, instanter, and proceed with the cause. *Lalande* v. *Terrel*, 12 L. R., p. 9.

The case might be different where judgment was taken in a proceeding of this kind, against a party, in his absence, by a wrong name.

Judgment affirmed.

Heirs of Oliver H. Spencer v. Executors of John McDonogh et al.

A *curator ad hoc*, whose appointment is superseded before trial, has no capacity to take an appeal, and the subsequent filing of an appeal bond by the proper agents of the party in interest, without a petition and citation, or motion for an appeal, will not constitute a valid appeal.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *G. B. Duncan*, for plaintiffs. *Bonford* and *Livingston*, for defendants and appellants.

Buchanan, J. It is needless to examine this motion as to the city of New

Orleans, appellant, for although there are many supposable cases where the previous authorization, by resolution, of the City Council, would be required for the institution of a suit, yet when a suit is instituted against the city, and has been defended in the lower court by the City Attorney, whose quality is not disputed, it will be inferred that he has been authorized to carry the case by appeal to the Supreme Court, in case of a judgment adverse to the city.

But as to the city of Baltimore, the petition of appeal has been presented by one evidently without capacity—a curator *ad hoc* appointed by the court in the first stages of the suit, whose appointment had been superseded before the trial of the cause.

An attempt has been made to cure this defect by giving an appeal bond, under an order of the District Court, in the name of the agents of the city of Baltimore residing in New Orleans.

But it is clear that the requirements of the law, for a valid appeal, have not been fulfilled.

There are only two modes of appealing known to the law, to wit: by petition and citation, according to the Code of Practice; and by motion, according to the Act of 1843.

In this case, the appeal was by petition and citation; *a petition*, filed on the 29th March, 1856, purporting to be that of "the city of Baltimore, represented by *J. Livingston*, the attorney appointed to represent the city of Baltimore"—and we have already seen that *Mr. Livingston* had, at that time, no capacity to represent the city of Baltimore; *a citation* issued upon that petition, and served the 2d April, 1856.

When (upon a motion of appellees to dismiss the appeal, among other grounds, because *Mr. Livingston's* appointment of curator *ad hoc* had been superseded, and his consequent want of capacity to represent the city of Baltimore in taking an appeal) the District Court rendered its judgment, on the 8th April, 1856, allowing the city of Baltimore to file another appeal bond, signed by its proper representatives, a petition was presented on the 12th April in the following words:

"To the Honorable Judge of the Fifth District Court of New Orleans, the petition of *Brantz Meyer*, *J. L. Peterkin* and *W. L. Emory*, representing the city of Baltimore, respectfully represents, that in obedience to the order of the court, made on motion to dismiss the appeal herein taken in the name of *J. Livingston, Esq.*, curator *ad hoc*, they present the annexed appeal bond, and pray that the same be filed in conformity with said order. And they pray for general relief."

This petition is, in no sense, a petition of appeal. Code Practice, Art. 573. It asked for no citation to be issued, and no citation was in fact issued upon it, neither was any motion made for an appeal. We have, therefore, before us no appeal on behalf of the city of Baltimore in either of the modes recognized by law. The only petition and citation of appeal in the record, are nullities, which never bound the city of Baltimore, and cannot therefore be considered as binding upon the plaintiffs.

Rule absolute and appeal dismissed as to the city of Baltimore; and rule discharged as to the city of New Orleans.

THE STATE v. JOHN JOHNSTON

Generally speaking, the Supreme Court is inhibited by the restraints of the Constitution from entering upon such inquiries as are necessary to determine a question of continuance in a criminal case. In such cases its jurisdiction is limited to questions of law alone. The propriety of granting or withholding a continuance in most criminal cases, depends wholly upon facts within the knowledge of the District Judge, but not cognizable in the Supreme Court. The only proper mode of bringing the subject before the Supreme Court, is by a bill of exceptions which will show affirmatively upon its face that the ruling of the District Court was predicated exclusively upon a matter of law in which the court erred.

The non-attendance of jurors who had been summoned, but not excused, is not good cause for a continuance.

A bill of exceptions was taken to the refusal of the District Judge to grant a continuance because the prisoner had been served with a list of jurors, upon which were the names of three jurors who had been excused for the term prior to the service of the jury list. *By the Court:* Although in these matters affecting life and liberty, the clerks of courts cannot be too particular in the discharge of their duties, and should be held to strict accountability for their negligence, still we are not prepared to say that the accidental insertion of the names of three jurors who had been excused for cause in a list of eighty two, could have confused or embarrassed the prisoner in regard to his challenges. Before the trial he knew that those three were excused. He averred no surprise. He did not allege that the absence of the three jurors entailed any embarrassment upon him in getting an impartial jury. We have no reason to suppose that he was surprised or confused by the failure of the clerk to omit the names of three excused persons. All the jurors who had been summoned, and none who had not been summoned, figured upon the list; and we think the statute requiring a list of the jury who are to pass upon his trial to be served upon the prisoner, was sufficiently complied with.

APPEAL from the First District Court of New Orleans, *Robertson*, J.

Moïse, Attorney General. *Larue* and *Field*, for appellant.

SPOFFORD, J. *John Johnston* has appealed from the judgment of the First District Court of New Orleans, sentencing him to imprisonment at hard labor for the term of eighteen years, for the crime of manslaughter, of which he was found guilty under an indictment for murder.

I. He complains that the court erred in overruling his motion for a continuance to procure the testimony of an absent witness.

This matter of continuances in criminal cases rests so much in discretion, a discretion generally to be regulated by a state of facts peculiarly within the cognizance of the judges of the first instance, that this court has, on numerous occasions, disclaimed the right to interfere with their rulings upon the subject. *State* v. *Hunt*, 4 An., 438; *State* v. *Long*, Ib., 441; *State* v. *Brette*, 6 An., 661; *State* v. *Cazeau*, 8 An., 114; *State* v. *Muldoon*, 9 An., 24.

Generally speaking, this court is inhibited by the restraints of the constitution from entering upon such inquiries as are necessary to determine a question of continuance in a criminal case. In such cases its jurisdiction extends to questions of law alone. Const., Art. 62. The propriety of granting or withholding a continuance in most criminal cases, depends wholly upon facts within the knowledge of the District Judge, but not cognizable here. The only proper mode of bringing the subject before this court is by a bill of exceptions which will show affirmatively upon its face that the ruling of the District Court was predicated exclusively upon a matter of law in which the court erred.

II. The prisoner objected to going to trial because the jury list served upon him was defective. And he assigns for error the ruling of the District Court which compelled him to go to trial notwithstanding his objections.

Two defects are relied upon: 1st, that the list contained the names of many

jurors who had not attended court during the term, and were not present on the day of trial; and 2dly, because the list contained the names of three jurors who had been excused from serving for the term, prior to the service of the jury list upon the prisoner.

We infer that all the persons upon the list had been duly summoned, as it is not denied.

The first objection is met and answered by the case of the *State* v. *Howell*, 8 An., 51, upon which the prisoner relies. Such a contingency as the non-attendance of some of the jurors who had been summoned and not *excused* was there anticipated and declared to be insufficient ground for postponing the trial. It was said that "the inconvenience to which the prisoner may be subjected in the event of the failure of jurors to attend from unforeseen causes, is one to which he must necessarily submit while deriving the benefit of the statute. It is one of those unavoidable evils which no legislative foresight can provide against, but can never be serious, the number of jurors selected at each drawing being limited. The object of the law will be fulfilled if the prisoner be furnished with a list which is correct at the time of its delivery."

The defendant relies upon the last sentence of this extract to sustain his objection that three excused jurors figured upon the list served upon him, a list embracing eighty-two names.

We do not think the case of the *State* v. *Howell* supports any such construction of the statute, which merely requires that "a list of the jury which are to pass on his trial shall be delivered to the accused at least two entire days before the trial." Acts 1855, p. 152, sec. 17. In the *State* v. *Howell*, the list served upon the prisoner "contained the names of one hundred and fifty-six persons, of whom *one hundred and twenty* had been either previously excused *or were not summoned*, or were exempted by law from serving on juries, and had made known their causes of exemption. It was known to the officers of court at the time the list was served, that those one hundred and twenty persons would not be in attendance, or offered to the prisoner at the trial."

Upon this state of facts it was well determined that the spirit of the law requiring a service of the jury list had not been complied with; that the erroneous insertion of one hundred and twenty names in a list of one hundred and fifty-six had a tendency to surprise and embarrass the prisoner in the exercise of his right to challenge jurors, his challenges having been prepared with reference to the extravagantly erroneous list served upon him.

But, although in these matters affecting life and liberty, the clerks of courts cannot be too particular in the discharge of their duties, and should be held to strict accountability for their negligence, still we are not prepared to say that the accidental insertion of the names of three jurors who had been excused for cause, in a list of eighty-two, could have confused or embarrassed the prisoner in regard to his challenges. Before the trial, he knew that those three were excused. He averred no surprise. He did not allege that the absence of the three jurors entailed any embarrassment upon him in getting an impartial jury. We have no reason to suppose that he was surprised or confused by the failure of the clerk to omit the names of three excused persons. All the jurors who had been summoned, and none who had not been summoned figured upon the list; and we think the statute requiring a list of the jury who are to pass upon his trial to be served upon the prisoner, was sufficiently complied with. See *State* v. *White*, 7 An., 532; *Boles* v. *The State*, 2 Cushman, 450.

Judgment affirmed with costs.

Delphine, f. w. c., *v.* Mad. Widow Guillet et al.

The plaintiff was, by will, directed to be emancipated as soon as she could be. She sued for her freedom. It was objected that she could not have a decree ordering the defendants to enfranchise her because she had not prayed for it. *Held:* The prayer for general relief was sufficient.

Plaintiff offered to prove that she was of good character and sober habits, and had always behaved well and conducted herself respectfully towards white persons; to the reception of which evidence defendants objected, on the ground that no such allegations were made in the petition, which objection was sustained by the District Court. *Held:* The defendants, by their answer, having put plaintiff's character and fitness for emancipation at issue, the testimony should have been received.

APPEAL from the Second District Court of New Orleans, *Lea*, J. *Duvigneaud* and *Collins*, for plaintiff. *J. & E. Bermudez*, for defendants and appellants.

Spofford, J. In 1839, *Aimé Guillet* made his last will in the olographic form, which contains the following clause among the bequests to his wife: "Je lui reconnais en outre de ce, trois de nos domestiques à son choix, à l'exception d'une jeune enfant nommée *Delphine*, âgée de six à sept ans, et née de notre domestique appelée communément *Mimi*, à qui je donne par le présent la liberté et qui sera émancipée par ma femme le plutôt que faire se pourra."

In 1847, the testator having died, the will was duly proved.

In 1854, *Delphine* brought this suit against the widow and heirs of *Aimé Guillet*, in which she invokes the benefit of the testamentary disposition in her favor, alleges that she has often applied to the *Widow Guillet* to emancipate her, according to the will, but has met with a refusal, and prays that she be decreed by the court to be free, and for all such other relief as the nature of the case or equity may require.

The answer of the defendants admitted the bequest, but averred that the plaintiff was not then twenty-one years of age; that by law she could not be emancipated until she attained the age of thirty years, and that the respondents could assign no motive to the Police Jury or Municipality of New Orleans to enable them to authorize her emancipation sooner, nor could they consistently with duty declare that the said *Delphine* had behaved well any four years since the 28th August, 1839, the date of the will.

The plaintiff prayed for a trial by jury, and there was a verdict in these words. "We, the jury, find that the plaintiff is not free, but that, under the will of *Guillet*, she is entitled to her freedom, and require that the defendant be instructed to institute such proceedings as will ensure the emancipation of the plaintiff."

There was a judgment ordering the defendants to institute such proceedings without delay, and they have appealed.

It is now intimated that the plaintiff was a minor, and should have been assisted by a curator to give validity to the proceedings.

No exception was pleaded to her right to sue unassisted. If the law of minority intended for free persons could be held to extend to one in her condition, she has now attained the age of twenty-one years, and does not require the intervention of a curator.

It is said that the plaintiff has mistaken her right, and should therefore become

non-suit; that she has alleged herself to be absolutely free, and that, as she is only a *statu liber*, she cannot have a decree ordering the defendants to enfranchise her, because she has not specially asked it.

In a suit of this character, the prayer for general relief suggests a sufficient answer to such an objection.

But the policy of the State has annexed conditions to the enfranchisement of slaves which the courts cannot permit to be disregarded. This the testator evidently knew, for he did not think the manumission would become complete under the will by the event of his death; he directed his wife to emancipate *Delphine* so soon as it should become practicable.

According to judicial precedents, this bequest gave *Delphine* an inchoate right, a right which could be enforced in her favor by the tribunals when a proper time should arrive. But to secure the completion of her enfranchisement, she should show that it has become lawful.

We do not find the requisite proof in the record. But it is, probably, owing to the fault of the appellants in objecting to testimony which we think was erroneously rejected.

By a bill of exceptions we learn that the plaintiff offered to prove by witnesses that she was of good character and sober habits, and had always behaved well and conducted herself respectfully towards white persons, whereupon the defendant objected, on the ground that said facts were not alleged in the petition, and that the action was brought merely to have the plaintiff declared to be free, which objections were sustained by the court.

The defendants themselves, by their answer, had put the plaintiff's character and fitness for emancipation at issue, and we therefore think the testimony should have been received.

Were this an ordinary case of private right, we might perhaps have presumed that the plaintiff was able to establish the facts which the defendants improperly objected to as inadmissible in evidence; but as it concerns the public that none but worthy persons should be admitted to the *status* of freemen, it is our duty to exact the proof.

As the necessity for remanding the cause was occasioned by the act of the appellants in objecting to proper testimony, they must pay the costs of this appeal. *Smith* v. *Leake*, 4 L., 297; *Parmele & Baker* v. *Johnstone*, 15 L., 429.

It is therefore ordered, that the judgment of the District Court be avoided and reversed, and the cause remanded for a new trial according to law, the costs of appeal to be paid by the defendants and appellants.

DANIEL FREDERICH *v.* RALLI & CO.

The duty of a clerk is to treat his employer with respect, and not to insult or wantonly offend those who come to the establishment to transact business. A course of conduct on the part of the clerk inconsistent with this obligation, is certainly one of the very best reasons that can exist for dissolving the contract.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Durant & Hornor, for plaintiff. *Benjamin, Bradford & Finney*, for defendants and appellants.

FREDERICH v. RALLI.

BUCHANAN, J. The plaintiff was bookkeeper in the commercial house of the defendants, at a salary of fifteen hundred dollars a year. The yearly term appears to have finished on the 30th June. On the 9th June, 1852, the defendants by letter informed plaintiff that in addition to this salary they would thenceforth allow him a gratification of five hundred dollars, which would make his salary two thousand dollars year.

We understand this increased salary, as intended by the parties, and as also appears by an extract from the books, and by an account furnished by plaintiff himself, to run from the 1st July, 1852, being the commencement of the new year then next ensuing.

On the 4th August, 1854, defendants discharged plaintiff from their service, informing him at the same time that his salary would be allowed him to the end of the current month. This suit is brought for the whole of the salary of the year commencing 1st July, 1854, and ending 30th June, 1855. The defendants plead that they had serious causes of complaint against the plaintiff, which justified them in discharging him before the term of his engagement expired.

They enumerate four grounds of complaint, of which it is only necessary to notice the first, which is as follows: "Habitual insolence to his employers, and habitually rude and offensive conduct to persons coming into the office, to such a degree as to prevent the friends and customers of the house from coming into their office."

This charge is established to our satisfaction by the testimony of several witnesses. The defendants appear indeed to have exercised an extraordinary degree of forbearance towards the plaintiff, and to have tolerated for a long time conduct most unbecoming the relation which plaintiff occupied towards defendants, an indulgence which can only be attributed to the age of the plaintiff (sixty years) and his business capacities.

The duty of a clerk is undoubtedly to treat his employers with respect, and not to insult or wantonly offend those who come to the establishment to transact business. A course of conduct on the part of the clerk inconsistent with this obligation is certainly one of the very best reasons that can exist for dissolving the contract. See the case of *Kearney* v. *Holmes*, 6 An., 373.

The plaintiffs have tendered in their answer, and deposited in court a sum of money equal to the amount of the plaintiff's wages to the day of his discharge, with the costs to the day of tender. They must, therefore, be absolved from the payment of any ulterior costs.

Judgment of the District Court reversed, and judgment for plaintiff, against defendants, for three hundred and sixty-five dollars and thirty-six cents; the plaintiff and appellee to pay costs in both courts.

McCan & Patterson v. Steamer Robert J. Ward et al.

When the engineer of a steamer directed the manner in which certain repairs to the engine were to be made, in a matter in which his own knowledge was supposed to be superior to the persons employed by him, and directly against their opinion and advice, such persons cannot be held liable for the imperfection of the repairs

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J. *Durant & Hornor*, for plaintiffs. *T. B. Hart*, for defendants and appellants.

Merrick, C. J. This case is before us on appeal by the defendants from a judgment dismissing their reconventional demand.

They employed the plaintiff to fit a piston-head, furnished by themselves, to the rod of one of the engines of the R. J. Ward. The engineer of the boat attended the work, and gave the directions as to the manner in which it should be done. The plaintiffs proposed to put the head on hot, as usual at that shop, in order that it might become fast by contraction. The engineer of the boat directed that it should be driven on cold and keyed. The work was done in accordance with the directions of the engineer, was taken to the boat and put in its place by the engineer.

The Robert J. Ward had not proceeded more than fifteen or eighteen miles on her trip up the river before the piston-head came loose, and the boat was detained twelve hours until the same could be repaired.

The reconventional demand is for damages occasioned by that detention.

The law of this case is well settled by one of the witnesses. He says: "As a general rule, the engineer, by giving the direction, assumes the responsibility as to the mode of doing the work. If he superintends it, and receives it without objection, witness conceives that he assumes the entire responsibility."

In the case before us, the engineer having directed the manner in which the work was to be done in a matter in which his knowledge was supposed to be superior to that of the persons employed by him, and directly against the opinion and advice of those persons, there can be no reasonable ground on which to hold them liable.

Judgment affirmed.

A. Brousseau & Co. v. Ship Hudson, Captain and Owners.

Action to recover damages for injury caused to goods by the bursting of casks containing chloride of lime. *By the Court:* Where the common carrier is unable to make good his defence upon some of the grounds which form exceptions to his liability, it is clear he must pay the loss, although not chargeable with any negligence whatsoever; and in fact, even where he has exercised every possible diligence to prevent the loss. He is also liable for a loss occasioned by an accident arising from any unseen nuisance in the course of his navigation.

As the damage in this case was not caused by superior force, (*force majeure*,) or by accident, (*cas-fortuit*,) defendants are liable.

As between the shipper and the master, the legal presumption arises from the bill of lading, that the goods were in good condition, but such presumption cannot affect third persons.

Code 2725.

BROUSSEAU v. SHIP HUDSON.

APPEAL from the Second District Court of New Orleans, LEA, J. *Hamner & Hays*, for plaintiffs. *Wolfe & Singleton*, for defendants and appellants.

VOORHIES, J. This is an action to recover the sum of $991 84, the alleged damage of four bales of carpeting shipped at New York on board of the ship Hudson, to be delivered to the plaintiffs at New Orleans.

The fact that the alleged damage was occasioned by the bursting of four casks of chloride of lime in the hold of the vessel, appears to be conceded. The cause of the accident, it would seem, has been attributed to an excess of unslacked lime in the composition of the chloride.

A witness in the employment of the ship's husband, testified to the fact of the importation of chloride of lime for upwards of twenty years, and that the bursting of a cask had never occurred before.

The question then arises, are the defendants legally responsible for the damage? Their liability is resisted on the ground, that they were bound, as common carriers, by the usage of the trade, to receive and stow the chloride of lime in the hold of the vessel, as other goods, for transportation; and hence the plaintiffs must be presumed to have known it, and consented to have their goods stowed with the chloride of lime. The cargo, it is urged, was well stowed, and no neglect was imputable to the defendants.

We think it is immaterial to the decision of the case, whether the alleged usage existed or not.

Under our code, common carriers are liable for the loss or damage of the things intrusted to their care, unless it be shown by them, that such loss or damage was occasioned "by accidental and uncontrollable events (*par cas fortuit, ou force majeure*)." Art. 2725, 1 R. R. 410. The term *vis major* (superior force) is used in the civil law in the same way that the words "act of God" are used in the common law, and so also is the term *casus fortuitus*. By the act of God is meant inevitable accident or casualty. "By inevitable accident is meant any accident produced by any physical cause, which is irresistible; such as a loss by lightning or storms, by the perils of the seas, by an inundation, or earthquake, or by sudden death or illness. By irresistible force is meant, such an interposition of human agency, as is, from its nature and power, absolutely uncontrollable." Story, Bailments, §§ 25, 489, 511. Angell, Law of Carriers, § 154. The term "by the act of God," was construed by the Superior Court of Errors and Appeals of Delaware, 4 Han. R. 448, to mean "such inevitable accident as cannot be prevented by human care, skill, or foresight; but results from natural causes, such as lightnings and tempests, floods and inundation." "To prevent litigation, the law presumes against a carrier in every case, except such as could not happen by the intervention of human means. Ang., Law of Carriers, § 154. Where the common carrier is unable to make good his defence upon some of the grounds which form exceptions to his liability, it is clear that he must pay the loss, although not chargeable with any negligence whatsoever; and, in fact, even where he has exercised every possible diligence to prevent the loss. He is also liable for a loss occasioned by an accident arising from any unseen nuisance in the course of his navigation. Story, Law of Bailments, §§ 528, 517, 518. 3 Kent's Com. (2d edition) 299. Emerigon, Insurances, 285. Hemp taking fire in a state of effervescence may be mentioned as an instance of loss which is not attributable to a *cas fortuit*.

From the principles advanced in these authorities, we think it clearly follows, as a natural deduction, that the damage in this case cannot be considered, in a legal sense, to have been occasioned either by superior force, *force majeure*, or by accident, *cas fortuit*. Every case, as we have seen, which might have been foreseen and avoided, is not a fortuitous one. Moreover, it is proper to remark, that there is not a tittle of evidence showing the condition of the casks, containing the chloride of lime, when stowed in the hold of the vessel. It is true, as between the shipper of the article and the master, the legal presumption arises from the bill of lading, that the goods were in good condition, but such presumption cannot affect third persons.

Judgment affirmed, with costs.

THE STATE v. RICHARD SCOTT.

Bill of exceptions to the refusal of the court to charge that "the jury are not the judges of the law and fact in a criminal case, but must take the law as laid down by the court"—*Held:* The charge asked for was erroneous. *By the Court:* In both civil and criminal cases, the jury are judges of the law and the fact; otherwise it would be impossible for them to render a general verdict in any case.

It is in general safe, as it is in conformity with the theory and the presumptions of our criminal jurisprudence, for the jury to regard the exposition of the law given by the court as correct and decisive—but they are under no compulsion to do so. They not only have the physical power to disregard the instructions of the court, but there might be extreme cases where it would be right to exercise the power. Still the statutes require the Judge to expound the law to the jury and, in general, they will do well to heed it as authoritative.

APPEAL from the First District Court, *Robertson*, J.

Moïse, Attorney General. *Henderson, Jr.*, and *Field*, for appellant.

SPOFFORD, J. The defendant having been found "guilty without capital punishment," under an indictment for murder, was sentenced to imprisonment at hard labor for life.

He has appealed, and now seeks to reverse the judgment of the inferior court for various alleged errors.

It is only necessary to notice one.

A bill of exceptions declares, that on the trial of this case before a jury, the court instructed the jury in these words: "The jury are not the judges of the law and fact in a criminal case, but must take the law as laid down by the court."

The charge was erroneous, and has not been fortified by the citation of a single precedent.

In both civil and criminal cases, the jury are judges of the law and the fact; otherwise it would be impossible for them to render a general verdict in any case. *Tresca* v. *Maddox*, *ante* p. 206. *The State* v. *Ballerio*, *ante* p. 81. *Bostwick* v. *Gasquet*, 10 Rob. 81.

In the case of *Ballerio*, the Judge merely refused to give a charge, which, if unexplained, might have left an erroneous impression upon the minds of the jurors; and we held, that there was no such error in declining to give the instructions asked, as would authorize us to avoid a verdict rendered after a strictly legal charge.

STATE v. SCOTT.

But here is an instruction that is absolutely erroneous; and we are bound to presume that it operated prejudicially to the prisoner.

Our view upon the respective provinces of the court and jury, are expressed with sufficient fullness in the case of *Ballerio*.

It is in general safe, as it is in conformity with the theory and presumptions of our criminal jurisprudence, for the jury to regard the exposition of the law given by the court, as correct and decisive; but they are under no compulsion to do so. They not only have the physical power to disregard the instructions of the court, but there might be extreme cases where it would be right to exercise the power. Still the statutes require the Judge to expound the law to the jury and, in general, they will do well to heed it as authoritative.

Judgment reversed, and the cause remanded for a new trial, according to law.

MERRICK, C. J. For the reasons given in my dissenting opinion in the case of *Ballerio*, I concur in the conclusion of the court in this case.

THE STATE *v.* JOSEPH JERRY TAYLOR.

A mulatto having been examined in chief as a witness for the State—on cross-examination it appeared that he had been a slave, whereupon the prisoner's counsel called on the court to exclude his testimony, there being no evidence that he had been emancipated. *Held:* the objection came too late—there being no averment that the incompetency of the witness was not known before the examination in chief. The color of the witness would naturally have suggested an inquiry into his condition on his *voir dire*; and as the prisoner had a person in court to prove that the witness had once been a slave, there could have been no surprise when, on the cross-examination, the witness testified to that fact. The prisoner could not be permitted thus to take the chances of the witness' testimony if it had been favorable to him, reserving the right to object to his testimony if unfavorable.

Where the objection to the competency of the witness arises from *his own examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might, on other grounds, be inadmissible. When the whole ground of the objection comes from himself only, what he says must be taken together, as he says it.

APPEAL from the First District Court of New Orleans, *Robertson*, J. *Moïse*, Attorney General. *Field & Wooldridge*, for appellant.

SPOFFORD, J. The prisoner, a free man of color, indicted for the murder of a slave, was convicted of manslaughter and sentenced to imprisonment at hard labor for seven years.

Upon appeal to this court he bases his only claim to relief upon a bill of exceptions to a ruling of the District Judge upon a question of evidence.

A mulatto, named *Charles Robinson*, was offered by the State as a witness, and sworn and examined in chief without objection on the part of the defence. In cross-examining the witness, the prisoner's counsel asked him if he had ever been a slave, to which he replied that he was once the slave of *Mrs. Robinson*, and since her death, had become free, and was now free, and had been told by many gentlemen that he was free. The Attorney General was then called upon by counsel to produce evidence of the freedom of *Charles Robinson*, which he declined doing, whereupon the defendant moved to exclude his testimony already given, which the court refused. The prisoner also offered a free

man of color, at the same time, to prove that *Charles Robinson* passed as the slave of *Mrs. Robinson* ten years ago, which evidence the court refused to hear.

We think the District Judge did not err in refusing to strike out the testimony of the mulatto, *Charles Robinson*, which had been received without objection; and this for two reasons; first, because the objection to his competency came too late, and, secondly, because his whole statement upon the cross-examination taken together, shows that he was competent.

I. The objection came too late. There is no averment anywhere that the alleged grounds of incompetency were only discovered on the cross-examination and there are reasons to suppose that they were not first discovered then. The defendant has a right to examine the witness upon his *voir dire* previous to his being sworn in chief; and the color of the witness would naturally suggest an inquiry into his condition. Another reason for supposing that the defendant was not surprised by learning, on the cross-examination, that *Charles Robinson* had once been a slave, is that he had a witness on hand to prove the fact. Now the defendant cannot be permitted thus to take the chances of the witness' testimony if it be favorable to him, reserving a right to object to his competency if unfavorable.

II. In the same breath that the witness stated he was once a slave he stated that he was free. "When the objection to the competency of the witness arises from *his own examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might, on other grounds be inadmissible. When the whole ground of the objection comes from himself only, what he says must be taken together, as he says it." 1 Green's Ev. § 422. In the *State* v. *Cecil*, 2 M. 208, where even the master was called to prove the incompetency of a witness, and swore that she was once his slave, but he had liberated her, the court could not require the written act of manumission, but remarked that the declaration of the master must be taken *in toto* and it established her emancipation in the same breath. In the case of *Roebuck* v. *Curry*, 2 An. 998, relied upon by the appellant, it appears that the objection was taken *in limine*, and the Judge refused to hear the witness at all until proof of his emancipation. There was a presumption raised that the witness offered was a slave. It could only be removed by legal proof, and the writing was required, which (the court remarked) was stated to be within the immediate reach of the party offering the witness, and who failed to produce it, though time was allowed for the purpose.

III. The case of the appellant was not strengthened by the offer of *Louisa J. Parker*, f. w. c., as a witness, to prove that the boy, *Charles Robinson*, passed as the slave of *Mrs. Robinson* ten years ago; and the court did not err in refusing to hear her to this fact, because she was not offered until after *Charles Robinson* had been examined without objection, and there was no allegation or pretence that the fact had just been discovered. "It was the duty of the party taking a bill of exceptions to state every fact necessary to establish the error complained of. In the absence of such proof, the presumption is in favor of the opinion rendered by the judge *a quo*." Porter, J., in *Pilié* v. *Lalande*, 7 N. S. 650.

The judgment is, therefore, affirmed with costs.

J. P. Whitney & Co. *v.* John Gauche.

Question of fact as to whether the damage to goods, was before, or after shipment.

APPEAL from the Sixth District Court, *Cotton*, J.

Durant & Hornor, for plaintiffs and appellants. *Dufour*, for defendant.

Voorhies, J. The owners of the ship Express sued the defendants on a freight bill for the sum of $937 48. The latter in his answer admitted the correctness of the bill, but claimed a reduction of the sum of $124 87, as damage which occured to his goods on their transportation from Liverpool to New Orleans.

This deduction was allowed by the court below, and the plaintiffs appealed.

The record discloses that the goods, when delivered to the defendant and unpacked, were found damaged by salt water. One of the witnesses states that a great many articles of crockery, consisting of pitchers, jugs and candlesticks, were broken; that the paper in which they were packed was wet with salt water; that the damage to which crockery is liable, when wet with salt water is, that the salt water tends to rot the straw, so that the articles become loose, and are destroyed by the least handling; and that crockery wet inside of the packages is always damaged. This testimony appears to be corroborated by several other witnesses. In regard to the question of damages to the goods, we think the proof is conclusive. The goods, according to the bill of lading, were shipped in good order and condition by *Thomas F. Bennett*, on board of the ship Express at Liverpool, on the 18th of July, 1854, to be delivered in like good order and condition to the defendant at New Orleans, "all and every the dangers and accidents of the sea and navigation of whatsoever nature and kind excepted."

The damage to the goods having been established, the burden was then thrown on the plaintiffs to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading. But such is not pretended to have been the case in this instance. The defence rests on the ground that the damage existed previous to the shipment of the goods. It is true that the acknowledgment of the master as to the condition of the goods, extended only to the external condition of the casks, excluding any implication as to their quantity, quality or condition, or whether properly packed or not in the casks, when received on board. Had the evidence laid a foundation for a reasonable inference, that the damage had occured previous to the shipment of the goods, it is clear that the burden would have been thrown on the defendant to rebut the inference. But we do not think that any such foundation has been laid. We are, therefore, bound to conclude that the damage was occasioned by the fault or negligence of the master of the vessel. This we think is in accordance with the doctrine announced in the cases of *Clark* v. *Barnwell*, and *Rich* v. *Lambut*, 12 Howard, 280 and 347, relied upon by the appellants.

It is, therefore, ordered and decreed, that the judgment below be affirmed with costs.

Lea, J. (with whom concurred Spofford, J.) The evidence in this case shows that the crates containing the damaged goods were in apparent good

order (viz: externally) when delivered: that they were stowed in a part of the vessel where damage from leakage was impossible: that the hold was kept free of water, caused by ordinary leakage, by pumping regularly every night: that the stowage was good, and that the vessel shipped no water on the voyage. There was no stress of weather. To use the language of two of the witnesses, the vessel did not ship more than a bucket of water on the voyage; and lastly, it appears that no other goods except those shipped to plaintiff were delivered in a damaged condition. It is moreover shown that these goods came from the interior of England, that they were brought to Liverpool in canal boats.

There is but one circumstance tending to rebut the conclusion that it was physically impossible that these goods could have been damaged on board of the vessel, and that is the probability that they were damaged from dampness caused by salt water, which rotted the exterior packing of the goods. It is well known, however, and it has been judicially recognized as a geographical fact, that the river Mersey is filled with salt water, and that the tide ebbs and flows to a very great height. 2d Rob. 403.

If these goods came down the river Mersey it is more than probable that they were damaged in their transportation to Liverpool. Be this as it may, it appears to me to be a physical impossibility that the four damaged casks shipped to *Gauche* (*all of one mark*) should, under the circumstances, have sustained damage from salt water on the voyage, while all the other merchandize of which the cargo consisted, remained uninjured. It appears to me that the burden of proof incident to the acknowledgment in the bill of lading, which is conclusive only as to the external condition of the casks, has been shifted from the shoulders of the carrier to that of the shipper. 12 Howard 280, 547.

JOHN O. BARTELS & A. W. DANA v. THEIR CREDITORS AND THE CREDITORS OF STAFFORD, BARTELS & CO.

Insolvents leased a hotel from S. for one year from the 14th January, 1855, for $15,000 per annum, payable in monthly installments of $1,250. In May, 1855, the lease was sold, by order of Court, and S. the lessor, became the purchaser. *Held:* That the purchase of the lease by the lessor extinguished the lease, and the lessor should be put down on the tableau as a creditor of the insolvents only for the sum due at the date of the sale of the lease. For the remaining seven months nothing was due him, as (he being the purchaser) the lease was dissolved by confusion.

Decision in *Cook & Morehouse* v. *Dodge & Johnson*, 6 An. 275, affirmed.

The order for the sale of the lease does not say that the purchaser shall assume the payment of the rent, and no such construction is warranted by implication of law. Neither the forced nor voluntary assignment of a lessee's right of occupation carries with it any such obligation. LEA, J., with whom concurred SPOFFORD, J., dissenting.

There are two ways of selling the unexpired term of a lease; one by selling it for a premium subject to the payment of rent to the landlord; the other by selling or assigning the right of occupation without the assumption of rent. The latter is the more frequent, as it rarely happens that the unexpired term of a lease is worth a premium. LEA, J., with whom concurred SPOFFORD, J., dissenting.

Where a lease is offered for sale upon the condition that the purchaser shall assume the payment of the rent, confusion would take place should the lessor, himself, become the purchaser. But where the payment of the rent is not to be assumed, by the terms of the sale, the rights of the lessor who purchases, are not extinguished: he has not acquired any obligation due himself and the price of the purchase, in such cases, is due not to the lessor, but to the principal lessee, or his representatives. LEA, J., with whom concurred SPOFFORD, J., dissenting.

Code 2676, 2677, 2696.

BARTELS v. CREDITORS.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Clark & Bayne*, for Syndic. *Magne, Mott & Fraser, Race & Foster*, and *Duncan & McConnel*, for different creditors.

VOORHIES, J. A provisional tableau of distribution filed by the syndic in this case has given rise to various oppositions.

1. The claim of *F. S. Slatter* for the sum of $17,705, classed as a privilege for rent, is opposed by *Edward Turpin*, one of the creditors of the insolvents. *Slatter*, it appears, leased his property, known as the "City Hotel," to *George W. Cullom* and *John O. Bartels*, for the term of three years from the 14th of January, 1852, at an annual rent of $16,200, payable in monthly instalments of $1,350. On the 20th of December, 1854, *Slatter* leased the same property to *James Stafford, John O. Bartels* and *Amos W. Dana* for the term of one year from the 14th of January, 1855, for the sum of $15,000, payable in monthly instalments of $1,250. The lessees under each contract furnished to the lessors their corresponding promissory notes. On the 30th of the same month in which the last contract of lease was entered into, *Bartels* and *Dana* filed a petition in the Fifth District Court of New Orleans, accompanied with a schedule or statement of their affairs, in order to obtain a respite for one, two and three years from their creditors. *Slatter* was carried on the schedule thus filed as a creditor of the insolvents for the sum of $3,048 75, as the balance stated to be due to him on the three last installments of the lease ending the 14th of January, 1855. In the proceedings, there is no reference to the other contract of lease. On the refusal of their creditors to grant the respite, *Bartels* and *Dana* made a voluntary cession of their property on the 27th of February, 1855. At the syndic's sale in May, 1855, the lease to the insolvents was adjudicated unconditionally to the lessor, *Slatter*, for the price of $3,000. *Slatter's* claim for rent was allowed for the entire term of the lease, ending the 14th of January, 1856, to-wit: $15,000, with the lessor's privilege, deducting therefrom the price of adjudication, to-wit: $3,000.

We are now required to determine, under these circumstances, whether *Slatter* is legally entitled to be classed on the tableau for the rent of the unexpired term of the lease, to be reckoned from the date of his purchase, to-wit: seven months and a half at $1,250 per month, making an aggregate of $9,375. We have recently decided a case in which we held, that the purchase of a lease by the lessor, operated as a dissolution of the contract of lease by confusion, the qualities of lessor and lessee uniting in the vendee. It is true, in that case, the consideration for the transfer of the lessee's rights was expressly stipulated to be a *premium*, whilst in the present, no such mention is made; but it appears to us this is immaterial, as the effect in either case must be the same; the divestiture of the lessee's rights to which the purchaser becomes subrogated. Let us suppose, for instance, that any other person than the lessor himself had become the purchaser of the lease, would not such purchaser be bound not only for the purchase money, but for the rent stipulated to be paid by his vendor? Illustrating farther, in a sub-lease, which the law permits the lessee to make, the rights of the lessor cannot be affected. "The lessee has the right to under-lease or even to cede his lease to another person, unless this power has been expressly interdicted." C. C. 2696. In such case the landlord's privilege or right of pledge only would be affected. C. C. 2676, 2677. What difference then is there between such a conveyance and a forced alienation of the lease to another person? As to the legal effect of either *quoad* the

lessor, we think there can be none. We are, therefore, of opinion that the lease in this case was dissolved by the sale to *Slatter*, the lessor. *Slatter* is, consequently, only entitled to recover the following sums with the lessor's privilege, to be classed as such on the tableau of distribution, to-wit: $3,048 75, balance due under the first lease, and $3,875, balance due for five and a half months' rent under the last lease, after having deducted therefrom $3,000, the purchase money for the unexpired term.

2. The claims of several creditors, for supplies as retail dealers, and for services rendered as domestics or servants, classed as privileges, are also opposed by *Turpin*. The controversy in this matter seems to be limited to the question, whether these creditors are entitled to the privileges allowed them by the judgment of the court below, to secure the payment of their respective claims. According to the decision in the case of *Cook & Morehouse* v. *Dodge & Johnson*, 6 An. 275, they are clearly not entitled to be ranked as privileged creditors. We do not think there is any good reason to authorize us to overrule that decision. Unless manifestly erroneous, we think it would be unwise for us to disregard the interpretation of a statute by our predecessors.

The claim of *Sampson & Keene*, classed as a privilege, is also opposed. They claim the vendor's privilege on the price of certain furniture which was sold by them to the insolvents. The proof leaves no doubt on our minds as to the correctness of their claim, which was allowed by the judgment of the court below.

4. The following claims classed as privileges on the tableau are also opposed, to-wit:

Clerk's costs and costs retained	$100 00
Sheriff's costs of sale, advertising, &c., labor, &c.	887 70
Notary's fees	150 00
Appraiser's fees	100 00

The sheriffs throughout the State are bound, whenever they return a paper or process into court, to endorse thereon the specified items of fees to which they may be entitled. All officers claiming costs or fees are bound, whenever required to do so, to deliver to the person against whom such fees may be charged, an explicit fee bill. Clerks and sheriffs can only demand such fees as are expressly allowed them by law. In the Act entitled "An act to regulate and define costs and fees generally," (Session Acts of 1855, 162,) the only charge in relation to sheriff's fees, left to the discretion of the court, is that for keeping personal property and slaves in certain cases. The fees which notaries may demand, are also defined and regulated by that Act. As none of the claims thus classed appear to have been established by the requisite proof, it is clear that they cannot be allowed. But considering the admissions in the record, which may have misled the parties in this regard, we think it would be inequitable to conclude them. Justice therefore, requires that the cause should be remanded to determine the matter legally.

5. The claim of *J. Stafford* for $6,300, classed as an ordinary debt, is also contested. He was, as we have seen, one of the joint lessees under the second lease, and bound *in solido* with his partners for the rent. He was also bound for the debts contracted for the hotel after he became a partner, about July, 1853, as shown by the testimony of *E. Barnett*. Under that lease we have allowed *Slatter* $6,250 as rent, with the lessor's privilege. Under these circumstances, we do not think *Stafford* should be permitted to partake in the

fund of the estate until the payment of the other creditors. For the same reason, we think the claims of *J. Stafford & Co.* for $3,502 and $274 41, classed as ordinary debts, should also be disallowed, so far as the same may be prejudicial to the other creditors. It is clear that the rights of the creditors of a partnership cannot be affected by equities which may exist between the partners.

6. We do not think there is any material error to the prejudice of the creditors in the amount allowed as commissions to the provisional syndic and syndic by the judgment of the court below.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, that *F. S. Slatter* be classed on the tableau of distribution as a creditor for the sum of six thousand nine hundred and twenty-three dollars and seventy-five cents, with interest thereon, according to law, with the lessor's privilege, being the balance due him for rent after deducting the sum of $3,000, the purchase money of the lease, that the claims of the creditors for supplies as retail dealers, and for services as domestics or servants be disallowed as privileges, and the same be classed as ordinary debts, that the claims of *J. Stafford* and of *J. Stafford & Co.*, classed as ordinary debts, be rejected, that the cause be remanded to determine the amounts to which the clerk, sheriff, notary and appraisers may be respectively entitled, that the judgment in other respects be affirmed, and that the costs of appeal be borne by the appellees against whom the judgment is reversed, and by the appellants where the judgment is affirmed in favor of the appellees.

LEA, J., (with whom concurred SPOFFORD, J.) dissenting. I concur in the opinion of the majority of the court, as delivered by Mr. Justice VOORHIES, except so far as it relates to the construction of the obligation assumed by *S. F. Slatter*, in the purchase of the lease at the Sheriff's sale.

In the opinion of the court, "the contract of lease was extinguished by the sale of it to the lessor," on the ground, "that having become the purchaser of the lease he, the lessor, united in himself the qualities of lessor and lessee."

The facts of the case, so far they are essential to the illustration of the question presented, are as follows: On the 2d of May, 1855, an order of court was granted for the sale of *all the property* belonging to the insolvents. By virtue of the order, the Sheriff offered for sale, on the 15th of May, the unexpired term of the lease made by *Slatter* to the insolvents, having then seven and a half months to run; at which sale, *Slatter* himself became the purchaser for the sum of $3000. The question is, whether at this sale, *Slatter* assumed the payment of a monthly rent of $1,250, in addition to a premium of $3,000; or whether the $3,000 was a bid made for the right of occupation of the hotel for the unexpired term of the lease. The test suggested in the opinion of the court, by which this question should be solved, is certainly a fair one. What would have been the obligation of any other purchaser but the lessor, at such a sale? For it would be contrary to all rules of equitable construction to impose upon *Slatter* a *different* obligation from that which would have been assumed by any other bidder. Now the order of sale does not say that the purchaser shall assume the payment of the rent; the lease does not appear to have been sold subject to any such condition, and it is not so stated in the adjudication. No such construction is warranted by implication of law. Neither the forced nor the voluntary assignment of a lessee's right of occupation, carries with it any such obligation.

It is not necessary to embarrass the inquiry with speculations as to the probable rights of a lessor in a case where his contract was infringed by such an arrangement. In the case at bar, no such question is presented; the lessor having acquiesced in the sale by becoming himself the purchaser. There are two ways of selling the unexpired term of a lease; one by selling it for a premium, subject to the payment of the rent to the landlord, the other by selling or assigning the right of occupation without the assumption of the rent. The latter is the more frequent way of selling or assigning it, since it rarely happens that the unexpired term of a lease is worth a premium. The case of a sub-lease is a familiar illustration of one form of this latter mode of assignment. The sub-tenant has nothing to do with the original contract of lease. He is bound only for the payment of the rent which he stipulates to pay as sub-lessee; and whatever may be the rights of the landlord to cause the lease to be cancelled for the non-payment of the rent by his tenant, he can in no case hold the sub-tenant liable for the payment of the rent under a contract to which he is not privy. Even the lessor's privilege would not extend to the effects of the under-lessee, except so far as the latter might be indebted to the principal tenant. C. C. 2676. 6 Rob. 294.

Now, it must be conceded, that where a lease is offered for sale upon the condition that the purchaser shall assume the payment of the rent, confusion would take place should the lessor himself become the purchaser, for the reason that the relation of debtor and creditor would be united in the same person; and this would be in accordance with the decision lately rendered in the case of *Young* v. *Cambot;* and for the like reason, where the payment of the rent is *not* to be assumed by the terms of the sale, the rights of the lessor, who purchases under such circumstances, are not extinguished. He has not, by the purchase, acquired any obligation due to himself; the price of the purchase in such case is due not to the *lessor*, but the principal *lessee* or his representatives. This doctrine was fully recognized in the case of *Bach & Co.* v. *Cottingham*, recently decided.

In that case, as in the case at bar, a judicial sale was made of the unexpired term of a lease, the purchaser paying a fixed sum therefor. Before the expiration of the lease, the property was destroyed by fire. The lessor, who had received the whole of his rent up to the expiration of his lease, was sued both by the purchaser of the lease and the seizing creditors of the principal lessee, for the reimbursement of the overpaid rent; the former contending, that by the terms of his purchase, he had acquired all the rights of the original lessee. But the court held, that the right to reimbursement had not passed to the purchaser of the unexpired term of the lease, but remained vested in the original lessee and, as such, was liable to seizure by his creditors. It is clear, therefore, that the purchaser of the unexpired term of the lease, was not subrogated to the contract of lease with its rights and corresponding obligations. He became not the assignee of the contract, but he acquired the right of occupation under the contract. There is nothing in the nature of the proceedings for a sale, nor in the presumptions arising from the facts of this case, which would indicate the intention or the expectation that the purchaser was to pay a premium on the lease. Had such been the intention of the syndic at the time the order of sale was applied for, it should have been clearly expressed.

But the facts of the case absolutely repel any such presumption. It appears to me manifest, that no person could be expected to pay a premium for the unexpired lease of a hotel, after the business season had nearly expired, and at a time when the season was approaching at which many of the large hotels of the city are closed from inability to pay expenses, and when those which are not closed, are kept open at a charge to the proprietors; and yet it is contended, that a purchaser would, under the circumstances, not only have assumed to pay a monthly rent of $1,250, but would be liable for a premium of $3,000 more for the privilege of so doing. As respects *Slatter* himself, such a conclusion is not less improbable, for having his accruing rent to the extent of $9,375 secured to him, by his privilege of lessor, we are to conclude that he offered a premium of $3,000 more for the purpose of extinguishing his claim, thereby making a voluntary sacrifice of the whole of it. A rule of interpretation which leads to such a conclusion, cannot, in my opinion, correctly illustrate the intentions of the parties.

I think that *Slatter*, after being charged with the amount of his bid, should be placed on the tableau, as a creditor for the rent accruing until the expiration of the lease.

CITY OF NEW ORLEANS *v.* WILLIAM H. GARLAND.

An affidavit alleging that the defendant attempted to depart permanently from the State, that he concealed himself to avoid being cited, and that he is about to remove his property out of the State, is insufficient for an attachment. The allegations refer, indefinitely, to the past—make no allusion to the present, or future, and are too vague to form the legal foundation of an attachment.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.
Livingston, City Attorney. *Hunton & Pike*, for defendant and appellee.

VOORHIES, J. This is an appeal taken from a judgment setting aside a writ of attachment.

The petition charges "that William H. Garland attempted to depart from the State permanently, and that he concealed himself so as to avoid being cited to appear and answer the demand of petitioner, and that he is about to remove his property out of the State." Besides the correctness of the allegations of the petition, and the amount of the debt claimed, the affidavit declares that "the said Garland did attempt to depart permanently from the State of Louisiana, and is about to remove his property out of the State."

A creditor may attach the property of his debtor, "when such debtor is about leaving permanently the State, without there being a possibility, in the ordinary course of judicial proceedings, of obtaining or executing judgment against him previous to his departure, or when such debtor has already left the State never again to return; or when such debtor resides out of the State; or when he conceals himself to avoid being cited and forced to answer to the suit intended to be brought against him." C. P., 240. To obtain the attachment, it is essential that the creditor should make "a declaration under oath, at the foot of his petition, stating the amount of the sum due to him, and that his debtor is either on the eve of leaving the State permanently, that he has left it never again to return, that he resides out of the State, or that he conceals himself in order to avoid being cited." C. P., 243.

Under these provisons, we think it is clear that the affidavit must be considered defective. The allegations, both in the petition and affidavit, in regard to the departure and concealment of the defendant, refer indefinitely to the past, making no allusion either to the present or future, too vague indeed to form the legal foundation of an attachment. As the remedy by attachment has always been considered harsh, a party who resorts to it must therefore bring himself strictly within the requirements of the law.

It is therefore ordered and decreed that the judgment of the court below be affirmed with costs.

THE STATE OF LOUISIANA, on the relation of JOHN HOLMES, v. EMILE WILTZ.

An interpretation of a statute which must lead to consequences mischievious and absurd is inadmissible, if the statute is susceptible of another interpretation whereby such consequences may be avoided. The legislative intention must be honestly sought after and faithfully executed, if not in conflict with a paramount law. And in cases like this, the meaning must be sought, not merely in the words of the statute itself, but in its subject matter, in the history of the legislation thereupon, in the purpose of the law, the reason of its enactment, and the evil it sought to remedy.

The subject matter of the Act of 14th March, 1855, ("an Act creating a Recorder of Mortgages for the parish of Orleans,") is not the erection of a new office. It seems to imply the recognition of an existing office, whose duties are well known. It does not purport to extinguish that office, and to substitute a new and different one. It provides for the mode of appointing an incumbent to fill it at stated intervals, for the mode of giving his bond, and for the appointment of his deputy, whose duties are to be commensurate with his own, but for whose acts he and his sureties are to be responsible. All these sections relate to the officer, not to the office; the office exists independent of the statute; and these simple provisions about the incumbent constitute its whole subject matter.

The statute in question is in fact but a grouping together in one act of parts of three pre-existing laws, with very slight changes of phraseology, and no change whatever of substance. By it the Legislature has merely said "here is a condensed statement of all the law now in force relative to the mode of appointment, term of service, amount and condition of the bond, and appointment, duties of and responsibility for a deputy, of the Recorder of Mortgages for the parish of Orleans: all else, *upon these specified matters*, is repealed."

It cannot fairly be inferred that an ancient office was thereby abolished, and a new one created. The literal terms of the statute do not seem to require such a construction; its history, subject matter and purpose alike forbid it.

A person holding an existing office under a fixed tenure cannot be removed, or his regular term of service abridged by an ordinary act of legislation, other than an Act abolishing the office. *The mode of removing officers is prescribed by the Constitution.*

While the history of the legislation, and the circumstances under which the statute was enacted may be inquired into, as furnishing aids to its interpretation, still the plain and unequivocal meaning, according to its received acceptation, of the language in which an Act is expressed, should not be overlooked. LEA, J., dissenting.

Under the Constitution unless the object of a law is expressed in its title, the law is absolutely void; indeed nothing else can be lawfully included in it; if therefore, the object or intention of the lawgiver is not made clear by the other parts of the Act, it must be determined with absolute certainty by a reference to its title. LEA, J., dissenting.

The object of the statute in question is *expressed in its title:* that title is "an Act *creating* a Recorder of Mortgages for the parish of Orleans." The statute created anew the office of Recorder of Mortgages, and authorized the appointment of a new officer. LEA, J., dissenting.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Lacy & Wooldridge and *Moïse & W. M. Randolph*, for plaintiff. *Ogden & Leovy*, for defendant and appellant.

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SPOFFORD, J. (LEA, J., dissenting.) The defendant, holding a commission from the late Governor, as Recorder of Mortgages for the parish of Orleans, for two years from the 1st day of March, 1855, has appealled from a judgment ordering him, by peremptory mandamus, to register the bond, and recognize the capacity of the relator, *Holmes*, who was commissioned by the present Governor on the 15th March, 1856, as "Recorder of Mortgages for the parish of Orleans, *vice Emile Wiltz*, whose term of office has expired by the provisions of an Act entitled "an Act creating a Recorder of Mortgages for the parish of Orleans," approved March 14th, 1855. The judgment appealed from also condemns the defendant to deliver all the archives of the office of Recorder of Mortgages in his possession to the relator, and to pay the costs of these proceedings.

The relator has moved to dismiss the appeal; the matter in dispute is shown by affidavit to exceed three hundred dollars, and the case is within our appellate jurisdiction.

The controversy turns principally upon the construction of the repealing section of the "Act creating a Recorder of Mortgages for the parish of Orleans," approved March 14th, 1855. (Session Acts, p. 321.) Section four declares "that all laws contrary to the provisions of this Act, and all laws on the same subject matter, except what is contained in the Civil Code and Code of Practice, be repealed."

The relator contends that, therefore, the statute of March 14th, 1855, abolished the office of Recorder of Mortgages for the city and parish of New Orleans, which had existed at least ever since the 20th March, 1813, (Session Acts, p. 136,) and created a new, distinct and independent office, which has never been filled until the relator was appointed as its first incumbent on the 15th March, 1856.

If this be true, the judgment is clearly wrong in decreeing the defendant to deliver the archives of his extinct office to the incumbent of a new and different office, without any warrant of law. For the Act of March 14th, 1855, upon which the relator bases all his pretensions, insisting that we must shut our eyes to everything else in our voluminous statute books, has declared what shall be done with the important and valuable documents belonging to the office said to have been abolished. If the statute has created a new office, it has left the first incumbent to enter upon a new career, unembarrassed by the custody of ancient records, but with faint lights to guide him.

The first section declares "that the Governor shall nominate and, by and with the advice and consent of the Senate, appoint a Recorder of Mortgages for the parish of Orleans, who shall hold his office for two years, and until his successor shall be duly appointed and qualified."

"Sec. 2. That he shall furnish to the Governor of the State his bond, with one or more securities, to the amount of forty thousand dollars, for the faithful execution of the duties required of him by law, and for the payment of such damages as may be sustained by his failure to discharge such duties.

"Sec. 3. That he is authorized and empowered to appoint a deputy, whose duties shall be the same as those of said Recorders; provided, that he and his sureties shall be responsible for the official acts of said deputy." Then follows the repealing section already quoted, and this is all.

An interpretation which must lead to consequences both mischievous and absurd is inadmissible, if the statute is susceptible of another interpretation

whereby such consequences may be avoided. The legislative intention must be honestly sought after and faithfully executed, if not in conflict with a paramount law. And, in cases like the present, we are authorized to search for that meaning, not merely in the words of the statute itself, but in the subject matter, in the history of the legislation thereupon, in the purpose of the new law, the reason of its enactment, and the evil it sought to remedy. *Ardry* v. *Ardry*, 16 L., 268; *Cox* v. *Williams*, 5 N. S., 140; *Commercial Bank* v. *Foster*, 5 An., 516.

The subject matter of the law, then, is not the erection of a new office. Indeed, it seems to imply the recognition of an existing office, whose duties were well known. It does not purport to extinguish that office and to substitute a new and different one. It provides for the mode of appointing an incumbent to fill it at stated intervals, for the mode of giving his bond, and for the appointment of his deputy, whose duties are to be commensurate with his own, but for whose acts he and his sureties are to be responsible. All these sections relate to the officer, not to the office; the office exists independent of the statute; and these simple provisions about the incumbent constitute its whole subject matter.

But the repealing clause is relied upon as accomplishing a great deal more than the statute would have done otherwise.

We take notice that, during the session of 1855, one hundred and forty other Acts were passed with the same repealing section.

These Acts were adopted in pursuance of a system inaugurated at the preceding session of the same General Assembly.

On the 15th March, 1854, was approved the "Act to provide for the revision of the statutes of the State of a general character," whereby a legislative committee was appointed "to revise the statutes of the State of a general character, to simplify their language, to correct their incongruities, to supply their deficiencies, to arrange them in order, and to reduce them to one connected text, with a view to their adoption as the Revised Statutes of the State." (Session Acts, p. 57.)

This committee proceeded with more than the usual celerity of codifiers, and the work was prepared in season for the next session. But an obstacle to its adoption as a whole was found in Art. 117 of the Constitution: "The Legislature shall never adopt any system or code of laws by general reference to such system or code of laws, but in all cases shall specify the several provisions of the laws it may enact." To evade this obstacle, it was proposed to pass the Revised Statutes in detail, with a sweeping repealing clause at the end of each; and, like evasions in general, this seems to have been productive of unforeseen troubles.

But, by this change, the Legislature did not, as contended by the relator's counsel, abandon their original purpose of "revising" the statutes; this is manifest from their own declaration in the "Act to regulate and define the duties of the commissioner appointed to revise the statutes of the State, and to fix his compensation" approved March 15th, 1855, (p. 212). That statute provided that the person selected by the joint committee of the two houses "to revise the statutes of the State under their supervision and direction, be continued in his functions until the final *completion and adoption* of the "Revised Statutes" by the General Assembly and their publication."

It provided further "that it shall be his duty *after their adoption and enactment*

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by the General Assembly, to compile them into a book, to be called the "Revised Statutes of Louisiana," with marginal notes, table of contents and index, similar *to the work reported to the Legislature.*"

These matters of history may aid us in arriving at the true meaning of the last section of the statute before us. For we find that the statute contains nothing that is original, except this repealing section.

As already remarked, it introduced no new office unknown to the law before. In fact, it is but a grouping together, in one statute, of parts of three pre-existing laws, with very slight changes of phraseology, and no change whatever of substance.

The first section is taken from the Act of March 20th, 1813, p. 136; the second from the Article 3358 of the Civil Code, and the third from the Act of March 7th, 1843, p. 29.

The duties of the office are not described, and therefore do not enter into the "subject matter;" they are left as they stood before. The original of this office is to be found in the code of 1808, p. 464. The Register of Mortgages at New Orleans was Register for the whole Territory. His duties were prescribed in the old code. By the Act of March 24th, 1810, sec. 25, Sess. Acts, p. —, the duties of this register at New Orleans were reduced almost to those of a register for the county of Orleans merely, the Parish Judges of the parishes where mortgaged property was situated being made recorders of mortgages for their respective parishes.

By the Act of 20th March, 1813, the term of the incumbent and the mode of appointing him were declared, but no change was made in the nature of the offices. The same term and the same mode of appointment have been re-declared in the Act of 14th March, 1855, and still no change is made in the office itself or its duties.

By the present code adopted in 1825 (and which is specially reserved as still in force by the repealing clause under consideration) the same office is recognized as then existing, and the duties thereof more distinctly defined than before.

"Art. 3349. There *is established* in each parish an office for the recording of mortgages, privileges and donations."

"Art. 3350. This office *is kept* in the parish of Orleans by a particular officer called the Recorder of Mortgages."

"Art. 3351 et seq. describe the duties of the Recorder of Mortgages for the parish of Orleans.

Art. 3521 of this code constitutes a repealing clause as extensive as the one annexed to the statute under consideration.

It has not been suggested that the code of 1825, which treats directly of the office itself, extinguished the old office and established a new one.

On the 7th March, 1843, the Act authorizing the appointment of a deputy to the Recorder of Mortgages for the city and parish of New Orleans was passed in the identical terms preserved in the 3d section of the Act of March 14th, 1855.

This review of the pre-existing legislation relative both to the office and the officer, may also contribute to elucidate the meaning and intent of the Act in question.

By this statute we think the Legislature has merely said: "here is a condensed statement of all the law now in force relative to the mode of appoint-

ment, term of service, amount and conditions of the bond, and appointment, duties of, and responsibility for a deputy, of the Recorder of Mortgages for the parish of Orleans; all else, *upon these specified matters*, is repealed."

We cannot fairly infer that an ancient office was thereby abolished and a new one created. The literal terms of the statute do not seem to require such a construction; its history, subject-matter and purpose alike forbid it.

If the office to which *Emile Wiltz* was duly appointed for a term of two years, from the 1st of March, 1855, has not been abolished, there was no vacancy when the relator was appointed to it, nor is there yet.

For, it is inadmissible to say that a person holding an existing office, under a fixed tenure, can be removed, or that his regular term of service can be abridged, by an ordinary act of legislation other than an Act abolishing the office. The mode of removing officers is prescribed by the Constitution.

It is therefore ordered that the judgment of the District Court be avoided and reversed, that the petition for a mandamus be dismissed, and that the relator pay costs in both courts.

MERRICK, C. J. I concur with Mr. Justice SPOFFORD. It may also be remarked that the Article of the Civil Code cited by him, 2358, and which is the second section of the Act of 1855, is in these words, viz:

"The Register of Mortgages for the parish of Orleans shall furnish the Governor of the State one or more sureties, to the amount of forty thousand dollars, for the faithful execution of the duties required of him by law, and for the payment of such damages as may be sustained by his failure to discharge such duties."

This Article, as well as all other Articles in the Civil Code on the subject of registry, are expressly exempted from repeal. The defendant, *Wiltz*, had given his bond in conformity to this Article of the code which is expressly recognized by the Act of 1855 as being in force. Now, the office having been continued, nothing short of an express declaration to that effect ought, in legislation merely revisionary, to be deemed sufficient to remove the incumbent.

LEA, J., dissenting. In March, 1855, an Act of the Legislature was approved having the following title: "An Act creating a Recorder of Mortgages for the parish of Orleans." By the first section of this Act it was enacted "that the Governor shall nominate, and by and with the advice and consent of the Senate, shall appoint a Recorder of Mortgages for the parish of Orleans, who shall hold his office for two years and until his successor shall be duly appointed and qualified."

In accordance with the instructions contained in this section, the Governor *did* nominate, and by and with the advice and consent of the Senate, appointed a Recorder of Mortgages, investing him with a commission authorizing him to hold the office from and after the date thereof. By virtue of the commission thus given to him, the relator, *John Holmes*, claims to be put in possession of the records, documents, books, papers and effects appertaining to said office of Recorder of Mortgages.

For answer to this demand, *Emile Wiltz*, the defendant, avers that he is the Recorder of Mortgages of the parish of Orleans, holding the office under a commission from Governor Hebert bearing date of the 1st March, 1855; that said commission was issued to him in strict conformity with the Constitution and laws of the State of Louisiana, and that by virtue of said appointment and commission, and by the laws under which it was given, he is entitled to hold the

office for the space of two years from the date thereof, to wit, until the 1st March, 1857. In other words, the defendant contends that the law under which he was appointed, never having been repealed, he is entitled to hold the office according to the tenor of his commission.

In the argument of the case at bar, questions have been presented affecting the interpretation of nearly all the revisory legislation of 1855; questions which are environed with difficulties which scarcely any rule of interpretation can reconcile, but which, it appears to me, the issue presented imposes upon us the necessity of solving only in part.

For the purpose of determining the issue between the parties, it is only necessary to inquire whether a new office has been created? and if so, whether the previous legislation inconsistent with the creation of such new office has been repealed? It is urged that the statute which is the subject of interpretation and which is entitled "*An Act creating a Recorder of Mortgages for the parish of Orleans*," did not in fact create and was not intended to create such an officer; that the section which instructs the Governor to nominate, and by and with the advice and consent of the Senate to appoint a Recorder of Mortgages, does not authorize, and was not intended to authorize him to make such appointment except in accordance with the provisions of previously existing statutes; and that the section which provides "that all laws contrary to the provisions of the Act in question, and all laws on the same subject matter, except such as are contained in the Civil Code and Code of Practice are repealed," in fact repealed none of them, but left the previous legislation precisely where it was before the passage of the Act, which is but a mere compilation of previous statutes having in itself no inherent vitality. This is not the language adopted in the arguments of counsel, but this (as it appears to me) is a correct statement of the conclusion to which it leads. If *Wiltz* is entitled to retain the office, then it is clear (and indeed it is so argued) that the statute of 1855 did not create a new office, did not authorize the Governor to make a new appointment, and did not repeal the previous legislation on the subject.

Now, I fully concede the correctness of those rules of interpretation which have been so concisely and clearly laid down in the opinion of the majority of the court. I think we may, and should look beyond the Act which is the subject matter of interpretation, for the purpose of ascertaining its meaning; that we should notice the fact that 140 Acts of a revisory character were passed during the session of the Legislature in 1855, and that it is proper that we should look to the history of the legislation which led to the enactment of these revisory statutes; more especially do I concur with my colleagues that any construction of these statutes which would lead to consequences both mischievous and absurd, should, if possible, be avoided; and whatever may have been the inadvertencies of legislation, it may be assumed that the Legislature did not intend to produce a state of anarchy: and where this would be the necessary result of a particular construction of a statute, the court will endeavor to find some other meaning not inconsistent with sound rules of interpretation; but even then, no mere inconvenience, however great, nor even any supposed public necessity could justify the court in ignoring the palpable force and meaning of language. It would involve a departure from its constitutional sphere, and an invasion of that appertaining to an independent and co-ordinate department of the government.

The history of the legislation which led to the enactment of the statutes of

1855 is substantially as follows: In 1854, the Legislature passed an Act entitled "*An Act to provide for the revision of the statutes of the State*," the preamble of which is in the following words, "Whereas it is a matter of great public importance that the public statutes of this State should be revised, their language simplified, their incongruities corrected, their deficiencies supplied, and the whole arranged in order and reduced to one connected text, with a view to their adoption as the revised statutes of this State, to the end that all may know the law, therefore," &c. The first section provides for the appointment of a committee of revision. The second section provides that "said committee shall select some suitable person, whose duty it shall be, under the supervision and direction of said committee, to revise the statutes of the State of a general character, to simplify their language, to correct their incongruities, to supply their deficiencies, to arrange them in order, and to reduce them to one connected text, with a view to their adoption as the 'Revised Statutes' of the State." The other sections of the Act refer merely to details for carrying out the work.

Now, it is evident that when this Act was passed, it was the intention of the Legislature, not to authorize the compilation of a mere digest of the laws of the State, but to adopt a body of laws under the general head of "Revised Statutes." It became manifest, however, that this plan was open to objections, as being in contravention of the 115th and 117th Articles of the Constitution. Being unwilling to authorize a mere digest of the laws, and being prohibited from adopting a compilation of revised statutes, they resorted to the plan of selecting separate and independent subjects of legislation, each of which should be the subject matter of a distinct statute which should embrace such of the provisions of antecedent statutes on the same subject as they might think proper to retain; and when the entire legislation upon a single subject matter was thus condensed, it appears to have been the intention that no reference should be made to previous statutes for the purpose of ascertaining the law;—hence the repealing clause. Both in form and in fact, the several statutes were separate and independent Acts of legislation. Among these statutes thus enacted is that upon the interpretation of which depend the rights of the parties in this litigation.

Approaching then the solution of the issue between the parties with a reference to the history of the whole legislation out of which it springs, and with a view solely to a recognition of the intention of the Legislature in the enactment of the statute referred to, as ascertained by those rules of interpretation which obtain in all countries having a fixed jurisprudence, the questions to be determined are:—Did the Legislature intend to create a new office? Did they intend to authorize the appointment of a new officer? Did they intend to repeal all previous legislation on the same subject matter and substitute the new statute in its place? Now, although I have freely conceded the propriety of looking to the history of legislation and to the circumstances under which it is enacted, as furnishing aids to its interpretation, I must still insist that the plain and unequivocal meaning (according to its received acceptation) of the language in which an Act is expressed, should not be overlooked. In the interpretation of that part of the legislation of Louisiana enacted since the adoption of the Constitution of 1845, we are furnished with a constitutional guide which, I believe, is peculiar to our State. Owing to the chaotic character of the legislation prior to that period, and owing to the fact that the title of a law often afforded no indication of its contents, it was, for the express purpose of determining with certainty the objects of legislation, adopted into the fundamental law of the

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State that "every law shall embrace but one object, and that shall be expressed in the title." Constitution, Art. 115. Unless, therefore, the object of a law is expressed in the title, it is absolutely void; indeed, nothing else can be lawfully included with it. If, therefore, the object or intention of the lawgiver is not made clear by the other parts of an Act, it must be determined with absolute certainty by a reference to the title. Now, the issue between the parties in this case is, whether a new office was or was not created by the statute under which the relator was appointed. If the object of the statute was to create anew the office of Recorder of Mortgages by new legislation, which should be a substitute for that which they intended to repeal, then the relator, as it appears to me, is clearly entitled to a judgment in his favor. If the object was merely to recognize an office already created by legislation which has not been repealed, but which is still in force, then it is equally clear that the judgment should be against him: but the designation of the object of the Act as "*it is expressed in the title*," is, as has been before stated, "An Act *creating* a Recorder of Mortgages for the parish of Orleans." It appears to me that this is a constitutional solution of the issue. Pursuant to this declared object, the first section instructs the Governor to make the appointment; and the last section repeals all Acts *contrary* to the provisions of this Act and all laws on the same subject matter, except such as are contained in the Civil Code and Code of Practice.

But putting the statute itself entirely out of consideration, as if it had never been passed, let us suppose that the Legislature was now about to pass an Act for the express purpose of "*creating a Recorder of Mortgages for the parish of Orleans*," and for the purpose of instructing the Governor to appoint an incumbent to the office thus created, and for the further purpose of repealing the previous legislation on the subject so as to leave no such laws in force, what language could they adopt for the purpose of giving expression to their intentions? If the language in which the statute under consideration is expressed fails to convey that meaning, I think it would be difficult to select such as would convey it.

Had the new statutes of 1855 been merely revisory, it might be questionable whether, as independent and separate statutes, in the absence of any repealing clause, they would not have operated as a repeal of the statutes which were the subject of revision; for the doctrine appears to be supported by authority, that "a subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, *although it contains no express words to that effect*, must, on principles of law as well as of reason, operate to repeal the former." See Smith's Commentary on Statutory construction, § 786.

Such appears to have been the interpretation of similar statutes in Great Britain, even in civil matters. The first section of the statute 6, Geo. 4th, simply repealed all previous statutes of bankruptcy. There being no saving clause as to acts, of bankruptcy committed, or any inchoate proceedings under the former acts, it was held that the court had no power to imply a saving clause, although it was plain that by a mere inadvertence in legislation, the kingdom was left destitute of its bankrupt law. The court was pressed for a construction which might avert so general an evil; but *Lord Tenterden* said, "We are not at liberty to break in upon the general rule," though he admitted that it was very unfortunate that an Act of so much importance had been framed with so little care." Smith's Commentary, § 765.

It is not necessary, however, in this case to determine what may be the full

extent and effect of the repealing clause. The statute I think creates the office of Recorder of Mortgages as a substitute for the former office, and authorizes the appointment of a new officer. The further continuance in office of the former officer is inconsistent with the new legislation, the new office being a *substitute* for the old one, the archives and other muniments of office appertaining to the latter would belong of right to the new officer.

These views are the result of my examination of the particular statute which is subject of interpretation in this case and of the history of the legislation which led to its enactment; but I am not unwilling to concede that where it is *manifest* from the context of the new statute that a substitution of the new legislation in the place of previous and similar provisions on the same subject was *not intended*, the repealing clause should be to that extent restricted in its application; but such a departure from the ordinary rules of interpretation should be confined to cases where the terms of the statute itself necessarily demand it, in order to give effect to the whole statute; on the ground that an Act should be so construed as, if possible, to give effect to all its parts. The Act now under consideration is not of that character.

I think the judgment should be affirmed.

R. F. NICHOLS *v.* HIS CREDITORS.

An opposition to the proceedings of creditors granting a respite is not too late, if the proceedings have not been homologated, although ten days may have elapsed since they were regularly filed in court.
Code, 3058.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Howard, for Syndic. *Sprig*, for *Voorhies, Griggs & Co.*, opponents and and appellants.

BUCHANAN, J.* The appellee petitioned for a respite, and a meeting of his creditors was ordered to take place before a notary public, in order to deliberate upon his applicatien. The *proces verbal* of the meeting of creditors, with the certificate of the notary that the legal majority of creditors had granted the respite prayed for, were filed in court on the 18th of June, 1855.

On the 11th of February, 1856, the appellants, *Voorhies, Griggs & Co.*, creditors of petitioner, filed an opposition to his proceedings, on various grounds.

On the 28th February, 1856, this opposition pending and undecided, the appellee presented to the district court, his petition for the homologation of the proceedings before the notary, which was allowed by the court, on the ground that appellants' opposition was filed too late, more than ten days having elapsed since the *proces verbal* of the deliberations of the creditors was returned into the clerk's office. A bill of exceptions was reserved to this ruling of the court, which sets forth the facts.

We think the court erred, and that the opposition of the appellants was in time. The rule of practice recognized in the case of *Longbottom* v. *Babcock*, 9 L. R. 42, is: "When an act is to be done within a given time, as the filing of

*VOORHIES, J., recused himself in this case.

an answer and the like, it may be done afterwards, if nothing occurs to prevent it." This was the case of an opposition to an account of administration. See also *Chiasson's Heirs* v. *Dupuy*, 9 L. R. 57. In both those cases, there had been no judgment of homologation, and therefore oppositions were held to be in time, although the delay fixed by law for opposing such accounts had expired.

The same principle was applied to motions for new trial in the case of *Saulsor* v. *Wilson*, 4 Rob. 152.

Indeed, the practice has been long established, to homologate, *so far as not opposed*, at the end of the legal delay, for the purpose of excluding further opposition. As to the particular case of respite, we find it distinctly laid down in Article 3058 of the Civil Code, that the contract of respite has no effect, until it is homologated by a judgment of the court which has ordered the meeting of creditors. 4 Martin's Rep. 466. 1 N. S. 240.

A different rule has been applied to the case of an opposition to the discharge of an insolvent who has petitioned for a surrender of property. But that is because, by the 17th section of the Act of 1817, it is not necessary to homologate the proceedings of a meeting of creditors convened under that act.

It is therefore adjudged and decreed, that the judgment of homologation be reversed, so far as it affects the appellants, *Voorhies, Griggs & Co.*, and that the cause be remanded for further proceedings, upon the opposition filed by said appellants, on the 11th of February, 1856, according to law; the appellee to pay the costs of appeal in both courts.

JOHANNA KEARNEY FOULKES, Administratrix, v. ROBERT HOWES.

Defendant, the highest bidder at an auction sale of property belonging to the succession, refused to comply with the terms of adjudication. The property was regularly resold, and there was a loss. This suit was brought for the difference of price between the first and second sale. *By the Court:* The petition states that the property was adjudicated to *Robert Howes* at the first auction sale for the sum of five thousand dollars, *all of which will more fully appear by reference to the proces verbal of sale, hereto annexed for greater certainty.* But the *proces verbal* states that the property was adjudicated to *Robert Howes for the minor children of John Foulkes*, and this is confirmed by the evidence of the auctioneer, who produced on the trial the card handed to him at the time of adjudication with the name of the purchaser written on it, as follows: "*Tutor Robert Howes*, for the minor children of *John Foulkes*." This is a variation between the *allegata* and *probata*, which in so rigorous a proceeding as that upon a *folle enchère*, is fatal to the action.

In order to extend the operation of Article 2593 of the Code, to the granting of damages against the party who has made the bid in the name of another, there should be bad faith on the part of the bidder, or at least a want of that care which a good father of family would have used.

The Supreme Court having decided both ways as to the rights of the defendant to make a bid for the minors without the previous consent of a family meeting, it seems unreasonable to hold the defendant liable for error of law as to his right so to bid.

It having been irrevocably determined that the *folle enchère* was valid, it follows, as an irresistible sequence of that judgment, that defendant is liable under Articles 2589 and 2593 of the Code. SPOFFORD, J., dissenting, with whom concurred LEA, J.

There is no fatal discrepancy between the *allegata* and *probata*. The *proces verbal* itself was annexed to the petition, and specially referred to in it for greater certainty. The liability of defendant is personal under Article 3893, for the very reason that he caused the adjudication to be made to him as tutor without sufficient authority to bind the minors. By legal intendment the adjudication was made to him personally. SPOFFORD, J., dissenting, with whom concurred LEA, J.

Neither error of law, nor the absence of bad faith can release the defendant and oblige the succession to lose the money. This is not an action in damages for a tort, where malice must be proved although even then, ignorance of the law, however obscure and uncertain it may be, has not been held to constitute an excuse. The substance of this action is to recover the damages, liquidated by the law itself, for the breach of a contract. SPOFFORD, J., dissenting, with whom concurred LEA, J.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Benjamin, Bradford & Finney, for plaintiff. *Durant & Hornor*, for defendant and appellant.

BUCHANAN, J. (SPOFFORD, J. and LEA, J., dissenting.) The petition states that the property was adjudicated to *Robert Howes* at the first auction sale for the sum of five thousand dollars, *all of which will more fully appear by reference to the proces verbal of sale, hereto annexed for greater certainty.* But the proces verbal states that the property was adjudicated to *Robert Howes, for the minor children of John Foulkes.* And this is confirmed by the evidence of the auctioneer, who produced on the trial the card handed to him at the time of adjudication, with the name of the purchaser written on it, as follows:

"Tutor, *Robert Howes*, for the minor children of *John Foulkes*."

This is a variation between the *allegata* and the *probata* which, in so rigorous a proceeding as that upon a *folle enchère* is fatal to the action. See the observations of the court in *Guillote* v. *Jennings*, 4th Annual, 242.

But it is said that *Howes* was without legal authority to purchase for his wards, and that the adjudication is to be considered as made to himself personally, under Article 2593 of the Code. We think that, in order to extend the operation of this Article to the granting of damages against the party who has made the bid, in the name of another, which is the object of the present action, there should be bad faith on the part of the bidder, or at least a want of that care which a good father of family would have used. But the judgment of this court pronounced in the May term of last year between the same parties, is a sufficient voucher for the good faith of *Howes* in making the bid in question. We refer to that decision for the facts of the case. The sole ground upon which the defendant is charged with personal liability, is in the words of Article 2593, that he was "without sufficient authority to bind the minors, in whose name he bid at the auction sale. And the want of authority is inferred from the decision of this court upon the re-hearing of the former case just mentioned, pronounced last January; which held that the tutor should have been authorized to make the purchase by a family meeting *previously to the sale.* But upon this point of law, this court was divided, two out of the five judges holding the contrary doctrine, namely, that the consent of the family meeting might be obtained *after the purchase.* And this had been the doctrine of the majority of the court last year, when the case was first decided. Under these circumstances it seems unreasonable to mulct the defendant in damages for having erred upon a matter of law upon which this court, the expounders of the law in the last resort, has decided both ways. In other words, we are asked to punish the defendant for that which this court, as constituted last May, declared to be a legal act; and which is only now held illegal, because of the resignation of the two judges and the election of two others in the interval between the petition for a re-hearing of the first judgment, and the decision of that application for re-hearing.

The circumstances of this case exclude the demand of the plaintiff.

FOULKES v. HOWES.

The judgment of the District Court is, therefore reversed; and it is ordered and adjudged that there be judgment for defendant with costs in both courts.

MERRICK, C. J. (with whom concurred VOORHIES, J.) Under the peculiar facts of this case, I am inclined to concur in the conclusions of Mr. Justice BUCHANAN.

The tutor of the first sale took upon himself in his bid, no name or capacity which he did not possess.

We are informed by the counsel for the plaintiff that this suit is prosecuted for the benefit of the minors for whom *Howes* is tutor.

I am unwilling to see a tutor who has been acting in good faith and for what was fairly supposed to be for the interests of his wards, mulcted in eighteen hundred dollars damages for a mere error of judgment. Had the administratrix sued for or even favored a specific performance of the contract, with permission to use the superior mortgage of the minors in its payment (which would have been injurious to no one) instead of insisting upon her strict rights in the other form it is probable that the tutor would have been enabled to comply with his bid.

If there has been any loss, it has been occasioned, perhaps, as much by the obstinacy of the administratrix as the error of judgment of the tutor.

Not finding the tutor within the strict letter of Article No. 2593 of the Civil Code, I am willing, in a proceeding, avowedly for the benefit of his wards, for whom he has acted with his best ability, to leave him where I find him, without imposing upon him a penalty for his zeal and exertions in their behalf.

SPOFFORD, J. (dissenting, with whom concurred LEA, J.) It has been irrevocably determined that the sale to *Dr. Puissan a la folle enchère*, under Article 2589 of the Civil Code, at the risk of the defendant *Howes*, was a rightful procedure and vested a title in *Dr. Puissan*. See the case of the *Succession of George Foulkes*, ante p.

It matters not how much the court may have wavered and differed in coming to that conclusion, nor indeed would it matter so far as the determination of this cause is concerned, if the conclusions were erroneous; for *res judicata pro veritute accipitur*.

It was decided that *Howes* made a bid in the name of the minors under his tutelage without sufficient authority to bind them.

He refused to pay the price, was duly put in default, neglected to take any steps to procure relief by attempting to comply with the requisites of law, and the result has been a resale of the property at a sacrifice of $1815, "If at the second crying, the thing is adjudicated for a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to the vendor for the deficiency and for all the expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudged, the first purchaser has no claim for the excess." C. C. 2589.

"The person who bids in the name of another without sufficient authority to bind him, is considered to have bought on his own account, and is answerable for all the consequences of the adjudication." C. C. 2593.

Under these Articles the liability of the defendant appears to me to be an inevitable sequence of our former judgment.

I am unable to perceive any fatal discrepancy between the *allegata* and *probata*, nor does it seem to have been noticed by counsel. The *proces verba*

itself was annexed to the petition and specially referred to in it for greater certainty. The liability of *Howes*, is personal under Article 2593, for the very reason that he caused the adjudication to be made to him, as tutor without sufficient authority to bind the minors. By legal intendment the adjudication was made to him personally.

Nor do I perceive how an error of law, or a lack of bad faith on his part can release the defendant and oblige the succession of *Foulkes* to lose this money. This is not an action in damages for a tort, where malice must be proved, although even then ignorance of the law, however obscure and uncertain it may be, has not been held to constitute an excuse. The substance of this action is to recover the damages, liquidated by the law itself, for the breach of a contract. By the act of *Howes* the succession of *Foulkes*, and by consequence its creditors have lost $1,815; now should not this loss fall upon the man whose mistaken notions of law occasioned it, though he may have acted in the best of faith, rather than upon the innocent creditors of the injured succession, since we have already determined that the administratrix acted throughout in strict conformity to law?

If we are at liberty to look into these equities in a proceeding of strict law, it should also be observed that *Howes* himself is proven to have caused the sacrifice, by insisting upon his own title at the re-sale, and menacing the bidders with a law-suit.

It has been said, that if we affirm the judgment, it may greatly injure the defendants, and possibly deprive the minors under his protection of a home. If so, it is an extremely hard case; but rules of law are inflexible or they are worthless.

The rule that operates a hardship to-day, may work beneficially in all time to come. We cannot make an exception where the law does not, without invading the legislative province. And it has ever been found that that system of law is best, which leaves the least to the discretion of the Judge.

The claim being *ex contractu* and not *ex delicto*, the prescription of one year is inapplicable. For these reasons, I think the judgment of the district court should be affirmed.

An application having been made for a rehearing, the following judgment was rendered:

MERRICK, C. J. We find in the application for a rehearing in this case, the following passage:

"Time is wanting to express our views fully. We respectfully refer the majority of the court to the opinion of Judge SPOFFORD, in connection with what we hastily suggest. We will not say that that opinion is unanswerable; although in our humble opinion no answer suggests itself. But we submit, that that opinion should be refuted, or should control the decision of this case, in the interest of the jurisprudence of our State.

If there be an answer, let it be given, and the decision of your honors be vindicated."

The high standing of the gentlemen who have applied for the rehearing in this case, requires from us some notice of the petition for a rehearing so extraordinary in its tone. We have hitherto supposed that we had discharged our duty, when we had respectfully considered each others opinions and decided each individual case, upon the reasons applicable to it. We were not aware that we owed to counsel or the public, the duty of combatting the

opinion of the Judge who might be unable to concur with the majority in opinion, neither had we surmised the way, or learned precisely, how we were to be informed, and on what occasions it would be necessary and proper to vindicate any particular decision of this court.

We thought that in the case before us, all that was required of either the minority or majority of the court was, that the case should be so decided that injustice should not be done under the law to the one party or the other.

The majority of the court did not believe, that in a proceeding *stricti juris*, they were bound to enlarge the letter of the law, in order to embrace and mulct a tutor in damages for the benefit of his wards, whom he was endeavoring to serve to the best of his abilities; nor did they think that the question in this controversy had already been adjudged against the defendant in the former suit.

The minority of the court have entertained, and with marked ability expressed, different views, which are entitled to the same respect, although not decisive of the matters in controversy, as the opinion of the majority of this court, and no more. Neither the opinion of the majority nor minority was written to catch the approbation of this or that man, (motives unworthy of any judicial tribunal, whose sole object should be to do justice in each case, according to the laws of the land.) Nor can it be permitted to any one, how respectable soever his standing may be, so far to forget in his official intercourse with this tribunal, what is due to it, as to point out, under the pretence of its interest to jurisprudence, what particular opinions are worthy of favor, and what need to be vindicated by the court.

A majority of the court are of the opinion, that justice has been done between these parties to this suit.

Rehearing refused; and inasmuch as the application for a rehearing is considered disrespectful to the court, it is ordered that the same be taken from the files by the Clerk, and returned to the counsel who filed it.

CHARLES PATTERSON *v.* D. D. TOMPKINS AND M. MARIGNY, Sheriff.

Under an allegation made by the plaintiff, who sought to enjoin the sale of property seized by defendant, that plaintiff was the owner of the property seized, he cannot be permitted to prove the extinguishment of the mortgage note held by defendant.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J. *Holland*, for plaintiff. *Scott*, for defendant and appellant. *Larue*, for Sheriff.

LEA, J. The plaintiff has sued out an injunction restraining the execution of a judgment obtained by the defendant, *Tompkins*, against *J. W. Dolbear*, on the ground that the property seized does not belong to the defendant in execution but to the plaintiff in the injunction. This is the only ground urged in the petition why the injunction should be granted. The evidence shows that the plaintiff purchased the property seized in execution from *Dolbear*, who purchased the same from *John M. Bach*, in whose favor the property was mortgaged to secure the payment of the notes given for the price. Upon one of

these notes the defendant, *Tompkins*, as transferree, obtained judgment against *Dolbear*, with privilege as a mortgage creditor upon the property seized in execution. The act of mortgage given to secure the vendee's notes was made in favor of *Bach*, or any other holder or owner of the same; it moreover contained the *pact de non alienando*. Under these circumstances the plaintiff's injunction had no legal foundation, the property being liable in his hands for the payment of the judgment without the necessity of resorting to the hypothecary action.

The plaintiff, on the trial of the case, was permitted to introduce evidence to prove the payment and consequent extinguishment of the note by *Dolbear*, acting either on his own behalf or agent of *Mr. Tompkins*. But this evidence was objected to by the defendant on the trial of the case as being inadmissable under the pleadings. We think the objection was well taken, and that the testimony should have been rejected.

Setting aside the testimony introduced for the purpose of proving the payment of the note, and the case is clearly with the defendant.

It is ordered that the judgment appealed from be reversed, that the injunction herein issued be set aside, and that the defendant, *D. D. Tompkins*, do have and recover of the plaintiff, *Charles Patterson*, and his surety, *Joseph Garts, in solido*, thirty dollars damages; and it is further ordered that the plaintiff, *Charles Patterson*, pay costs in both courts.

HENRIETTE, alias MARY, *v.* HEIRS OF CHARLES BARNES.

The emancipation of a slave by last will only takes effect after the formalities prescribed by Article 187 of the Code have been fulfilled; that is to say, after a declaration shall have been made to a competent court; after that declaration shall have been advertised; and after the oppositions, if any be made, shall be determined. The declaration of intention to emancipate is to be made by the executor, or by the heir of the testator. BUCHANAN and VOORHIES, JJ., and MERRICK, C. J.

Since the statute of 1846 a slave taken from Louisiana to California does not thereby acquire freedom. BUCHANAN and VOORHIES, JJ., and MERRICK, C. J.

A slave carried from Louisiana to California by her master, though she there acquires the *status* of a free person, cannot stand in judgment in this State, except in a suit for freedom. STOFFORD, VOORHIES and LEA, JJ., and MERRICK, C. J.

If the court were to decree to the plaintiff, now in California, the legacies bequeathed to her, her freedom would be recognized, which would be final between the parties to this suit. What then would prevent her return to Louisiana? What force would there be in the Act of 1846, after her freedom had been recognized by the court. MERRICK, C. J., and VOORHIES, J.

APPEAL from the District Court, Third District, Parish of Jefferson, *Burthe*, J. *R. N. Ogden*, for plaintiff. *Marks*, for defendants and appellants.

BUCHANAN, J., with whom concurred MERRICK, C. J., and VOORHIES, J. This suit was instituted in April, 1852. The plaintiff sues for herself and for her minor daughter, for legacies bequeathed to them by the late *Charles Barnes*, to wit: one thousand dollars to the mother and five hundred dollars to the daughter. The defence is, first, that the plaintiff is a slave to the succession and not capable of standing in judgment: and if this exception be overruled, that the legacies in question exceed the disposable portion (the testator having left a father and mother) and should be reduced to such portion.

The will of *Charles Barnes*, made at Freeport, in the parish of Jefferson,

HENRIETTE v. BARNES.

June 14th, 1847, reads as follows: "I, *Charles Barnes*, will and bequeath to my servant girls, named *Henrietta, alias Mary*, and her child, *Mary, alias Marietta*, their freedom and emancipation, according to law, from and after my decease, and as much of the proceeds of my property as one thousand dollars, and all my house furniture, to the said girl *Henrietta, alias Mary*; and the sum of five hundred dollars to be invested in a lot of ground in the corporation of Lafayette or Freeport, to be and is hereby given to my little servant girl *Mary, alias Marietta*. If possible, my executors will purchase for *Henrietta, alias Mary*, a lot and dwelling with said one thousand dollars, which is thus to be laid out. I hereby dispose of the balance of my property to my relation as the law directs for the same."

This is an enfranchisement by last will; and this mode of enfranchising a slave is recognized by our law, provided the manumission be made with the forms and under the conditions prescribed by law. C. Code, Art. 184. These forms and conditions are particularly detailed in Articles 185 and 187. We infer from the phraseology of the Article first quoted (184) that an emancipation of a slave by last will only takes effect after the formalities prescribed by Article 187 of the Code shall have been fulfilled; that is to say, after a declaration shall have been made to a competent court; after that declaration shall have been advertised; and after the oppositions, if any be made, shall be determined. 4 Rob., 179; 9 An., 176; *Delphine* v. *Guillet*, lately decided. The declaration of intention to emancipate is to be made by the executor, or by the heir of the testator. But in the present case none of these formalities have been observed. On the contrary, it seems to be taken for granted that the plaintiff has acquired the *status* of a free person because her master, *Barnes*, after making his will, took her and her child with him to California, a State in which slavery does not exist, with the avowed intention that she should be free; in which State, as appears from the petition, she still resides.

We cannot admit the correctness of this position. *Barnes'* will was made in Louisiana, of which State he was at the time a resident; where his property is situated; and where his succession is in course of administration. It is evident from the language of the will, made two years before his departure for California, that the intention of the testator was that the emancipation should be effected according to the law of Louisiana. It is the policy of this State, as evinced by its legislation, to restrict the power of masters to emancipate their slaves. Emancipation is considered to be a matter which concerns the State, inasmuch as its tendency is to substitute a free colored population for the system of compulsory labor, which involves to such a vast extent the fortunes of our citizens and the production of our agricultural staples. Accordingly we find that in the year 1842 masters were forbidden by law to take their slaves into free States. (Acts of 1842, p. 314.) And in the year 1846 it was enacted that no slave should thenceforward be entitled to his or her freedom, under the pretence that he or she has been, with or without the consent of his or her owner, in a country where slavery does not exist, or in any of the States where slavery is prohibited. (Session Acts of 1846, p. 163.) This latter statute is conclusive of the right of plaintiff to be considered as actually free, in consequence of having been taken by her master to California. Under the decisions of the Supreme Court of Louisiana prior to the Act of 1846, such transportation would have had the effect contended for; but it is well known that the Act in question was passed in consequence of those decisions. The defendants' exception should have been maintained.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that this suit be dismissed, at cost of plaintiff and appellee.

MERRICK, C. J., with whom concurred VOORHIES, J. The plaintiff is *quoad* our laws still a slave. (Acts of 1846, p. 163.) Were we to decree to the plaintiff the legacies bequeathed to her in the will of *Charles Barnes*, we should recognize her freedom by a judgment which would be final between the parties to this suit. What then would prevent her return to Louisiana? What force would there be in the Act of 1846 after we had recognized her freedom?

I think for the reasons assigned both by Mr. Justice BUCHANAN and Mr. Justice SPOFFORD that the judgment of the lower court ought to be reversed.

SPOFFORD, J., with whom concurred MERRICK, C. J., VOORHIES, J., and LEA, J. The plaintiff was not manumitted acording to the forms of our law before she departed for California with her master.

Although, by the law of California, where she now resides, she possesses the *status* of a free person, and although she cannot now be reclaimed by the heirs of *Barnes*, because she is not a fugitive from labor or service, having been carried hence to California by her master, with intent to remain permanently, still the policy of our local statutes forbids that she should stand in judgment in the courts of Louisiana for any other cause than to sue for her freedom. Act of May 30th, 1846, p. 163; C. C., 177. As, if she returned hither, she would be a slave until duly enfranchised according to our laws, so, until she is thus enfranchised, she cannot be heard in our courts to sue for a legacy left her in Louisiana by the will of *Barnes*, executed here when she was his slave.

For these reasons I concur in the judgment of non-suit.

GEORGE G. EALER *v.* JAMES P. FRERET.

After the testimony had been taken, and the argument commenced, the cause was continued. Pending the continuance a new judge was elected, who refused to try the case *de novo*, but permitted counsel to take bills of exceptions to the testimony which had previously been introduced. *Held:* The plaintiff had the right to have the cause tried *de novo*, but as he was not prejudiced by the action of the court, inasmuch as his bill of exceptions shows that his sole purpose in asking for a trial *de novo*, was to allow him to except to certain evidence, which the court permitted, there is therefore, no error in the proceedings of the inferior court.

Parol evidence is admissable to show fraud in the registry of title to a steamboat.

APPEAL from the Second District Court of New Orleans, *Morgan*, J. *R. & H. H. Marr* and *Mott & Fraser*, for plaintiff and appellant. *Thomas Hunton*, for defendant.

MERRICK, C. J. (SPOFFORD, J., dissenting.) There are several bills of exception in this case which must be disposed of before considering the merits.

The first we notice is, the bill taken by the plaintiff to the refusal of the judge to try the case *de novo*. It appears that whilst the predecessor of the present District Judge was on that bench, the testimony was heard and the argument of one of the counsel concluded, but there being a want of time to complete the case, it was continued. At the trial, in November, 1855, the defendant's counsel moved the court to take up the case just as it was left at the former trial in July, that is to treat the testimony as concluded. The

plaintiff opposed the motion and insisted that "the testimony should be offered anew, subject to all legal exceptions." The court refused to allow the testimony to be offered *de novo*, and the plaintiff excepted. It is, we think, clear that the plaintiff had the right to try the case *de novo*. The judge before whom the case had been submitted, having failed to render judgment, the regular mode would have been to proceed as in the case of a new trial. But it is not enough for the party who desires the reversal of a judgment to show that the court erred, he should show that he has been prejudiced by such decision.

The bill of exceptions in this case shows that the plaintiff desired to try the case *de novo* for one purpose only, viz: to secure himself the right to except to the testimony as it should be again offered. This right appears to have been accorded him, at the last trial of the case. Seven bills of exception to testimony, attest the fact that the parties were not prejudiced by the refusal of the District Judge to go through the formality of requiring the testimony to be offered piece by piece, as was done on the first trial.

Had the plaintiff been prevented from offering other and further testimony, or from excepting to the testimony offered, it would have been clearly error. As the case is now presented to us the plaintiff has not been prejudiced, he merely wished to except to the testimony and he has fully exercised that right. Parol proof was admissible on behalf of the attaching creditors to show that the real interest in the steamboat was in *T. Graham & Son*. The Act of Congress requiring the registry of the title of steamboats and other vessels, was intended as a protection against fraud. It could never have been in the contemplation of Congress to make it a shield to a party who had made a false and fraudulent registry. But to hold that no proof except written evidence could be adduced to show fraud, would be to give such effect to the Act. It is well settled that the registry, so far from being conclusive proof of title, is so little considered, that it requires some auxiliary evidence in order to charge, as owner, the party in whose name the vessel is registered. 1 Greenleaf Ev. No. 494.

We think the judge *a quo* erred in receiving the testimony of those of the attaching creditors who were examined as witnesses. It is true they are not parties to this suit, nevertheless the judgment in favor of the defendant who is merely their agent, would directly benefit them. The testimony, therefore, of *A. H. May*, *L. M. Wilson*, *J. A. Greer*, *A. M. Elgin*, *John Cline and W. A. McClure* must be excluded.

With this testimony rejected, the defendant is without sufficient evidence to overcome the repeated written and verbal acknowledgments of *T. Graham & Son*, that they had no interest whatever in the steamboat Louisa. Still there is in the record a document which, as the case now stands, must have a controlling effect in this controversy. It is the document executed by *Scotto C. Burrell* and *T. Graham & Son*, as the boat was leaving for St. Louis for sale. It provides for the sale of the boat; and *L. J. T. Wilson*, the clerk of the boat, was empowered to receive three-fourths of the proceeds, and by him to be handed to *Messrs. May & Vanhook*, of New Orleans, for the purpose of securing to *L. M. Wilson* and *Dorancy & Son*, and the balance to be placed on their said *May & Vanhook's*, books to the credit of said *T. Graham & Son*. The other one-fourth of the proceeds was by said contract to be paid to *Scotto C. Burrell*. It was also provided that if the boat could not be sold within one week at St. Louis she was to be brought back to New Orleans.

This instrument signed by *Scotto C. Burrell* and *T. Graham & Son*, indirectly recognizes *Scotto C. Burrell* as the one-fourth owner and *Graham & Son* as the owners for the other three of the boat, and in the doubt created by the other testimony, they must be considered as owners in that proportion.

We think that the testimony shows that *Henry D. Ealer* and *George G. Ealer* were aware of the presence of *J. T. W. Graham*, of St. Louis, and that they knew *S. C. Burrell* was without authority to sell the boat, and we think that the purchase by *George G. Ealer* was, under the circumstances, in fraud of *T. Graham & Son*.

The only title, therefore, which *George G. Ealer* acquired by this sale was the one-fourth interest which *Scotto C. Burrell* owned in the boat. Claiming as *George Ealer* does, the proceeds of the sale of the boat, we think he is entitled to recover one-fourth of the proceeds of the steamboat Louisa in the hands of the defendant. It is, therefore, ordered, adjudged and decreed by the court that the judgment of the lower court be reversed, and that the plaintiff do recover of the defendant and have judgment against him for the one-fourth part of the proceeds of the sale of said steamboat in the hands of the sheriff, after deducting simply the costs of the sale, and no other costs, and it is further ordered that this case be remanded to the lower court to make the deduction and ascertain the said one-fourth and award execution therefor. And it is further ordered that the defendant and appellee pay the costs of both courts.

SPOFFORD, J. (dissenting.) Concurring in many of the views expressed by Mr. C. J. MERRICK, I am yet unable to see how the plaintiff can recover any part of the proceeds of the boat.

I regard the plaintiff and his brother *Henry D. Ealer* as one person in the transaction with *Scotto C. Burrell*, at St. Louis; and, concurring in the opinion of the Chief Justice that they had notice of the title of the *Grahams*, and of the lack of authority in *Burrell* to sell at the time he did, I am compelled to regard their pretended purchase as a simulation, the result of collusion with *Burrell*, which can give the plaintiff no claim in law or equity upon any part of the proceeds.

There is, in my judgment, no such proof of title in *Scotto C. Burrell* as would authorize *Burrell* himself, still less his fraudulent pretended vendee, to recover anything. And the plaintiff can only recover upon the strength of his title. The defendant was not bound to show title in the *Grahams*.

I think the judgment should be affirmed.

JAMES C. KATHMAN et al. *v.* THE CITY OF NEW ORLEANS.

The Legislature, by the Act of 11th of March, 1854, p. 46, intended, in fixing the compensation of the Assessors, to include, under the term property, the capital which it was the duty of the Assessors to ascertain.

The term property, in its enlarged signification, includes capital.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Collins, for plaintiff. *Livingston*, City Attorney, for appellant.

MERRICK, C. J. We think the Legislature by the Act of the 11th of March,

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1854, p. 46, intended in fixing the compensation of the Assessors, to include, under the term property, the capital which it was the duty of the Assessor to ascertain. The term property, in its enlarged signification, includes capital. The Assessors were required to carry the capital into the assessment roll, and it figures therein precisely as do real estate and slaves, as a subject of taxation. The only difference between the two is, that capital required no further assessment than to ascertain the amount, whilst slaves and real estate require an estimate of their value.

The testimony renders it probable that something ought to be deducted from the amount claimed by the Assessors of the Second and Third Districts. But there is nothing in the record by which we can ascertain the precise amount. As to the sums claimed by the city for printing, there is nothing to show that it was done at the request of the Assessors. For all that appears, it was done for the convenience of the city, and for the further assurance of the correctness of the tax rolls. It appears, moreover, to have been done before the copy of the tax roll was delivered to the city.

Judgment affirmed.

CITY OF NEW ORLEANS, PRAYING FOR THE OPENING OF DRYADES STREET.

The owner of property and others interested will not be considered as having notice of the proceedings of the commissioners of estimate and assessment after the expiration of the delay fixed by the court for filing their report; and where the report was afterward filed and homologated—it will not bind them.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Livingston*, City Attorney. *Clarke & Bayne*, *Dunlap & Clarke*, *Eggleston*, *Leovy*, *J. C. Clarke*, and *Clarke & Waples*, for different opponents.

LEA, J. The commissioners of estimate and assessment appointed by the court, upon the application to open Dryades street, under the provisions of the statute of 1832, made their report on the 23d of February, 1854. The appellants having made opposition thereto, it was on motion referred back to the commissioners for correction, with instructions that an amended report should be filed within ten days from the date of the order, viz, the 22d of April, 1854. The delay fixed by the court expired on the 2d day of May. No report, however, was filed on that day, nor was any application made by the commissioners for an extension of the time. On the 25th of May, the amended report was filed, and on the 12th of June, (no opposition having been filed,) it was, on motion, homologated.

The appellants complain that this judgment was rendered *ex parte*, without any notice, either actual or constructive, having been given to them of the filing of the amended report.

The question presented then is this: Are the owners of property and others interested, to be considered as having had notice of the proceedings of the commissioners, after the expiration of the delay fixed by the court? Up to that period, the order of court, by its very terms, was a notice to them, but in the absence of any order of court extending the delay, it was a mere matter of conjecture to the proprietors at what period the amended report might be filed.

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Parties, when once properly brought before the court, are bound to recognize its orders, and are deemed to have notice of all matters necessarily incident thereto, among which, in this case, would be the order of extension; but it would be unreasonable, as it was ruled in the proceedings for the opening of Exchange Alley, "to hold these parties to perpetual vigilance in watching, day by day, the minutes of the court, while the city remained inactive and the commissioners disregarded and disobeyed the orders of the court." See 4 An. 5. Nor is the case altered in principle by the fact, that the report was actually filed within twenty-three days after the delay fixed by the court had expired. If the owners of property are, without notice, to be held to watchfulness for twenty-three days, awaiting the uncertain action of the commissioners, it is impossible to fix a period at which such diligence would cease to be obligatory. Any designation of such a period, would be clearly arbitrary. The ground urged in support of the motion to dismiss the appeal for want of interest and for want of citation to the proper parties, are not supported by a reference to the record. The citations appear to have been properly served, and the appealable interest of the appellants is displayed in the record.

It is ordered, that the judgment appealed from be reversed, and that the cause be remanded for further proceedings according to law; the appellee paying the costs of the appeal.

JAMES PHILLIPS *v.* ST. LOUIS PERPETUAL INSURANCE COMPANY.

A valid abandonment passes the property in the vessel to the underwriters, and from that moment, at least, the captain becomes the agent of the underwriters, and his sale of the vessel, however reprehensible it may be, is made for their account and cannot relieve them from liability.

In estimating the cost of repairs in order to ascertain whether it will exceed fifty per cent of the ship's value, the deduction of one third new for old is not to be made; that rule applies to repairs made in certain cases of partial, or average losses, and seems to have been extended to a case of technical total loss only by local usage in two or three States.

Where but two thirds of the valuation is insured, the owner is his own underwriter for the balance, and the nett proceeds of the sale of the vessel should be divided as salvage between the parties, in proportion to the amount each had at risk.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Sage*, for plaintiff. *Hunton & Pike*, for defendants and appellants.

SPOFFORD, J. The plaintiff took from the defendants policies of insurance upon the barque Eleanor and her freight-list at and from the port of New-Orleans to the port of Baltimore. The barque was valued in the policy at $6000, and the insurance upon her was for $4000. Her freight, of the value of $1873 36, was insured for $1225. She took the ground in attempting to cross a bar at the mouth of the Mississippi River, where, at the time, there was a short, chopping sea; the tow-boat had great difficulty in twisting her off the bar, and did some damage by knocking against her, and carrying away her windlass-bitts, and some parts of her tackle. After getting into blue water, it was discovered that she leaked; day after day she encountered heavy gales and seas, and the leak continued to increase; it was finally found necessary to put into the port of Key West, where a survey was called, which resulted in a recommendation that she be discharged; upon another survey, she was reported

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unseaworthy, and irreparable save at a cost greater than her value after repairs; the captain forwarded her cargo to Baltimore by another vessel at a charge exceeding the amount of her original freight-list; the agent of the plaintiff in New Orleans, upon being advised of the facts, made an abandonment to the defendants, which they declined to accept; the Insurance Company, however, sent an agent to Key West, who reported, after another survey called by himself, that the barque was unseaworthy by reason of rottenness in her timbers and fastenings; the captain, after her abandonment to the underwriters, had her sold at auction, when she produced the sum of $1208 02.

This suit was brought by the owner upon both policies, for the amounts insured upon the hull and freight; the defendants have appealed from a judgment against them pursuant to the verdict of a jury.

Both parties having put their case upon its merits before us, we deem it unnecessary to notice the bills of exceptions, any further than they may be incidentally passed upon in this opinion.

The plaintiff bases his demand solely upon the position that there was a constructive total loss by reason of the perils insured against; that is to say, upon the position that, at the time of the abandonment, the damage done to the vessel by means of those perils was such, that the cost of her repairs would have exceeded one half of her value. *Hyde* v. *Louisiana State Insurance Company*, 2 N. S., 410. *Riley* v. *Ocean Insurance Company*, 11 Rob., 258. If so, the abandonment was a valid one and passed the property in the barque to the underwriters, and from that moment at least, the captain became the agent of the underwriters, and his sale of the vessel, however reprehensible it may have been, doubtless was made for their account and cannot relieve them from liability to the assured. 3 Kent's Com., p. 331–2.

We think that the evidence preponderates in favor of the plaintiff, as to the extent of the loss, and that the necessary repairs of the vessel would have cost more than one half of her value, whether we take as a basis the sum at which she was rated in the policy, or her actual value as repaired. It becomes immaterial, then, to decide which is the true test, a question upon which authorities differ, although the better opinion seems to point to the real value as the criterion. 2 Phil. Ins., §1538-9.

In estimating the cost of repairs in order to ascertain whether it will exceed fifty per cent of the ship's value, we are of opinion that the deduction of one third new for old is not to be made; that rule applies to repairs made in cases of partial or average losses, and seems to have been extended to a case of technical total loss only by local usage in two or three States. 3 Kent's Com. *p. 331. *Bradlie* v. *The Maryland Insurance Company*, 12 Peters, 378. 2 Phil. Ins., §1543. For the rule in New York and Mass. see 11 Wend., 453; 16 Pick., 303.

Much testimony has been taken upon the extent of the damage, the purport of which is that the repairs would have cost upwards of $3000.

The defendants, by their course of action, have lent additional weight to this evidence; for, as we have intimated already, the agent whom they sent to Key West with a view to repair the barque and forward her, if possible, to her original port of destination, made no attempt to do so, but held a new survey before she was sold by the captain but after her abandonment by the owner, and reported, thereupon, to his principals that she was unseaworthy from the inception of the voyage, her disasters having been, in the judgment of the surveyors,

occasioned by rottenness and unsoundness of the vessel and her fastenings; upon the faith of this report, it would seem that the defendants have always denied their liability and refused to pay anything to the plaintiff.

If the ship had not been greatly damaged, or damaged to a degree quite sufficient to justify the assured in declining to repair, such a report would hardly have been made by the defendant's agent.

Now, it is proven that the condition of the vessel at Key West was owing to recent external injuries, and not to internal decay. The soundness of her timbers, at the time of her departure from New Orleans, is abundantly established, and the theory of the company's agent as to the cause of her innavigability completely refuted.

She was old, it is true; but the company knew precisely her age, and charged an extra premium on that account.

They say she was overladen and may have been rendered unseaworthy thereby; but the evidence also repels this theory. Numbers of witnesses, including those who knew her best, testify that she was not laden at all beyond her capacity, and the one or two who entertained a different opinion only thought of it upon seeing her after she had experienced the disasters of the voyage.

The only remaining question is, was the injury caused by any of the perils insured against?

It is argued for the defence that her grounding on the bar was an ordinary peril, and, if that was the cause of her disaster, that they are not responsible.

We are of opinion that a combination of causes, which taken together constitute "perils of the sea," led to the breaking up of her voyage. These were: the chopping sea at the time she crossed the bar, the thumping of the steamtug against her, the strains produced in twisting her off the bar, and the severe gales she encountered immediately afterwards.

The abandonment of the vessel for a constructive total loss was, therefore, rightful, and the defendants are liable. There was a total loss of the freight in consequence of the same disasters.

The plaintiff has prayed for an amendment of the judgment in his favor. By an agreement of the parties, made without prejudice, the plaintiff received $1008 49 as the nett proceeds of the sale of the vessel. This sum the jury deducted from the amounts insured, and gave a verdict in favor of the plaintiff for the balance. It is now insisted that, as the defendants insured but two thirds upon the valuation, and the plaintiff was his own underwriter for the balance, the nett proceeds of the barque should be divided, as salvage, between the parties, in proportion to the amount each had at risk. This view is sustained by authority.

"If the total amount covered by all the subscriptions on policies does not equal the value of the thing insured, the assured is considered to be his own insurer to the extent of the sum not covered, and is consequently entitled, to that extent, to his proportionate share in the proceeds of the salvage. Thus, suppose A. to have insured goods, the real value of which is £1000, for £800, of which sum B. subscribes for £500 and C. for £300. A., it is plain, stands his own insurer for £200: a constructive total loss takes place on the goods, in respect of which A. abandons: the proceeds of the salvage amount to £100, i. e., a *tenth part* of the whole insurable value of the goods; this salvage, there-

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fore, must be distributed among the parties to the insurance in the proportion of a *tenth* of their respective interests.

To A. for his £200 uncovered by the policy.....	£20
To B. for his £500 insured.....	50
To C. for his £300 insured.....	30
	£100.

2 Arnould's Ins., *p. 1187.

It is, therefore, ordered and adjudged that the decree of the District Court be so amended as to reduce the amount allowed as a credit to the defendants for moneys received by the plaintiff on account of salvage, from the sum of one thousand and eight dollars and forty-nine cents, to the sum of six hundred and seventy-two dollars and thirty-three cents, and that, as thus amended, the said decree be affirmed with costs.

BERNARD R. GARRAHAN *v.* MARY CURLEY, Tutrix, &c.

The prescription of three years of actions for the recovery of money loaned, is not applicable when there has been an acknowledgment of the loan in writing amounting to an obligation. Code, 3503.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *O'Neal* and *Collins*, for plaintiff. *Durant & Hornor*, for defendant and appellant.

LEA, J. In this case the plea of the prescription of three years is interposed as a bar to a recovery upon due bills sued upon, they having been given for money loaned. This prescription is not applicable where there has been an acknowledgment of the loan in writing amounting to an obligation. See Civil Code, Art. 3503. Any dictum of the court in the case of *Cowan, wife of Aiken*, v. *Pulley*, at variance with this view of the case, was too general in its application and not intended to cover such a state of facts as the evidence discloses in this case. In that case the note was negotiable, and was sued upon in February, 1854. The second section of the Act of 1852, relative to prescriptions, has reference only to open accounts.

Upon the account for alleged disbursements of money, made for the purpose of defraying the funeral expenses of *Mr.* and *Mrs. O'Gara*, we consider all the charges of a date prior to the 5th April, 1852, barred by the prescription of three years, whether the claim be considered as for money loaned, or as due upon an account. In the one case the Article 3503 of the Civil Code is applicable, in the other the statute approved March 5th, 1852, relative to prescriptions. Of the remaining items in the account, the details of which it is unnecessary to recapitulate, we consider as proved disbursements made for the funeral of *Mrs. O'Gara* to the amount of twenty nine dollars.

It is ordered that the judgment appealed from be reversed, and proceeding to render such judgment as in our opinion should have been rendered: It is ordered that the plaintiff, *Bernard R. Garrahan*, do have and recover of the defendant, *Mary Curley*, in her capacity as tutrix of the minor *Thomas O'Gara*, the sum of five hundred and twenty-nine dollars, with interest thereon at the rate of five per centum per annum from the 5th day of April, 1855, till paid

the same to be paid in due course of administration according to law. It is further ordered, that the costs incurred in the District Court be paid by the defendant and appellant, and that the costs of the appeal be paid by the plaintiff and appellee.

EULALIE AND HER DESCENDANTS *v.* LONG & MABRY.

Under Article 3510 of the Code a slave may acquire freedom by prescription.

Article 3510 of the Code was not intended to introduce a mode of emancipating slaves, or of changing their *status*. It treats of the slave as being still a slave after the ten years enjoyment of his freedom. But it prohibits the master from restraining him. The public have an overruling interest in the question of his *status*; and the laws by which the manumission of slaves has always been so sedulously guarded from abuse, are all in vain, if the State can be compelled to recognize as unconditionally free, with liberty to remain in the State, and without regard to age, character, and other legal qualifications, all such slaves as their masters may choose to turn loose for the space of ten years. SPOFFORD, J., with whom concurred LEA, J.

Code, 177.

APPEAL from the First District Court of New Orleans, *Robertson*, J.

S. L. Johnson, for plaintiffs. *Marr*, for defendants and appellants.

BUCHANAN, J. The plaintiffs claim that they are free by prescription, and that the defendants illegally and by violence have taken possession of their persons and treat them as slaves. The defendants at first excepted that the petition disclosed no legal cause of action; which exception having been overruled by this court, (see the decision in 9th Annual, page 9,) the defendants have answered, setting up title to the plaintiffs in themselves, by virtue of a sale from one *Loftin*.

It was clearly ruled by this court, when the cause was before us previously, that the law (Civil Code, Art. 3510) recognizes prescription as one of the modes in which a slave may acquire a right to freedom. The same doctrine was held by our predecessors in *Spalding* v. *Taylor*, 1 An., 197, which was a suit for damages against the owners of a steamboat for carrying plaintiff's slave away. And in *Verdun* v. *Splane*, 6 Rob., 530, when the slave was the actor, through his mother, Judge Martin did not dispute the right of a slave generally to claim his freedom under the Article 3510 of the Code, but denied the exercise of it in that particular case, because the tender age of the slave precluded the presumption that it had been the intention of the master, in leaving him in the possession of his mother, (who was free,) to recognize the child as also free.

The counsel of the defendants has renewed the argument, so strongly urged by him on the former trial, that the peculiar phraseology of the Article 3510 only excludes the right of action of the master to reduce his slave to possesion after suffering him to enjoy his freedom during a certain length of time. And he relies upon the case of *Meillun* v. *Coupey*, 8 N. S., 129, as negativing the right to freedom derived from prescription. But the case of *Meillun* v. *Coupey* arose under the Old Code which did not contain an Article analogous to the Article 3510 of the Code of 1825. Compare the language of Judge Martin in the decision of this case with that in *Verdun* v. *Splane*, already cited, and the influence of the change of legislation which had taken place in the interval upon the doctrine of the court will be at once perceived. See also the remarks of the court in *Baker* v. *Tabor*, 7 An., 556.

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The plaintiff *Eulalie* was formerly the slave of *Simon Porche*, who died about thirty-five years before the institution of this suit, leaving his widow his universal legatee. Some years before *Simon Porche's* death, *Eulalie*, with his permission, married a free colored man, an illegitimate brother of *Porche's* wife, who had a farm in *Porche's* neighborhood; and lived with her husband in the full enjoyment of her freedom during the whole lifetime of *Porche*, and of his widow, being more than thirty years, with their knowledge and consent. Indeed it is proved that *Mrs. Widow Porche* frequently spoke of formally emancipating *Eulalie* and her children, (the other plaintiffs) but never carried her design into effect. After the death of *Mrs. Widow Porche*, *Eulalie* and her children and grandchildren appear to have been taken by force from her residence in Pointe Coupée, notwithstanding an ineffectual resistance on the part of her aged husband, and brought to a slave mart in New Orleans, where they were conveyed as slaves for life to the defendants.

There is no doubt from the evidence that the heirs of *Mrs. Porche* were privy to this abduction of the plaintiffs from Pointe Coupée, yet they do not figure in the conveyance to defendants; neither, although the defendants ostensibly paid twelve thousand dollars in cash for the plaintiffs, do they make any call in warranty.

Their bill of sale gives no origin to the vendor's title. The production of a certificate of mortgages is dispensed with; and their vendor is declared by defendants to be dead and insolvent. These are circumstances calculated to inspire a suspicion that the true parties in interest are keeping out of sight. And if so, the reason may be easily imagined.

Judgment affirmed, with costs.

SPOFFORD, J., with whom concurred LEA, J. I concur in the judgment, but I do not think the Article 3510 of the Code was intended to introduce a mode of emancipating slaves, or of changing their *status*. Its cautious phraseology shows that such a result was not contemplated. "If a master suffer a slave to enjoy his liberty for ten years, during his residence in the State, or for twenty years while out of it, he shall lose all right of action to recover possession of the *slave*, unless the slave be a runaway or fugitive." The Article treats of the slave as being still a slave after the ten years' enjoyment of his freedom. But it prohibits the master from restraining him. The public has an overruling interest in the question of his *status;* and the laws by which the manumission of slaves has always been so sedulously guarded from abuse are all in vain if the State can be compelled to recognize as unconditionally free, with liberty to remain in the State, and without regard to age, character, or other legal qualifications, all such slaves as their masters may choose to turn loose for the space of ten years.

I adhere to the doctrine of the cases of *Meillun* v. *Coupey*, 8 N. S., 128, and *Ned Baker* v. *Tabor*, 7 An., 556.

Even if the plaintiffs never were emancipated, as, after enjoying their freedom for thirty years, possibly it might be presumed they were, still I think the Article 3510 of the Code may so far avail them as to enable them to invoke the protection of the courts against a manifest usurpation by the defendants. C. C., 177.

Jean B. Jeannin v. Mr. and Mrs. Charles DeBlanc.

Until plaintiff pays defendant one half of the cost of the wall, it is not a wall in common, but remains the exclusive property of the defendants, though resting one-half upon the plaintiff's land; and defendants may open or shut apertures in it, at pleasure, subject only to the police regulations of the city. In this she exercises not a right of servitude, but a right of property.
Code, 671, 672, 681, 692.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Preaux, for plaintiff and appellant. *J. & E. Bermudez*, for defendant.

Spofford, J. We adopt the following opinion of the District Judge:

"The defendant, availing herself of the provisions of Art. 671 of the Civil Code, rested one-half of her wall on the ground of the plaintiff; the wall is shown to be thirteen inches thick. The plaintiff did not contribute and has not contributed, in any manner, to the building of said wall. Since the construction of the wall, the defendant has caused certain openings to be made in it, consisting of grated windows in the second story, and of ventilators below the ground flooring. The plaintiff alleges that the defendant had no right to make said openings in the wall thus constructed, and that in so doing, she usurps the right of view upon his premises to his injury and damage. Therefore, he prays that the defendant be condemned to close the said openings at her proper cost, and to pay the plaintiff damages in the sum of $600, with costs., &c.

There is no question of servitude presented by the pleadings and evidence, since it is conceded that the plaintiff may at any time close the apertures and grated windows by making the wall a wall in common; but, in so doing, the plaintiff would have to pay one-half of its value.

The defendant contends that, until the wall is made common, it is her exclusive property, and that she has therefore a right either to pull it down altogether, or to make apertures in it, as she pleases. It appears to me that this view of the case is correct; indeed, if the exclusive right of property is conceded to the defendant, it seems to be a necessary consequence; and the only limitations placed upon this right of property, in the Code, are those having reference to the right of making such a wall common, and to the restricted use of it after it is made common."

These views, which led the court below to give judgment for the defendant, are supported by the text of the Code.

"He who first builds in the cities, towns or suburbs of this State, in a place which is not surrounded by walls, may rest one-half of his wall on the land of his neighbor; provided he builds with stones or bricks at least as high as the first story, and not in frame or otherwise; and provided the whole thickness of this wall do not exceed eighteen inches, not including the plastering which must not be more than three inches. But he cannot compel his neighbor to contribute to the raising of this wall." C. C., 671.

"If the neighbor be willing to contribute for his half to the building of the wall thus raised, then this wall is a wall in common (*mur mitoyen*) between the proprietors. The neighbor, who has refused to contribute to the raising of this wall, preserves still a right of making it a wall in common, by paying

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to the person who has made the advance, the half of what he has laid out for its construction, according to the rules hereafter established." C. C., 672.

"Neither of the two neighbors can make any cavity within the body of the wall *held by them in common*, nor can he affix to it any work without the consent of the other, or without having, on his refusal, caused the necessary precaution to be used, so that the new work be not an injury to the rights of the other, to be ascertained by persons skilled in building." C. C., 681.

"One neighbor cannot, without the consent of the other, open any window or aperture through the wall *held in common*, in any manner whatever, not even with the obligation, on his part, to confine himself to lights, the frames of which shall be so fixed within the wall that they cannot be opened." C. C., 682.

It follows that, until the plaintiff pays the defendant one-half the cost of the wall it cannot be a wall in common, but remains the exclusive property of the defendant, though resting one half upon the plaintiff's land.

And it being the exclusive property of the defendant, it follows that she may open or shut apertures in it, at her pleasure, subject only to the police regulations of the city.

In this she exercises not a right of servitude, but a right of property.

But the plaintiff says that the judgment should, at least, be so amended as to recognize his right to shut the apertures by erecting a wall or enclosure opposite to them.

By the same right that the defendant builds a wall with apertures, undoubtedly the plaintiff may build one facing it without apertures, if it shall so please him. "In suo pariete potest quis fenestros fucere vicino etiam invito; vicinus contra ædificando eos obscurare potest."

But, as this right of the plaintiff is not put in controversy by the pleadings, so it is not barred by the judgment.

Judgment affirmed.

BUCHANAN, J. As the idea is very general in this community, that a proprietor of a wall adjoining the land of another, has not the right to make openings in such wall, it is proper to notice a change in our legislation on this subject, made by the Code of 1825, and the reasons given by the framers of that Code for the change.

The Articles 43 and 44, on page 136 of the Code of 1808, permitted the proprietor of a wall not held in common, adjoining the estate of another, to make apertures or windows through said wall, under certain restrictions. Those two Articles were omitted in the Code of 1825: and we might have supposed that the intention of the Legislature, in suppressing those Articles, was to prohibit absolutely the making of openings in walls thus situated; were it not for the reasons given for the suppression of those Articles by the jurists charged with the amendment of the Code, in their report or *projet*. See Travaux préparatoires, page 73. "Nous avons cru devoir supprimer ces deux Articles qui prescrivent au propriétaire d'un mur non-mitoyen, joignant immédiatement l'héritage d'autrui, de n'y faire des ouvertures ou fenêtres qu'à une certaine hauteur, et avec des barreaux ou à verre dormant. *Nous avons pensé que chacun doit être le maître de faire dans son bien ce qui lui plaît, et par conséquent, d'ouvrir dans son mur telles fenêtres que bon lui semble.*"

The argument of the learned counsel of plaintiff against the exercise of the right claimed by defendant, reposes entirely upon the difference between the French Code and the Code of Louisiana, in relation to the rights of adjoining

proprietors of land in towns and cities. By Article 23, page 132, of the Code of 1808, repeated in Article 671 of the Code of 1825, the right is given of placing one half of the boundary wall of a town lot on the adjoining lot. This is an appropriation of the property of another, which is not copied from the Code Napoleon, nor sanctioned by any law in France. The argument drawn from this difference of legislation, is, that all the remarks of French commentators touching the right of the proprietor of a wall not common, to make openings in said wall, can have no application to a state of things unknown to the French law, to wit: the wall belonging to one, and yet built upon the land of another, without the consent of that other. But it strikes me that this makes no difference as to the right of the party who owns the wall. By the terms of Article 672 of our Code, the neighbor upon whose land this wall is built, has no property in the wall unless he pays for it. Until he does so pay, there is, for the neighbor, a positive expropriation of so much of his land as is covered by the wall. And this, after all, is only one among many proofs, that the right of private property is less sacred in this country than it is in the monarchical States of Europe.

However distasteful it may be to the plaintiff, he must give up the idea that he is the owner of soil which another enjoys without his consent and against his will. *Ita scripta est lex.*

I concur in the opinion pronounced by Mr. Justice SPOFFORD.

JOSEPH MAILLOT, Curator, *v.* JOSEPHINE WESLEY.

Parol evidence is admissable to prove the manual gift of movables.

As our laws does not permit either replication or rejoinder, all matters of defence set up in the answer, must therefore be considered as open to every objection of law and fact, as if such objections had been specially pleaded. So, where plaintiffs claim certain furniture as belonging to the succession, and defendant answers that the furniture was a donation to her from the deceased, it is competent for the plaintiff to prove that defendant was the concubine of the deceased, so as to reduce the donation if it exceeded one-tenth of the estate.

Code 1526.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Race & Foster, for plaintiff and appellant. *Egan & Dupuy*, for defendant.

VOORHIES, J. This is an action of revendication, in which the plaintiff claims certain household furniture as property belonging to the succession of the late *James C. Logan.*

The defendant, in her answer, avers that she acquired the furniture in question from the deceased, by donation *inter vivos*, accompanied by real delivery.

"The manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality." C. C. 1526.

It is clear, therefore, that the Judge *a quo* did not err in overruling the plaintiff's objection to the introduction of parol evidence, to prove the manual gift of the defendant. But we think he erred in excluding evidence offered by the plaintiff to prove that the donor and donee lived together in open concubinage. As our law does not permit either a replication or rejoinder, all matters of defence set up in the answer, must therefore be considered as open to every objection of law and fact, as if such objections had been specially

pleaded; thus the plaintiff may resort to the exceptions of nonage, coverture, fraud, violence, and the like, without pleading them, because he is not permitted to reply. So in the present case, it was competent for the plaintiff to show, that the defendant was the concubine of the donor, in order to ascertain whether the donation of the furniture made to her, exceeded one-tenth part of the whole value of the donor's estate; and if so, to reduce the same according to law.

After a close examination of the case, we think the evidence is sufficient to sustain the conclusion of the Judge *a quo* in his solution of the question, as to the fact of the donation of the furniture to the defendant, accompanied by a real delivery. On this point, we consider the matter adjudged.

It is therefore ordered and decreed, that the judgment of the court below be avoided and reversed; that the case be remanded for a new trial, touching the issue, whether the donor and donee lived together in open concubinage, in order that the rights of the parties litigant may be regulated in accordance with the requirements of the law. And it is further ordered, that the costs of this appeal be paid by the defendant and appellee, and those of the court below by the estate, except those arising hereafter, which are to abide the final determination of the suit.

CITIZENS' BANK OF LOUISIANA *v.* J. E. ARMOR and M. FISHER.—H. J. MASON et al., intervenors.

By Article 2428 of the Code, a thing claimed by suit cannot be alienated pending the suit by the defendant, to the prejudice of the plaintiff. Mortgage is a quasi alienation, and if made pending a suit for the property, cannot prejudice the plaintiff.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Pitot*, for plaintiff and appellant. *Hamner & Hays*, for intervenors.

BUCHANAN, J.* The defendant was recognized as heir of the late *Mrs. Josephine Armor*, and put in possession of her estate by a judgment. Subsequently, the intervenors sued *Armor* in the court in which the succession was opened, claiming the property of the succession of *Josephine Armor*, of whom they alleged themselves to be next of kin and heirs at law. Pending this suit, the defendant mortgaged certain real estate, being a portion of the property of *Mrs. Josephine Armor's* succession, in favor of the holder of two promissory notes for three thousand dollars each, to secure the payment of the said notes. In the suit of the intervenors against the defendant for the property of *Mrs. Armor's* succession, they obtained judgment, from which defendant appealed, but subsequently abandoned his appeal.

The Citizens' Bank, as holder of one of defendant's mortgage notes, is now seeking to enforce its mortgage, and is opposed by the intervenors. The latter having obtained a judgment in their favor, declaring the mortgage null, the bank appeals.

Upon the above statement of facts, the right of intervenors and appellees is clear. By Article 2428 of the Civil Code, a thing claimed by suit cannot be

*VOORHIES, J., recused himself.

alienated, pending the suit, by the defendant, to the prejudice of the claim of plaintiff. Mortgage is a quasi alienation. *Rippoll* v. *Morino*, 12 Rob. 662, and *Long* v. *French*, 13 L. 261, are cases in point. The plaintiff pleads fraud and collusion between intervenors and defendant; but there is nothing in the record to support this plea.

Judgment affirmed, with costs.

J. C. MARSH *v.* HIS CREDITORS AND THE CREDITORS OF MARSH & CO.

The commissions of syndics upon the property sold take precedence of the vendor's privilege as an expense of administration resulting to the benefit of the vendor, but not so the fees of the cousel for insolvent, nor the counsel for syndic, nor the attorney of absent creditors.
Code, 3223, 3234.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Legardeur, for *Pochel*, opponent and appellant. *Coxe* and *Brewer*, for syndic.

LEA, J. The question to be determined in this case is "What are the expenses which immovables subject to the vendor's privilege must contribute, under Article No. 3234 of the Civil Code "where the remaining assets are insufficient to pay costs." The Article referred to provides that the vendor shall be paid from the price of the object affected in their favor in preference to other privileged debts of the debtor, even funeral charges, except the charges for affixing seals, making inventories, and others which may have been necessary to *procure the sale of the thing*. In this case the issue between the parties is what charges were necessary to "procure the sale of the thing." On the one hand it is contended that this claim embraces all the charges of the administration by the syndic, and on the other, that its application is to be restricted to those charges without which the sale could not have taken place. We think this latter construction most in accordance with the letter of the Article and the decisions interpreting it. We adopt, however, the ruling of our predecessors in the case of *Monroe* v. *His Creditors*, 2d Rob. 281, which includes the syndic's commissions upon the property sold as an expense of the administration resulting to the benefit of the vendor. It is conceded thatthe sheriff's clerk's, notary's and appraisers' fees were necessary charges in procuring the sale, and as to these charges we consider the opposition withdrawn. It is, therefore, unnecessary for this court to pass upon their validity. To these we think the syndic's commission should be added, for the reasons before stated. Neither the fees of the counsel for the insolvent, nor of the syndic (far less that of the attorney of absent creditors) constitute a charge without which the sale could not have taken place. For a construction of an analogous Article of the Civil Code see *Garritson* v. *His Creditors*, 1st Robinson, 446, also Civil Code, 3223.

The opposition filed is not deficient in pleading. As the opponent does not dispute the correctness of any of the items on the tableau, but merely claims a superiority of privilege, it was not necessary that each item should be specially opposed.

It is ordered that the judgment appealed from be reversed, that the opponent be placed on the tableau as a creditor in the sum of $3,335, with privilege

upon the proceeds of the property refered to in his opposition above all others, except the fees of the sheriff, clerk, appraisers, notary, and the commissions of the syndic, and that in other respects the judgment be affirmed. It is further ordered that the costs of this appeal be paid by the appellee.

JAMES STAFFORD *v.* HIS CREDITORS.

So much of the Act of 20th February, 1817, as upon a verdict of fraud against an insolvent, disqualifies him from holding any office of trust or profit under the government of this State, is repealed by the Act of 1855.

In *Holmes* v. *Wiltz* (ante p. 439) it was held that the repealing clause appended to the revisory Acts of 1855, did not repeal such pre-existing statutory provisions as were re-enacted by the revisory statute.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Cotton*, *William H. Hunt* and *Denegre*, for plaintiff and appellant. *Magne*, for *Rochereau & Co.*, opponents.

LEA, J. The verdict of the jury in this case establishes the fraud of the insolvent and we are not prepared to say that there is any error in their verdict. Upon this verdict the court decreed "that the insolvent proceedings instituted and had in the District Court by the said *Stafford* be quashed and annulled and that in conformity to section 20, of the Act relative to voluntary surrender, approved 20th February, 1817, said *James Stafford* be forever deprived of the benefit of the laws passed in favor of insolvent debtors in this State, and that according to section 21 of the aforesaid Act, the said *James Stafford* be deemed incapable of holding any office of trust or profit under the government of this State;" from this judgment the insolvent has appealed, and urges as a ground for the reversal of the judgment, that the Act of 1817 has been repealed by the statute of 1855, and therefore, had no existence at the date of the judgment. So far as the Act of 1817 is inconsistent with the Act of 1855 or so far as its provisions are not embraced in the statute of 1855 it must be considered as repealed; that portion of the decree which imposes a disqualification to hold office should, therefore, be reversed. But the opponents have joined in the appeal, and complain that the insolvent having been found guilty of fraud by the verdict of the jury should have been condemned to three years imprisonment. It is to be remarked that it is not under the statute of 1817 exclusively that the opponent proceeds. He invokes the penalty of three years imprisonment as provided by the Act of 1840, as applicable to a conviction of fraud under that *or any other statute then in force*, see Act of 1840, sections 7, 10, 11 and 13, also Act of 1817. Greiner's Digest, Articles 1667, 1668, 1669. Now the matters complained of in the opposition under which the penalty of three years imprisonment was invoked, are such as are provided for not only by the statutes above referred to, but by the Act of 1855 to which the provisions therein contained have been transferred, and within which they are included. See statutes of 1855 "relative to the voluntary surrender of property and mode of proceeding," sections 19, 20, 21, 24. In the case of the *State, on the relation of Holmes* v. *Wiltz*, we lately held that the repealing clause appended to the revisory Acts of 1855 did not repeal such pre-existing statutory provisions as were re-enacted

in the revisory statute. This being the case the insolvent is in accordance with the verdict liable to an imprisonment not exceeding the term of three years, the duration of which is to be fixed at the discretion of the court. We think this discretion can be better exercised in this case by the District Judge who may be cognizant of many facts coming under his personal inspection, which may and probably should regulate the exercise of that discretion.

It is ordered that the judgment be reversed so far as it relates to the disqualification of the insolvent from holding office, and that the verdict of the jury be approved and recognized as a proper basis for the decree of imprisonment at the discretion of the court for a term, however, not exceeding three years, and for the purpose of enabling the District Judge to proceed further herein, according to law, and in accordance with the principle recognized in this decision, it is ordered that the case be remanded and that the costs of this appeal be paid by the appellee and the costs in the District Court by the appellant. It is further ordered that in other respects the judgment appealed from be affirmed.

J. PERKINS *v.* A. DOUGLASS—G. W. HULSE, Warrantor.

Counsel who made a certain admission on the minutes of the Court, not permitted to lessen its effect by his own testimony, showing that it was not authorized by his client, and that he made it from the statement of a witness whom he believed, and by whose affidavit, produced, it appeared that the witness did not state quite so much as was covered by the admission.
Code, 3400.

APPEAL from the District Court, Tenth District, Parish of Tensas, *Farrar*, J. *J. P. Farrar*, for plaintiff. *Reeves*, for defendant and appellant. *Snyder*, for warrantor.

MERRICK, C. J. This action was commenced on the 19th day of September, 1854. The warrantor, *Hulse*, acquired title to the land in controversy from *Compton*, in February, 1843, by a formal deed translative of property. The record contains the following admissions entered on the minutes of the court, viz:

"It is admitted by plaintiff that *Dr. Hulse* went upon the property named in the deed from *Compton* in January, 1844, that he and his vendee have occupied and cultivated part of the same as a cotton plantation ever since."

We think that full effect ought to be given to this admission formally entered upon the minutes of the court. If it was fraudulently made and possibly if made in error, induced by the statements of the opposing party, it might be set aside on a rule. But we do not think that the counsel, who made it, ought to be permitted to lessen its effect by his own testimony to show that he was not authorized to make the admission by his client, and that he made it from the statement of a witness whom he believed, and by whose affidavit, produced by the plaintiff, it afterwards appeared that the witness did not testify to quite so much as covered by the admission.

The defendant had a right to rely on the admission which was volunteered by the plaintiff to facilitate the trial, and he cannot legally be deprived of it by the mistaken motives which induced the plaintiff's attorney to make it.

PERKINS v. DOUGLASS

Although the tract of land sold by *Compton* to *Hulse* is described by the sub-divisions of the land-office, yet the same (it may fairly be inferred) were lying contiguous and were placed together in the act of sale for the purpose of forming a plantation. The entry, therefore, upon and possession of a part must be held, we think, to be a possession of the whole included within the boundaries embraced in the Act of sale. C. C. 3400.

We think, therefore, that the plea of prescription ought to have been sustained.

It is, therefore, ordered, adjudged and decreed by the court that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff and in favor of the defendant, and that the plaintiff pay the costs of both courts.

G. F. MUNTZ *v.* THE SUCCESSION OF SAMUEL BROOM.

In a compromise partition of the effects of the succession between the widow and heirs in 1850, the ship C. fell to the heirs. The executor, however, was not discharged. In 1851 the ship was in Liverpool, where she was supplied by plaintiff with patent metal for sheathing, for the price of which this suit was brought. The ship seems to have been sent on this voyage by B. & C., B. being the executor. *By the Court:* Under the circumstances of this case, the executor, in that capacity cannot be rendered responsible for this bill. The plaintiff must be left to his remedy against B. & C. and the heirs who authorized this voyage. The executor, as such, can only be rendered responsible for expenses incurred in the legitimate administration of the succession.

The acknowledgment of the correctness of the account by the captain who contracted for the repairs, withdrew it from the application of Article 3499 of the Code and subjected it to the prescription provided by Article 3508. LEA, J., with whom concurred SPOFFORD., J., dissenting.

It is unjust that the owners should be benefited to the extent of the labor and materials furnished by the plaintiff, without any liability for a reasonable remuneration. LEA, J., with whom concurred SPOFFORD, J., dissenting.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Jourdan, for plaintiff and appellant. *Durant & Hornor*, for executor. *D. N. Hennen*, for the heirs.

MERRICK, C. J. It has been held by this court in the case of *Jouanneau, curator*, v. *Shannon*, 4 An. 330, that a steamboat might, after the death of the owner, be employed by those representing the succession, and that they would not be personally responsible for accidents happening in the usual employment of such boat. We do not think that the authority of this case extends to the case before us under the present appeal. *Samuel Broom* died in 1849. *George L. Broom* was appointed his executor. In 1850 a compromise in the nature of a partition of the effects of the succession was made between the widow and the heirs, although the executor does not appear to have been discharged from the further settlement of the succession.

In 1851 the ship Cato, which was left to the heirs in the partition was at Liverpool, in England, where it appears to have been sent by *Broom & Caughlin* on a voyage, which appears to have been made on their account. The plaintiff furnished the master of the ship with sufficient patent metal to sheathe the same, receiving the old copper in part payment. The bill, amounting to £217 17s. 4d., was acknowledged by the master of the ship in the name of *Broom & Caughlin*.

We think, under the circumstances of this case, the executor, in that capacity, cannot be rendered responsible for this bill. The plaintiff must be left to his remedy against *Broom & Caughlin*, and the heirs who authorized the voyage.

The executor, as such, can only be rendered responsible for expenses incurred in the legitimate administration of the succession. After the partition between the widow and heirs, the executors who had been directed by the will to sell the real and personal estate not otherwise disposed of by the same, could not be justified in making voyages with the ships belonging to the heirs on account of the succession. This view of the case renders it unnecessary to express an opinion upon the plea of prescription.

Judgment affirmed.

LEA, J. The plea of prescription in this case cannot be maintained. The acknowledgment of the correctness of the account by the captain who contracted for the repairs, withdrew it from the application of Article 3499 of the Civil Code, and subjected it to the prescription provided by Article 3508. See *Davis* v. *Houren*, 10 Rob., 402.

The evidence shows that the repairs to the vessel were necessary, and that the materials and labor were furnished at current rates. It is unjust that the owners should be benefited to the extent of the labor and materials furnished by the plaintiff without any liability for a reasonable remuneration.

The case of *Jouanneau* v. *Shannon* does not appear to me to be applicable to the facts of this case. It may be remarked, however, that neither in that case nor in the one at bar, was any claim made against an administrator *personally*. This suit is brought against the succession of *Broom*. In that case the issue was between the curator of the succession of *Whipple* (in *his capacity* as such) and a co-proprietor of a vessel. As I understand the ruling in that case, it was determined that where the surviving part owner of a vessel continued to employ her in her usual trade, in the absence of any objection on the part of the proper representatives of the succession, the estate of the deceased part owner would be liable for a contributive share of the cost of necessary repairs to the vessel. Indeed the case is quoted by Mr. Flanders in his work on shipping for the purpose of confirming this very doctrine; and the correctness of this construction is made apparent by the fact that judgment was rendered against the succession of *Whipple* for a proportionate contribution to the cost of the repairs.

So far, then, as the case is applicable to the peculiar facts of this case, it would seem to favor the right of the plaintiff to recover.

My impression, moreover, is that the plaintiff is entitled to recover as for useful and necessary repairs made upon the property of the defendants, by which they have been to that extent enriched. See C. C., Art. 2278.

SPOFFORD, J. I am also of this opinion, and add that the succession might, perhaps, have its recourse over against the heirs to whom the ship fell in the partition.

JOHN MCCARTY *v.* J. W. ZACHARIE.

Where neither the plaintiff nor defendant sought to avail himself of the report of experts in the manner provided by Article 456 of the C. P., the plaintiff had the right to disregard altogether the report and prove up his claim.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Durant & Hornor*, for plaintiff. *Garrett Duncan*, for defendant and appellant.

VOORHIES, J. This is a suit to recover a balance alleged to be due on an account for work and labor done and materials furnished by the plaintiff for the repair of the defendant's building, known as the Verandah Hotel.

After issue joined, *Daniel Blair* was appointed, by consent, sole expert to measure the work, make an estimate of the same, and to report upon the whole bill of the plaintiff.

A report was filed by the expert on the 28th of March, 1854, awarding the sum of $1185 07 in favor of the plaintiff. On the 2d of May following, the defendant opposed two items therein allowed to the plaintiff, one for the sum of $160, as an overcharge on sixteen water-closets, and the other for the sum of $47 18, as commission charged for purchasing, etc. Alleging that the report was correct in all other respects, the defendant prayed that the same, after making the correction of said errors, might be confirmed and made the basis of the judgment of the court.

It does not appear from the evidence that any other steps were afterwards taken either by the plaintiff or the defendant in relation to the report. At this stage of the proceedings the cause was fixed for trial on the 10th of November following, without any objection on the part of the defendant.

On the trial, the plaintiff introduced evidence to prove his demand, which was excepted to by the defendant, "on the ground that the same was incompetent, irregular and irrelevant under the pleadings, report and exceptions."

We do not think the Judge *a quo* erred in overruling the objection. After a report of experts, auditors or arbitrators, is filed, the party wishing to avail himself of the same, may, on motion, call upon the adverse party to show cause, within ten days after the notice of such motion shall have been served on him, why such report or award should not be homologated. C. P., 456. In the present case there is nothing to show that the plaintiff ever took any steps, or ever intended, to avail himself of the report of the expert; on the contrary, we are led to infer, from all the circumstances disclosed by the record, that he never entertained any such intention. Had the defendant wished to avail himself of the report, when the cause was called, on the 1st of September, to be fixed for trial, he should then, or, at all events, previous to the day fixed for the trial, have done so, by calling on his adversary in the manner prescribed by law. 3 L., 73; 6 R., 494; 2 An., 892. Under these circumstances, the plaintiff, it appears to us, had clearly the right to disregard altogether the report of the expert, and to prove up his claim.

On the merits, we consider the items charged in the plaintiff's account for work and labor done, amounting to $962 45, and those for materials furnished, including the water closets, etc., amounting to $3485 30, to be sufficiently

proved by the evidence. After deducting therefrom the sum of $1765 51, the total amount of credits to which the defendant is entitled, there remains a balance of $1682 24, for which we think there should have been judgment in favor of the plaintiff, instead of the sum of $1463 31, as allowed him by the Judge *a quo*. Hence, we are of the opinion that the judgment should be amended in favor of the plaintiff and appellee, as prayed for in his answer to the appeal.

It is, therefore, ordered and decreed, that the judgment of the court below be amended in favor of the plaintiff, by allowing him the sum of sixteen hundred and eighty-two dollars and twenty-four cents, instead of fourteen hundred and sixty-three dollars and thirty-one cents, and so amended, that said judgment be affirmed, with costs.

L. D. Whipple *v.* P. Hertzberger et al.

No privilege is granted by law to one who furnishes feed for the horses of a keeper of a line of omnibuses employed on such line.

The seizure and even the sale of property does not deprive the vendor of his privilege, so long as the property, or its proceeds, are in the hands of the Sheriff, syndic, administrator, etc., and the property has not been sold confusedly with a mass of other things belonging to the vendee. C. C., 3195.

An amendment to the judgment of the lower court, by embracing within it the name of one of the opponents, accidentally omitted, is irregular. But if the record contains evidence which shows that judgment in the same form should be immediately pronounced, the decree will be affirmed by the Supreme Court.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Lugenbühl*, for plaintiff and appellant. *Janin*, *St. Paul & Bouny*, *Preaux*, *Holland*, *Budd & Lambert* and *Saucier*, for different defendants.

Merrick, C. J. The plaintiff complains of the judgment of the lower court, because it recognized the privilege of the vendor upon the movables which he had seized under execution, and because the judgment of the lower court was amended after it was rendered, without ordering a new trial, and because it refused to the plaintiff a privilege for feed furnished for the horses used for the line of omnibuses kept by *Hertzberger*.

The law does not seem to have accorded a privilege to him who has furnished feed to the keeper of a line of omnibuses for the horses employed in such line.

Although the seizure has the effect to take the property out of the custody of the debtor, the vendee, yet the seizure and even the sale of it does not deprive the vendor of his privilege, so long as the property or its proceeds are in the hands of the Sheriff, syndic, administrator, etc., and the property has not been sold confusedly with a mass of other things belonging to the vendee. C. C., 3195.

We think the amendment of the judgment of the lower court, by embracing in it the name of one of the opponents accidentally omitted, without granting a new trial, was irregular. But as the testimony is in the record, and requires that the judgment should be immediately pronounced in the same form, we will affirm the decree, and award to the appellant the costs of the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be affirmed, and that the appellees pay the cost of the appeal.

Daniel Mayes *v.* Schmidt & Co.

Where the plaintiff does not interfere with the officer charged with the execution of a final process upon a judgment regularly obtained, he cannot be held responsible for the wilful or negligent acts of such officer in the execution of the writ.
C. P. 659.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.
Helm, for plaintiff. *Fitz*, for defendants and appellants.

Merrick, C. J. This action is brought to recover of defendants damages for injury done to household furniture, injured while under seizure on a judgment for rent.

The defendants *Schmidt & Co.* had obtained judgment against the plaintiff (while absent during the summer months at Biloxi) for two hundred dollars, it being for four months rent. They caused furniture of about two thousand dollars in value, to be seized. The Judge of the lower court was of the opinion that the seizure of all the furniture was directed by the plaintiffs in order to obtain possession of the leased premises. The unnecessary seizure of all the furniture perhaps gives some color to this supposition. The proof shows that the furniture was injured in taking it from the premises leased and in storing it afterwards.

The Sheriff's or Constable's duty and responsibility are prescribed by Art. 659 of the Code of Practice, in these words, viz:

"When the objects seized consist of money, movables, beasts or slaves, he should put them in a place of safety, under the penalty of being responsible for the loss or injury they may sustain through his fault or neglect."

Where the plaintiff does not interfere with the officer charged with the execution of a final process upon a judgment regularly obtained, he cannot be held responsible for the wilful or negligent acts of such officer in the execution of the writ. But we are not satisfied that there was such an active interference on the part of *Schmidt & Co.*, as to render them responsible for the acts of the officer.

See *Meredith* v. *Flaxman*, 5 C. & P., 99.

The plaintiff has filed an answer praying for an amendment of the judgment in his favor, by allowing him a larger amount of damages than was allowed in the lower court. The defendants, *Schmidt & Co.*, claim that they should be allowed an additional month's rent, on account of the removal of the property by the plaintiff since the seizure.

We do not think the judgment ought to be disturbed in either particular.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed as against the said *George F. Pierson*, with costs, and that said judgment as to the said *Schmidt* and *Vogel*, composing the firm of *Schmidt & Co.*, be avoided and reversed, and that there be judgment against the plaintiff and in their favor, and that they recover their costs in both courts.

E. G. Marmiche v. F. Roumieu.

Defendant was in possession of plaintiff's house under a lease, and when the lease was about to expire, defendant refused to renew it on the terms proposed by plaintiff. Defendant continued to occupy and was notified by plaintiff that he considered the annual lease renewed, to which defendant responded that he would leave the premises at the end of the month, and continued to notify plaintiff from month to month that he would leave. *Held:* There was no contract, and the relation of lessor and lessee can only be created by contract; and that defendant was only liable for the rent of the house during the period it was actually occupied by him.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Eyma, for plaintiff. *Filleul*, for defendant and appellant.

Lea, J. The facts of this case are correctly stated by the District Judge. "The plaintiff claims $1,500 for the rent of a store, to be paid monthly, on the ground that the defendant rented the store from him by the year. The defendant claims that he is merely a monthly tenant, and denies any liability for rent except when in the premises. The facts show that the defendant first occupied the house under a written lease, that when the lease was about to expire, plaintiff asked defendant if he would continue for another year. The defendant was desirous of doing so, but under different conditions, to which the plaintiff refused to accede. The defendant continued to occupy the premises, and was notified by the plaintiff that he considered the lease renewed. To this defendant replied that he would leave the premises at the end of the month. He continued in the premises and notified plaintiff from month to month that he would leave." To this statement we may add that both before and after the expiration of the written lease, the defendant positively refused to accede to the terms proposed by the lessor, who, in his turn, insisted upon his original proposition, and would consent to no other. Under these circumstances it is clear that there was no contract and the relation of lessor and lessee cannot be created otherwise than by a contract. If the defendant was a trespasser, which is not pretended, the plaintiff had his remedy by the summary process for expelling a tenant, together with his claim for damages, if any were sustained; but this is a suit upon an alleged contract, to which the defendant not only never agreed, but against which he always protested. The tacit reconduction of the lease of property not predial does not extend beyond one month, which will be presumed to be continued from month to month, unless terminated by one of the parties, in accordance with the provisions of Article 2656 of the Civil Code. See *Geheebe, et als* v. *Stanby*, 1st Annual, p. 17, also *Bowles* v. *Lyon*, 6th Rob. 264.

This suit was brought before the expiration of the first month, no exception was taken to the prematurity of the suit, and the evidence shows that the defendant continued to occupy the premises belonging to the plaintiff up to the month of April inclusive. The defendant is, therefore, bound for six months rent, say 750 dollars.

It is, therefore, ordered that the judgment appealed from be reversed, and proceeding to render such judgment as in our opinion should have been rendered: It is ordered that the plaintiff, *E. G. Marmiche*, do have and recover of the defendant, *F. Roumieu*, the sum of ($750) seven hundred and fifty dollars and costs of suit in the District Court, for the rent of his store up to

the 1st day of May, 1855, without prejudice to the plaintiff's rights, if any he have, to sue for and recover such damages as he may have sustained by a failure to rent his store for the residue of the year ending 31st October, 1855, in consequence of the alleged occupation of the same by the defendant without his consent.

It is further ordered that the plaintiff and appellee pay the costs of this appeal.

THE STATE v. WILLIAM BASS.

The action of the District Court relative to the granting of new trials, in criminal causes, cannot be reviewed by the Supreme Court, unless brought before it in such a mode as to present for solution an unmixed question of law.

When the prisoner provokes an inquiry into the character of the deceased, he cannot complain that the State, on re examination, seeks to obtain from the same witness evidence of a general character calculated to rebut the unfavorable impression produced by the answers of the witness to the prisoner's questions.

The prosecuting officer always has the right to open the argument of the cause. If the prisoner offer no evidence, it seems that it is usual for the argument to cease with the reply of his counsel to the argument of the prosecuting officer. But the prisoner's counsel is not entitled to open the argument upon the merits before the jury, in any case, as a matter of right.

APPEAL from the District Court, Seventh District, Parish of East Feliciana. *Watterson*, J., presiding. *Moïse*, Attorney General. *Muse*, for appellant.

SPOFFORD, J. The action of the District Courts relative to the granting of new trials, in criminal cases, cannot be reviewed by this Court, unless brought before it in such a mode as to present for solution an unmixed question of law. Const., Art. 62. *State* v. *Johnson*, ante, p. 422.

We must therefore confine our attention in this case to the two bills of exceptions.

I. The prisoner complains that the court erroneously admitted evidence touching the general character of the slave whom he was accused of killing.

It is true, as a general rule, that evidence in regard to the character of the person on whom the offence was committed, is inadmissible. 3 Green Ev., p. 27. But, in this case, the defendant's counsel opened the subject by inquiring into the character of the slave and eliciting answers from one of the witnesses for the prosecution in cross-examination, which had a tendency to cause the jury to form an unfavorable estimate of his general character; if objected to, such evidence could not have been received; but the party who provoked it certainly cannot complain that the State, on a re-examination, sought from the same witness evidence, of a general character, calculated to rebut this unfavorable impression.

II. The prisoner's counsel having adduced no evidence, except by cross-examining the witnesses for the prosecution, claimed the right to open and close the argument of the cause, which the court refused, and the counsel took a bill of exceptions.

He asked too much. The prosecuting officer always has the right to open the argument of the cause. The burden is on the State to make out a case of guilt. If the prisoner chooses to rest his defence upon the weakness of the State's proof, and to offer none himself, it seems that it is usual for the argu-

ment to cease with the reply of his counsel to the argument of the prosecuting officer. 1 Chit., Cr. Law, *p. 627. 2 Bay, 451, *State* v. *Brisbane*. But the prisoner's counsel is not entitled to open the argument upon the merits before the jury, in any case, as a matter of right.

Judgment affirmed with costs.

STATE v. PATRICK KENNEDY.

The Supreme Court has no jurisdiction over the conclusions of the lower court on the mixed questions of law and fact raised by an affidavit for a continuance in a criminal case.

Decision in *State* v. *Johnson* ante, p. 422, affirmed.

The Supreme Court, as a court of error, or an appellate court, for the consideration of questions of law only, is without authority to reverse the judgment of the lower court in a criminal case, except upon a clear showing that there has been error committed in the proceedings of the lower court, and that the appellant has been prejudiced by it.

Bill of exceptions to the order of the judge directing the clerk to commence calling the jury list at No. 70. *By the Court:* The industry of counsel has not furnished us with any adjudged case, nor have we been able to find any, in which it has been held that it was error if the jury were not called to the book in the order in which they were placed on the list served upon the accused. There is nothing in the statute which directs the order in which the jury are to be called to be sworn, nor which requires the names to be set down on the list in the order in which they are drawn, although that is the more regular and natural mode of transacting the business. The statute which provides that the accused shall be furnished with a list of the jury who are to pass upon his case, at least two days before his trial, does not require that the list should be numbered. Yet, we believe the practice is almost universal, (and it ought not unnecessarily to be departed from) to number the list, and in capital cases to call the jurors in the order of their numbers.

It is not sufficient for the accused to show a mere irregularity in the manner in which the jury is called—he should show that he has been prejudiced by the action of the court in that particular.

APPEAL from the First District Court of New Orleans, *Robertson*, J.

Moïse, Attorney General. *Field*, for appellant.

MERRICK, C. J. The prisoner and *James Doyle* were indicted for the murder of *James Cruise*.

The prisoner was tried alone, and an unqualified verdict of guilty having been rendered against him, he was sentenced to be executed.

On his appeal to this court, he urges for the reversal of the judgment of the District Court, what may be embraced in three grounds. They are in substance as follows, viz:

1st. The court erred in refusing the accused a continuance on his affidavit showing the absence of his material witnesses.

2d. The court erred in proceeding to trial in the absence of a large number of the jurors who were not, and had not been in attendance; three of whom were excused by the court.

3. The court erred in not allowing the names of the jurors to be placed in a hat or box and drawn therefrom one by one and so tendered the accused, and in refusing to commence the calling of the jurors from the head of the list, and by commencing the calling of said jury from No. 70 of the list.

I. It has been so often decided by this court that we have no jurisdiction over the conclusions of the lower court on the mixed question of law and fact raised by an affidavit for a continuance in a criminal case, that it is sufficient to refer to those decisions as an answer to the first ground urged by the appellant.

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See *State* v. *John Johnson*, 11 An., p. 422, and authorities there cited, viz: *State* v. *Hunt*, 4 An., 438; *State* v. *Long*, Ib., 441; *State* v. *Butte*, 6 An., 661; *State* v. *Cazeau*, 8 An., 114; *State* v. *Muldoon*, 9 An., 24.

II. The second ground of reversal presented was considered by us in the case of the *State* against *Johnson*, just cited. The jury list, in this case, is the same as served upon the defendant in that case, and the reasoning of the court in that case is applicable to this. The only difference between the case of *Johnson* and the present, consists in the remark of the judge annexed to the bill of exception in this, which was not a part of the bill of exception in that case. The remark is in these words: "The court had made extraordinary efforts to obtain a full panel. Some of the jurors on the list had been placed there, as they were well known citizens and it was thought that they could be obtained; but, owing to the prevalence of cholera, and other causes, many jurors were never in attendance, though repeated attachments had been issued," &c.

It has been argued to us, although not a ground of exception taken in the bill, that this bill of exception shows that instead of drawing the jurors as required by law, the judge has arbitrarily placed upon the pannel the names of certain well known citizens to serve in the place of the jurors who did not attend. We do not think the language of the judge will bear the construction contended for by the accused. It is not to be presumed, except upon the clearest showing, that the District Judge so far forgot his duties, as to prepare a list of jurors, because they were well known citizens and might be supposed willing to serve. The law has intrusted the duty of drawing the jury to the sheriff, even to supply the absence of jurors when a sufficient number are not in attendance to transact the business of the court. We are therefore bound to conclude that the expression of the judge contained in the bill, was merely an opinion which he entertained of the jury as it had been originally drawn.

On the authority, therefore, of the case of the *State* against *Johnson*, to which we refer for the reasoning of the court on this point, we conclude that the second objection is untenable.

III. The third error alleged is presented by the following bill of exception, viz:

"Be it remembered that at the time this cause was called for trial, and before any of the jury had been sworn, the defendant, who notwithstanding his objection had been ruled to go to trial, moved the court to have the names of the jurors found on the list served on the accused, to be placed in a hat or box, to be thence drawn by the clerk or sheriff, one by one, and tendered as jurors, which motion the court overruled; whereupon the accused moved the court to require the clerk to call the jurors from the head of the list, which motion the court likewise overruled and began the calling at No. 70 on the list, to which rulings of the court the defendant by his counsel excepts," &c.

This court, as a court of error, or an appellate court for the consideration of questions of law only, is without authority to reverse the judgment of the lower court in a criminal case, except upon a clear showing that there has been error committed in the proceedings of the lower court, and that the appellant has been prejudiced by it.

The industry of counsel has not furnished us with any adjudged case, nor have we been able to find any, in which it has been held that it was error if the jury were not called to the book in the order in which they were placed on the list served upon the accused. There is nothing in the statute which directs the

order in which the jury are to be called to be sworn, nor which requires the names to be set down on the list in the order in which they are drawn, although that is the more regular and natural mode of transacting the business. The statute which provides that the accused shall be furnished with a list of the jury who are to pass upon his case, at least two days before his trial, does not require that the list should be numbered, yet we believe the practice is almost universal, (and it ought not unnecessarily to be departed from) to number the list, and in capital cases, to call the jurors in the order of their numbers. It is the practice, in the case of high treason, in England, to call them in the order of the list. 1 Chitty Crim. Law, p. 532. We know that the practice in civil cases and in misdemeanors, in many parishes of this State, is to call the jury in such a manner as to divide the labor of the jury trials during the term among all the jurors in attendance, and not impose upon the first named on the list the labor of the term. And such, we were informed in the argument, was the object of the judge of the District Court by commencing the call of the jurors in this case at number seventy of the list. A comparison of the jury empannelled with the jury list shows that four of the jury between numbers seventy and eighty-two (the last number on the list) were sworn as jurors, that the residue of the jury accepted and sworn were taken from between numbers one and twenty-three. Indeed, the bill of exception does not complain that the jury were not consecutively called from the number at which the calling commenced, but that the court refused to commence calling from the head of the list. That the jury called were not legal, competent and impartial jurors, (*legales homines*), is not pretended; nor is it shown that the accused was taken by surprise by the mode in which the calling of the jury to the book was conducted, nor that he even used, much less exhausted, his challenges, in order to prevent men with whose character he was not familiar from being placed on the jury. On the contrary, the accused first desired the court to place the names of all of the jurors on the list in a hat or box, and to draw the jury one by one therefrom, thus showing a willingness that the jury should be taken from any part of the list as chance should determine.

Moreover, he seems to have anticipated the action of the court by his motion to commence the calling of the jurors from the head of the list. We are therefore unable to see in what manner the accused has been prejudiced by the mode in which the jurors were called from the list; for it must be conceded they were as competent and impartial at the one end of the list as the other.

We have already observed, that it is not sufficient for the accused to show a mere irregularity in the manner in which the jury were called, he should show that he has been prejudiced by the action of the court in that particular. Had the bill of exceptions shown that the accused was taken by surprise by the unusual manner in which the jurors were called, and that he had been compelled to exhaust all his challenges to protect himself against such action of the court, or that the court arbitrarily and without cause, directed the jury list to be called in an unusual manner, a different case would have been presented from the present. Whether sufficient to occasion the reversal of the judgment, it does not become us now to determine.

We have already intimated that the court did not err in refusing to put the names of the jurors in a hat or box, and draw them therefrom. This is done by statute in England in ordinary cases oply; but even there, in those cases

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where the list is served on the accused, they call from the list in its order. But the accused has so little of a vested interest, so to speak, in the jurors that the State always exercised, the arbitrary right of setting aside any of the jurors in the pannel, until it is gone through with, whereupon the jurors which have been set aside, are then called, and if not challenged by the accused, they are sworn, unless cause is shown on behalf of the crown. Wharton, Crim. Law, 839, note v.

Such is still the practice in the United States Courts, and such was the practice of this State from the passage of the act requiring the indictment and list of jurors to be served upon the accused, until the enactment of the Statute of 1837, p. 42, which took from the State the power to set aside jurors, and gave in lieu thereof six peremptory challenges. If it was not error in the State to set aside the jurors as called, at its pleasure, under the Act of 1804, it cannot be error now, under the same statute, for the Judge simply, for a cause tending to facilitate the transaction of the public business, to commence at a particular number on the list, and call the same consecutively until a petit jury is formed or the pannel exhausted.

Judgment affirmed.

AUGUSTE DEVRON *v.* HIS CREDITORS.

Where mortgage creditors not only did not oppose the sale by the syndic of the mortgage property, and did not endeavor to enforce against him the pact *de non alienando*, but took a rule upon him to compel him to sell the property for cash, they cannot complain that the proceeds of the sale are burthened with the charge of the surrender, the movables proving insufficient.

By the Court: We are not prepared to say that a privilege for law charges does not attach as well to property mortgaged with the foregoing pact as without it, so long as the title to the property has not been divested by a sale. The pact gives the creditor a more easy mode of seizing the mortgage property, but does not elevate his mortgage into a privilege.

The proceeds of mortgaged property ought to be applied, whether there are one or several immovables, to the payment of the privileges in the order in which the property was mortgaged, commencing with the most recent and ascending to the most ancient.

The mode of contribution to debts *privileged generally upon movables and immovables* has been judicially determined. The decisions are that the immovables, not the mortgage creditors, owed the contribution and that these privilege debts must be borne by the immovables *pro rata* according to the price which they produced respectively, and this rule is not opposed to Articles 3236, 3237 of the Code. SPOFFORD, J., with whom concurred LEA, J., dissenting.

C. P. 715.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Magne, for *Rochereau & Co.*, appellants. *Dufour*, for Syndic.

MERRICK, C. J. (SPOFFORD, J., and LEA, J., dissenting.) *Eugene Rochereau & Co.* appeal from a judgment homologating a tableau of distribution.

They are mortgaged creditors, and complain of the judgment on the following grounds, viz:

I. and II. "That having seized the property prior to the surrender they could not be divested of the rights they had so acquired. That having in their favor the pact *de non alienando*, they have the right to take the proceeds of the sale of the property without any further costs and charges than would have been incurred by a sale under their order of seizure and sale which was

arrested by the surrender; that it is unjust to impose upon them, the movables proving insufficient, almost the entire charges of the surrender."

In answer to this reasoning it may be replied, that the opponent not only suffered the property to be sold without objection and without endeavoring to enforce against the syndic the pact *de non alienando* on which they were relying, but they took a rule upon him to compel him to sell the property mortgaged for cash.

Neither are we prepared to say that a privilege for law charges does not attach as well to property mortgaged with the foregoing pact as without it, so long as the title to the property has not been divested by a sale. The pact gives the creditor a more easy mode of seizing the mortgaged property, but does not elevate his mortgage into a privilege. We see no error in the ruling of the court in allowing the privileges to be paid, for want of movables, out of the immovables specially affected with the mortgage of opponents.

III. The third objection is, that the division of the privileges among the mortgage creditors, and charging them therewith *pro rata* is in direct opposition to the principles of the law of mortgages embodied in the Code. In support of this proposition the appellant cites Article 3236 of the Civil Code, and insists that the court ought to have charged the privileges against the proceeds of the property in the order in which it was mortgaged beginning with the *least* ancient and ascending in this order, so that the younger mortgages should be compelled to bear the loss, and not compel the older ones to bear any portion of the same.

To this it is replied, that the opponents are made to contribute to the privileged expenses by virtue of Art. 3236 C. C.; that the second paragraph of the Article speaks of the *creditor* who is to bear the loss, showing clearly its application or reference exclusively to different special mortgages on the same property; whereas, the first paragraph containing the rule of the law has invariably been construed to mean that it is not the *creditor* holding the mortgage, but the *property* on which the mortgage exists which is liable to the contribution. In support of this position counsel for appellees cite 5 M. 469, 6 M. 520; 10 L. R. 554, 18 L. R. 372; and 6 Rob. 268.

It may be remarked in regard to the first two of the authorities cited, that they were decided under the old Code, the provisions of which are not the same as the Code of 1825. In regard to the more recent cases the attention of the court does not appear to have been directed to Articles 3236 and 3237, which seem to us to be provisions directly in point. They read as follows:

"Art. 3236. With the exception of special privileges which exist on immovables in favor of the vendor, of workmen and the furnisher of materials, as declared above, the debts privileged on the movables and immovables generally, ought to be paid, if the movables are insufficient, out of the product of the immovables, and slaves belonging to the debtor, in preference to all other privileged and mortgaged creditors.

The loss which may result from their payment must be borne by the creditor whose mortgage is less ancient and so in succession, ascending according to the order of the mortgages or by *pro rata* contributions where two or more of the mortgages have the same date."

"Art. 3237. When the debts privileged on the movables and immovables cannot be paid entirely, either because the movables are of small value or subject to special privileges which claim a preference or because the movables and

immovables together do not suffice, the deficiency must *not* be borne proportionally among the debtors (creditors), but the debts must be paid according to the order established above, and the loss must fall on those which are of inferior dignity." (*du rang inferieur.*) But it is contended that the foregoing Articles of the Civil Code apply to cases where the same property is affected by the all the mortgages, and that then only the loss must fall upon the junior mortgage and that where there are several pieces of property, the privilege attaches to them all and under the authoritics cited they must bear the loss *pro rata.* The reason why there should be the distinction contended for between one or several immovables is by no means clear.

The first mortgage creditor having his mortgage upon a single immovable, would, in the event of insolvency, have the right to insist that the proceeds of the movables and unincumbered immovables should be exhausted before his fund should be required to contribute to the payment of the general privileged claims. Let us take another step; a second mortgage creditor acquires a right upon another immovable, and the debtor becomes insolvent. Here, this second mortgage creditor has the right in like manner to compel the application of the proceeds of the movables and unincumbered immovables to the payment of the general privileges before his fund shall be required to contribute. But suppose the movable and unincumbered immovables are insufficient to meet the privileged claims, and that the mortgaged property must contribute, and he were to call upon the senior mortgage creditor, to contribute to the payment of the privileges, would there be any want of equity in a reply to him, from the first mortgage creditor, to this effect: "Sir, when I took my mortgage, the very immovable, the proceeds of which you now claim, was liable, in the hands of my debtor, to be first exhausted for the payment of all general privileges before I could be called upon to contribute at all. You have acquired no greater right than the debtor had, who gave you the mortgage"?

The compilers of the Civil Code of 1825, having made no exception, appear to have adopted the view, that the proceeds of mortgaged property ought to be applied, whether there are one or several immovables, to the payment of the privileges in the order in which the property was mortgaged, commencing with the most recent, and thus ascending to the most ancient. This is also in harmony with Article 715 of the Code of Practice, which requires the holder of a legal or judicial mortgage, to discuss other property which the debtor has in his possession, and even that which he has alienated since the purchase, before requiring payment of a purchaser of property bought at Sheriff sale, which is subject to a legal or judicial mortgage. The reason announced by the lawgiver, in the same article, is: "Because the creditor who has a general mortgage, can only act against the property of which his debtor disposed, in the order in which the alienations have been made, beginning at the most recent and ascending to the most ancient."

Although the *property* contributes, and not the mortgage creditors, to the payment of the privileges, nothing prevents the appropriation of the proceeds of the mortgage property to the payment of the privileges in an inverted order from that in which the mortgages were created.

Since the adoption of the Code of 1825, we do not think the point now before us has been expressly decided. The cases of *Janin* v. *His Creditors*, 10 L. R. 554; *Montouchet* v. *Ferraud*, 18 L. R. 372; and *Cazeau* v. *His Credi-*

ters, 6 Rob. 268, without directly deciding the case, seem to affirm, by implication, the decisions in the 5 Martin, 469, and 6 Martin 520, decided under the Old Code. In the case of *Dreux* v. *His Creditors*, 7 N. S. 637–640, the court notice the change in the legislation introduced by Article 3236, but the case itself having arisen before the Code of 1825, was decided under the provisions of the Old Code.

We consider the provisions of the Code clear and unambiguous, and that hitherto there has not been any interpretation placed upon the articles cited, which could weigh as an authority against what appears to us to be their obvious meaning.

The mortgages of *François Jartoux* and *Mrs. Devron*, being both junior to those of *Eugene Rochereau & Co.*, the property subject to the subsequent mortgages, must first contribute to the payment of the privileges, and the fund subject to the mortgage of *E. Rochereau & Co.*, can only be applied to the payment of the residue of the privileges, after the funds subject to the junior mortgages are exhausted.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be amended, by directing that said tableau of distribution, filed 7th November, 1855, be further amended by applying the whole instead of a part of the following sums, to the payment of expenses, viz:

Amount of movables and collections	$324
The proceeds of the undivided half of thirteen lots in the Third District	310
Lots at Carrollton, set down on tableau as No. 9	110
Price of slave *Rosania*	270
Total	$1014

That the claims of *François Jartoux* and *Mrs. Devron*, to any part of said sums, be rejected; that the sum of $18,342 60, mentioned as the proceeds of property mortgaged to said *E. Rochereau & Co.*, contribute to the payment of the expenses and privileged claims, $957 98, instead of $1589 82, mentioned in said tableau, leaving $17,270 02, to be distributed to said *Eugene Rochereau & Co.* And it is further ordered, that the Judgment of the lower court, so amended, be affirmed, and that the appellees pay the costs of the appeal.

SPOFFORD, J., (with whom concurred LEA, J.,) dissenting. It appears to me, that the mode of contribution to debts, *privileged generally upon movables and immovables*, has been judicially determined in the cases of *Janin* v. *His Creditors*, 10 L. 554 and *Cazeau* v. *His Creditors*, 6 Rob. 268, in both of which cases the court must have had in view Articles 3236 and 3237 of our present Code.

The decision was, that the immovables, not the mortgage creditors, owed the contribution, and that the privileged debt aforesaid, must be borne by the immovables *pro rata*, according to the price which they produced respectively.

Nor does this interpretation seem to me to be opposed to the fair meaning of Articles 3236 and 3237.

The reference to different mortgages, according to their date, must be taken to refer to different mortgages upon the same thing.

Conventional mortgages, in due form, upon different things, are of equal dignity irrespective of their dates.

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The argument, that the eldest mortgagee of a single immovable, looks to the fact, that the mortgagor has at the time other unincumbered immovables to respond first to the privileged claims in question in case of insolvency, would seem to imply that the mortgagor was bound not to alienate his other immovables, or, if alienated, that they would still be liable to contribute, when the opposite is the fact.

Until death or a declared insolvency, the privileged claims under consideration do not spring into existence. When they arise, I think they attach indifferently to all the immovables surrendered, and thus each must pay its quota. When there are two or more creditors, with mortgage upon the same thing, their rank is fixed by the Code.

On this point, I dissent from the opinion just pronounced.

SAME CASE ON A REHEARING.

MERRICK, C. J. A rehearing having been granted in this case, as to the claim of *Mrs. Devron*, by consent of parties, her marriage contract was produced in evidence in this court.

The parties further consent, that her legal mortgage be maintained for $246 46, as set down on the tableau.

It is therefore ordered, adjudged and decreed by the court, that the judgment heretofore pronounced by us, be so far set aside and amended, as to maintain the legal mortgage of said *Mrs. Devron*, as set down on the tableau, for the sum of $246 46, and that sum ordered to be paid to *E. Rochereau & Co.*, viz, ————, be reduced accordingly to the sum of $17,023 56; and, that said judgment by us so pronounced, remain in all other respects undisturbed.

THOMAS J. IVY *v.* JAMES A. LUSK and FRANCIS QUARLES.

There is nothing in the Act of 8th of March, 1841, creating the office of Harbor Master, which justifies the conclusion that the 8th of March was the day fixed by law for the commencement of the term of office of the Harbor Master.

However specious the argument that the Governor should, if possible, seek to avail himself of the assistance of his constitutional advisers, the Senate, in making appointments to office, and to avoid an independent nomination, which would only have effect until the end of the next session of the Legislature, it is plain that an appointment thus made by anticipation, has no other basis than expediency and convenience, and can only derive its binding force from the supposition that there will be no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office.

It is entirely inadmissible to pretend that the Governor and Senate can forestall the action of their own successors in office, upon executive appointments to the offices, of which the term shall expire during their possession of the reins of government.

APPEAL from the Second District Court of New Orleans, *Lea*, J. *M. & H. H. Taylor*, for plaintiff and appellant. *Elmore & King*, for defendants.

BUCHANAN, J. The motion to dismiss the appeal in this case, cannot pre-

vail. *Mr. Quarles* is not a warrantor in the legal sense, although styled so in the pleadings in the district court.

The pretensions of plaintiff, as well as those of defendant, to the office of Harbor Master, are not only independent of, but antagonistic to, those of *Mr. Quarles*. The case of *Williams* v. *Courtney*, 8th Ann. 63, has therefore no application.

The true test of the necessary parties to an appeal is this: Has the party an interest that the judgment appealed from be maintained? As to *Quarles*, it is plain that such an interest does not exist in the present instance. The judgment of the court below was against him, as well as against *Ivy*. *Quarles* has acquiesced in the judgment. *Ivy* alone has appealed. A reversal of the judgment, as between *Ivy* and *Lusk*, can have no effect upon *Quarles*. His right to the office is not in question before us, and even should we be of opinion that neither of the other parties has the legal right to the office, we could not award it to *Quarles*. We could do nothing more, in such a case, than dismiss the suit. In no event, could either of those parties have had any recourse against *Quarles*, had he even been made party to the appeal. He has therefore no interest in the success of either appellant or appellee.

The plaintiff and defendant both claim to have had, at the date of the institution of this suit, (November, 1853,) the legal right to the possession of the office of Harbor Master of the First District of New Orleans. Each is holder of a commission under the broad seal of the State; that of plaintiff, signed by *Governor Walker*, bears date the 12th of March, 1852; and that of defendant, signed by *Governor Hébert*, is dated 8th of August, 1853. The term of office of the Harbor Master, by the Act of 8th March, 1841, is two years; and it is admitted on all sides, that *Francis Quarles* was the legally qualified incumbent of this office, up to the 25th of February, 1853, at which date his term of office expired, and that he was not reappointed. When *Governor Hébert*, therefore, appointed *Mr. Lusk*, in August, 1853, the office was vacant, unless the appointment of *Mr. Ivy* by *Governor Walker*, about a *year* before the expiration of *Quarles'* term, took effect from the expiration of that term, as it was intended to do. But in the interval between the 12th of March, 1852, when *Ivy* was commissioned, and the 25th of February, 1853, when that commission was intended to take effect, a new State Constitution was adopted, and a new State Government organized, with a new Governor, and a new Legislature; and the only question which we deem it necessary to decide, is the legality of an executive appointment to office, under such circumstances, in anticipation of the vacancy of the office.

The argument for the plaintiff is, that inasmuch as the Act of the Legislature creating this office of Harbor Master declares, that "from and after the passage of this Act," it shall be the duty of the Governor to nominate, and by and with the consent of the Senate, appoint three Harbor Masters for the port of New Orleans, who should "hold their office for two years"; therefore, the term of this office has a day fixed by law for its commencement, to wit, the 8th of March, 1841, and the same day, every second year thereafter; and that inasmuch as under the Constitution of 1845, the Legislature only sat biennially, and the year 1853, when *Quarles'* term of office would expire, was a year of legislative recess, it was proper, if not necessary, that the Governor should lay his nomination of *Quarles'* successor before the Senate, which was in session in 1852, the year previous to the vacancy of the office.

As to the 8th of March being the day fixed by law for the commencement of the term of office, we see nothing in the Act of 1841, which justifies such a conclusion. The practice of the government, as proved by the executive record in evidence, is, moreover, contrary to this theory; for we find therein that *Quarles'* commission, as already said, took effect from the 25th of February, 1851. And however specious the argument, that the Governor should, if possible, seek to avail himself of the assistance of his constitutional advisers, the Senate, in making appointments to office, and to avoid an independent nomination which would only have effect until the end of the next session of the Legislature, it is plain that an appointment thus made by anticipation, has no other basis than expediency and convenience, and can only derive its binding force and effect from the supposition that there will be no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office.

But we hold it to be entirely inadmissible to pretend that the Governor and Senate can forestall the action of their own successors in office, upon executive appointments to other offices of which the term shall expire during their possession of the reins of government.

Judgment of district court affirmed, with costs.

SPOFFORD, J., concurring. The plaintiff admits that he could not succeed in his pretensions, without overthrowing the constitutional interpretation upon which the decision of the case of *Sigur* v. *Crenshaw*, 8 An. 401 was based.

The public interest and repose, to which all personal pretensions to office are subordinate, demand that the jurisprudence upon this subject, should be as consistent and uniform as possible.

I concur in the decree, upon the authority of the case of *Sigur* v. *Crenshaw*.

J. M. Butchert v. Samuel Ricker, Jr.

J. M. Bach, Appellant.—Mrs. S. Lakin, Appellee.

Where the purchaser took a rule on the prior mortgage creditors to release mortgages and distribute the purchase money, the latter may insist on their mortgage rights and subject the property to the payment of their debts.

Matters properly triable in a hypothecary action, should, after the parties have gone to trial, be determined by the court, on a rule, where the form of proceeding had not been objected to at the proper time.

An attachment will issue in favor of a vendee against the property of a non-resident vendor, to secure a claim in warranty.

Where counsel for a married woman admitted in his brief that the person who filed an answer on her behalf, was her accredited agent, "with the full authorization and consent of her husband," the court will presume that the proceedings against the wife were fully authorized by the husband.

The exhibition of a certificate of mortgages, or the attaching of the same to an act of sale, does not relieve vendor from an express warranty of "all mortgages and incumbrances."

APPEAL from the District Court of the parish of Jefferson, *Burthe*, J.

Purvis & Dugué, for appellant. *Van Dalson*, for appellee. *Stansbury*, for *Pearson*.

Merrick, C. J. *John M. Bach*, the plaintiff in the rule taken in this case, on the twenty-second day of April, 1853, bought of *Mrs. Celeste Eliza Ricker*, wife of *John Solomon Lakin*, of the city of Cincinnati, two squares of ground containing forty-six lots, in Rickerville, a few miles above this city, for the price of $7,363.

Mrs. Lakin, who is the daughter of *Samuel Ricker, Jr.*, on the 22d of June, 1852, purchased those lots at a Sheriff's sale, made upon two executions issued by a Justice of the Peace, at the suit of *J. M. Butchert*, for work done upon banquettes in front of certain of these lots. The judgment being by confession and for $36 45, in one case, and $46 48, in the other, and purporting to give a privilege on each square respectively.

At the time of the sale, the property of *Ricker* was encumbered with mortgages to a large amount, and there can be but little doubt that this proceeding was resorted to for the purpose of extricating a part of it from the power of the mortgage creditors; for it appears that the sale of almost any one of the lots would have paid the judgment before the Justice of the Peace. *Mrs. Lakin* became the purchaser at the sum of $1800, which after paying the two judgments under which the property was sold, left, by the terms of the adjudication, in her hands, for the mortgage creditors, $1,653 32.

J. M. Bach having, in the act of sale, assumed to pay this sum to the mortgage creditors, and, it seems, afterwards apprehending that they might endanger his title to the whole property bought, if the matter was suffered to remain in that condition, took a rule in the District Court upon the mortgage creditors to show cause why their mortgages should not be cancelled upon this property, upon his depositing in court the $1663 32 above referred to.

J. H. Pearson, being one of the mortgage creditors cited to show cause, and holding a judicial mortgage for $32,162 92, filed an answer to the rule, wherein he set forth, among other things, that *Butchert* had no privilege upon the two squares of ground, and that the judgment could not create or recognize a

privilege, and that the privilege, if it existed, only affected the lots in front of which the work was done and did not affect the whole square; that the pretended sale to *Mrs. Lakin* was collusive and contrived by *Ricker* to defeat the defendent; and he concluded, by praying that his mortgage be recognized as existing and unimpaired upon said two squares of ground in the hands of said *John M. Bach*, and praying that the mortgage property be seized and sold to pay the debt.

Thereupon, *John M. Bach*, the plaintiff in the rule, filed what he designates as a supplemental petition, and sued out a writ of attachment against his vendor, on account of the threatened eviction, and cited her, through her agent, in warranty.

This attachment having been set aside, a second attachment was moved. To obtain these attachments, he sets forth his proceedings in the rule and the reconventional demand of *Pearson*, and prays for judgment against *Mrs. Lakin*, and propounds interrogatories to her agent, *John Calhoun*, as garnishee.

Calhoun, the garnishee answered, that he had in his hands $6,120 of *Mrs. Lakin's* money.

To this demand in warranty, *Mrs. Lakin*, by counsel, answers the rule and the pleadings of *John H. Pearson*, by a general denial, and she avers that her warranty to *Bach* only extended to such mortgages as were not mentioned in the certificate of mortgage annexed to the act of sale. She alleges that *Pearson* obtained his judgment against *Ricker* by collusion, and that the same being by confession, is not binding on her. She further alleges, that she is a mortgage creditor of the said *Samuel Ricker*, and that her credit is of a date anterior to that of *Pearson*, and that it has never been cancelled. She then assumes the character of plaintiff in reconvention against *Pearson*, and prays that he be cited to appear and answer her petition; that his petition be dismissed, and should he establish his mortgage against *John M. Bach*, that then her mortgage on the property be recognized against *Pearson*, and she have judgment against him for $750, and six per cent. interest, and that her mortgage be recognized on all the other real estate belonging to *Samuel Ricker, Jr.*

John H. Pearson, after service of *Mrs. Lakin's* reconventional demand on his attorney, comes into court and excepts to the same on the following grounds:

1st. That she is a married woman and not authorized by her husband.

2d. That she sets up no cause of action against him.

3d. That her claim as a mortgage creditor is inconsistent with that of owner.

4th. That she does not set forth the ground of her claim against her father, *S. Ricker, Jr.*

5th. That her demand contains no allegation under which *John H. Pearson* can be called upon to prove his judgment.

Subsequently, *Pearson* filed his answer to the merits. He denied generally all of her allegations. He denied that *Mrs. Lakin* was a creditor of her father, and alleged that her pretended mortgage was placed there to baffle the creditors; that he, *Samuel Ricker, Jr.*, was not indebted to his children, but that the mortgages in their favor are fictitious and void; that in a suit wherein *Mrs. Lakin*, and her husband and her father were parties, and he, said *Pearson*, defendant, said mortgage now set up by *Mrs. Lakin*, were decreed to be fictitious and void; he plead said judgment as a peremptory exception in bar of *Mrs. Lakin's* claim. He further pleaded, that his judgment is real, and

that it was so adjudged in the same judgment, and precludes *Mrs. Larkin* from again questioning the same.

So far the parties seem to have acquiesced in these irregular proceedings, and with the exception of the objections of *Pearson* to *Mrs. Lakin's* demand, they have confined themselves to allegations upon the merits.

At this stage of the controversy, *Mrs. Lakin* filed what she calls a peremptory exception, wherein she alleges that *Pearson's* action can only, as a hypothecary action, be brought directly against *Bach* as third possessor, and that "*Pearson* cannot stand in court in consummation of his alleged claim, without first having given thirty-days notice to the third possessor of the property sought here to be made responsible, before commencing suit for the recovery thereof, which he has failed to do."

The parties thus having brought the proceedings to an issue, *Mrs. Lakin* and *Pearson* entered into an agreement, that either party might, on the trial, offer the part of any judicial record in evidence. Under this rule, the parties went to trial, and after they had, by their industry, made a voluminous record and submitted their case to the Judge, he dismissed the proceedings on account of their irregularity, and condemned *Bach* to pay the costs. From this judgment he has appealed.

Bach demands that the decision of the lower court should be reversed, and that the mortgages against this property be cancelled, or that he have judgment against his vendor for $6,900, and that the attachment be sustained.

J. H. Pearson appeared in this court and filed an answer, praying that the judgment of the lower court might be amended in his favor.

The counsel for *Mrs. Lakin* admits, in his brief, that *John Calhoun, Esq.*, who it appears filed the answer of *Mrs. Lakin* at the time of the filing the affidavit for an attachment, "was and yet remains the most perfectly accredited agent and attorney in fact of *Mrs. Lakin*, with the full authority and consent of her husband." We, therefore, conclude that the proceedings in this case on the part of *Mrs. Lakin*, were fully authorized by her husband. We should, therefore, give them such effect as they are entitled upon this supposition, and we will proceed to consider the objections raised by her counsel as far as we are able to gather them from the brief, though not in the order there treated.

I. It is objected that neither *Bach* nor *Pearson* had the right "further to discuss the rights to real property in the form of their present proceedings, which is simply a rule to erase mortgages in which *Pearson* and *Bach* were attempting to aim at a judgment upon matters that clearly can only be discussed in a *real action* of the hypothecary form." The Judge of the lower court seems also to have been of this opinion, inasmuch as he dismissed the proceedings.

The proceedings in this case are certainly very irregular, and had they been excepted to in time, such exception would have occasioned the dismissal of the rule. But the exceptions of *Mrs. Lakin* were not filed until after the cause had been at issue on its merits. Even then she did not require the Judge to pass upon her exceptions, but proceeded to the trial on the merits. Moreover *Mrs. Lakin* was not the third possessor. Without questioning the right of the court on its own motion, to dismiss proceedings for great irregularity, yet we think, after the parties had gone to trial and he had heard the testimony, he should have passed upon their pretensions, as the substance of their respective

claims and rights were set forth in the pleadings, perhaps as fully as they could have been presented in a formal petition.

II. She denies that *Bach* has any claim in warranty against her, as the mortgage of *J. H. Pearson* was mentioned in the certificate of mortgages, made a part of the act of sale to *Bach*.

We do not understand that the exhibition of a certificate of mortgages or the attaching the same to an act of sale, relieves the vendor from her express warranty against all mortgages and incumbrances. It might be the very reason why the third warranty was required.

III. *Mrs. Lakin* has not urged in this court, as we understand, any objections to the proceeding by attachment. We, therefore, proceed to consider the last objection urged by *Mrs. Lakin*, which is, that *Pearson* did not appeal, and therefore he cannot demand a change of the judgment in his favor. To this, it is satisfactorily replied that *Bach* appealed, and that *Pearson*, as appellee, by the prayer in his answer, has a right to have the judgment corrected as against *Bach*.

As between the parties to this proceeding, *Pearson* has most clearly shown the reality of his mortgage, and, moreover, that the pretended mortgages of *Mrs. Lakin* have been decreed to be fictitious and void.

We furthermore think that the proceedings instituted before the Justice of the Peace, were designed to defeat the mortgage creditors, and that no prudent person, in view of the trifling amount of the judgment, and the great number of lots put up to be sold under them, with the long list of mortgages exhibited, could have formed any other conclusion. We are therefore of the opinion, that whether there was a privilege upon the lots in favor of *Butchert* or not, the proceeding cannot be permitted to prejudice the mortgage creditors.

We understand from the pleadings, that in the event the mortgage of *Pearson* is recognized, that *Bach* abandons the property to his mortgage creditor. C. C. 3363.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and proceeding to pronounce the judgment which ought to have been rendered by the lower court, it is ordered, adjudged and decreed by the court, that the judicial mortgage in favor of *John H. Pearson*, upon the said squares of ground numbered six and eleven, in said Rickerville, in the parish of Jefferson, be recognized for the sum of thirty-two thousand one hundred and fifty-two dollars and ninety-two cents, with five per cent. interest thereon per annum, from the third day of June, A. D., 1847, until paid. And it is further ordered, that said squares of ground be seized and sold to pay said judicial mortgage and interest thereon. And it is further ordered, adjudged and decreed, by the court, that the said *John M. Bach*, on his demand in warranty, do recover and have judgment against the said *Mrs. Celeste Eliza Ricker*, wife of *John S. Lakin*, for the sum of five thousand seven hundred and nine dollars and forty-three cents, with five per cent. interest thereon, from the twenty-sixth day of February, A. D. 1855, until paid.

And the said *John Calhoun*, garnishee, is ordered to pay to said *Bach*, all or so much of said sum of six thousand one hundred and twenty-dollars in his hands, as may be sufficient to pay said sum of $5,709 43 and interest, and so much of the costs in this case as the said *Mrs. C. E. Lakin* may be decreed to pay.

And it is further ordered, that the costs of this appeal be equally borne by the said *John M. Bach* and said *Mrs. C. E. Lakin*, and that the costs of the lower court be paid by the said *Mrs. C. E. Lakin*.

JAMES CRANE *v.* HENRY W. ALLEN.

Witnesses cannot be impeached by proof of particular facts but only by proof of their general reputation for truth and veracity in the neighborhood where they are known, otherwise a witness might be prejudiced without the possibility of defending himself.

Though recognizing the decisions of common law courts, that where a father sends home slaves with his married daughter, it is presumed to be a gift—yet it is settled in Mississippi, that the character of the wife's possession of such property may be shown by her acts and declarations, out of the presence of her husband.

Only adverse possession can be the basis of prescription in Mississippi.

APPEAL from the Tenth District Court, parish of Tensas, *Farrar*, J.

T. P. Farrar and *Reeves & Briscoe* and *Parham & Short*, for plaintiffs. *Stacy & Sparrow* and *J. M. Chilton*, for defendant. *Stockton* for *Douglas*.

MERRICK, C. J. This suit is brought by the plaintiff to recover of the defendant twenty-eight slaves and their natural increase, together with $2,800 per annum, the alleged value of their services.

The principal facts out of which this controversy took its rise occurred in the State of Mississippi, where both plaintiff and defendant resided at the time.

The defendant claims title to the slaves in controversy through the plaintiff, and hence the burden of proof in this case is upon the defendant to establish, by clear evidence, his right to the property in question.

The principal facts in the case are these: In 1845 the defendant married *Saloam Crane*, the daughter of the plaintiff, who resided in Claiborne county, Mississippi. At the time of her marriage she possessed in her own right certain negroes inherited from her deceased brother, *William C. Crane*, an estate in certain other negroes called the Brashear negroes, determinable upon her death without children, and perhaps one other negro girl given her by her father.

James Crane, the plaintiff, having a tract of land or plantation in Sunflower county, Mississippi, placed his daughter and her husband upon the same, with certain negroes belonging to himself, which were either on the place at the time or placed there after *Allen* and his wife took charge of it. *Allen* cultivated the place with these negroes and those belonging to his wife for his own account. In 1847, the second year after *Allen* and wife had taken possession of this plantation, called the Greenbriar or Sunflower Plantation, *Mrs. Allen* being dissatisfied in Sunflower county, an arrangement was made by which she and her husband returned to Claiborne county. The Greenbriar Plantation was left in the condition it then was, negroes and stock, except three of his wife's slaves, *Charles*, *Anarcha* and *Little Sara*, and some horses which *Allen* brought away with him.

He removed to a plantation under the control of *James Crane*, which belonged to his children, inherited from *William C. Crane*. *Mrs. Allen's* interest in this plantation, as heir of her brother, was one-fifth. *Crane* had on the

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plantation, when *Allen* and wife moved to it, in Nov. 1847, the twenty-eight slaves now in controversy. *Allen* and wife cultivated this plantation for their own use, as they had previously done with the Greenbriar Place, until she died, in January, 1851. The defendant refusing to deliver up the slaves, an action of replevin was instituted in Mississippi by the plaintiff against the defendant. The defendant removed the slaves to the parish of Tensas, in this State. The bond under which the slaves had been released on replevin being defective, that action was dismissed, and the present action was commenced against the defendant in this State.

He alleges in substance that he has title in this manner: That said *Crane* had given his daughter six slaves previous to his removal to Sunflower county; that at the time of his removal he gave her verbally a tract of land and three more slaves; that with these slaves, his wife's Brashear negroes and those she had inherited from *William C. Crane*, the Greenbriar plantation was cultivated by him; that he and his wife exchanged the Greenbriar Plantation and slaves with the plaintiff for the William C. Crane or Waterman Crane plantation and slaves; that by the laws of Mississippi he inherited the slaves on the death of his wife as next of kin.

He also relies on the statute of limitations of Mississippi limiting the actions of trover detinue and replevin to three years.

The testimony is almost exclusively made up of depositions.

The jury, on a second trial, (the first jury being unable to agree) found for the defendant, and the plaintiff appealed.

The record is voluminous, and the testimony somewhat conflicting. We shall not undertake to recapitulate the same, but merely state the conclusions to which we have arrived.

We disregard all that plea of defendant by which the testimony of certain of plaintiff's witnesses is attempted to be impeached by the proof of particular facts against them. The mode of impeaching the credibility of witnesses is well defined: it is by inquiries as to their general reputation for truth and veracity in the neighborhood where they are known, and not in inquiries as to particular facts which might often be extremely prejudicial to a truthful witness without any possibility of his defending himself against them. *Stanton* v. *Parker*, 5 Rob., 109. 1 Greenleaf's Evidence, No. 461.

We find no sufficient evidence in the record to show that the plaintiff made a verbal gift of the Greenbriar Plantation and the negroes claimed to the defendant's wife. In arriving at this conclusion we have not been unmindful of the decisions of the common law courts, that where a father sends slaves home with his married daughter it is presumed to be a gift; but while we recognize this principle of law, we find another equally well settled in Mississippi, which is also available in this case, viz: that the character of the wife's possession of such property may be shown by her acts and declaration out of the presence of her husband. *Muirhead* v. *Muirhead*, 1 Cushman, 97.

We think it results from the testimony:

1st. That *Crane*, who had not been in the habit of giving off property to his children, did not intend to do so in this instance, either to transfer the ownership of the land which was transferable by deed, or the slaves, which might be conveyed by him by parol.

2d. That *Mrs. Allen* did not understand that she had any title to the property except the eight negroes she held in her own right.

In regard to the alleged exchange of the *property* in the two plantations and slaves, we do not think it took place for these reasons:

1st. *Crane* had not been divested of title to the Greenbriar Plantation, and it would have been absurd in him to attempt to acquire title to a plantation which he already owned, by giving in exchange therefor one which already belonged to the person with whom the exchange was made and her co-heirs.

2d. *Allen* was a lawyer, and the property considerable, and there is not the slightest written evidence of such transfer, and moreover we are informed by defendant's counsel, and such is the law, that a married woman cannot alienate even her right to slaves except by deed duly acknowledged.

3d. The acts of *Mrs. Allen* were inconsistent with such exchange of property, and were not so understood either by herself or by *Crane*.

4th. Such exchange is also inconsistent with the declarations and acts of the defendant after the death of his wife, in obtaining a release of the heirs as to the other property claimed by her in her lifetime, and in asserting as a moral right that *Crane* ought to allow him possession of the property until the debts were paid.

The next question presented for our consideration is the statute of limitations.

We find that the limitation of the actions of trespass detinue and trover for taking any goods and chattels to three years, and we suppose the action of replevin to have been limited by a previous statute to the same period. As this statute, instead of acting directly upon the right to the property, only applies to the actions named which might be invoked to recover the property, and does not apply to a bill in Chancery, there might perhaps be some question how far the courts of this State ought to regard the statute creating, as it does, a prescription so much shorter than that known to our own laws.

But we will assume for the purpose of this case, although the point is at least doubtful, that property protected by it from actions of law in that State will be protected when brought to Louisiana, and test the case on this supposition.

We gather from the decisions of the courts of Mississippi that the law in regard to the limitation of actions is governed by rules almost identical with our own laws. Among other things, in order to claim the benefit of this statute, the party must possess as owner. In other words, the possession must be adverse. Now we think this was not the character of *Mrs. Allen's* possession up to the time of her death; she was one-fifth owner of the plantation; she had three negroes upon the place the title to which in her was admitted; her husband had five negroes upon the same place. We think it sufficiently appears, from her declarations and her acts, that she did not possess as owner but merely by the permission and as tenant at will of her father. The possession by *Allen* since his acknowledgement to *Bertron* can give rise to no prescription. In this connection it is proper to remark that the testimony in this case will appear less conflicting when we consider that the act of *Crane* in permitting his son-in-law to remove from one of his plantations to another under his control, and stocked with his hands, could hardly be spoken of by the family or neighbors without calling it an exchange of places. Probably *Crane* himself may have used the same expression, which has been misinterpreted by some of the witnesses.

There is no force in the objection made by defendant, that *Crane* ought to have tendered to the plaintiff the negroes in his possession previous to bringing this action. If *Mrs. Allen* was merely his tenant, the property in the slaves

was not divested, and he could vindicate his ownership of the slaves against any one attempting to deprive him of them. We will, however, in the decree which we shall pronounce, guard the defendant's interest in this respect.

We do not think it just to award damages to the plaintiff without first giving the defendant an opportunity to compel the plaintiff to account for the hire of those slaves, belonging to the defendant, in his possession.

In conclusion, we remark, as we have often done, that it is with diffidence that we undertake to make an application of the law of our sister State on the subject of title to slaves. But as the parties, instead of leaving these matters to the courts of Mississippi for decision, which would have been so much more satisfactory, have sought the interposition of our own courts, we are obliged to decide the case in accordance with such reasons as seem to preponderate.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and now proceeding to pronounce such judgment as ought to have been rendered, it is ordered, adjudged and decreed by the court, that the plaintiff do recover and have judgment in his favor, and against the defendant for the following named slaves described in his petition, viz: *Jack*, *Tom*, *Will*, *Bill*, *George*, *Lewis*, *Jenny*, *Elizabeth*, *America*, *Patsey*, *Emma*, *Ed*, *Hannah*, *Henry*, *Sarah*, *Branch*, *Narcissa*, *Ed*, *Martha*, *Anderson*, *Nancy*, *Ruth* and her child *Noah*, *Ann*, *Barbara*, *Watt*, *John* and *Henry*, and their increase, if any, born since the pendency of this suit; and it is further ordered, that no writ of possession issue until the plaintiff deposit with the Clerk of the lower court his written release, under seal, in favor of the defendant, of all interest and claim to the girl *Ann* and her children, bequeathed to said *Saloam Allen* by *Waterman Crane*, also all interest and claim in and to slaves *Joe*, *Isaac*, *Anarcha*, *Charles* and *Little Sarah*, and any increase since they have been in the possession of the plaintiff, with a special warranty against his own acts, as affecting the title to said slaves since November, 1847; and it is further ordered, that this cause be remanded to the lower court for the sole purpose of assessing the value of the hire of said slaves herein decreed the plaintiff, with leave to the defendant to plead by way of reconvention or compensation any claim he may have against the plaintiff for the value of the services of his slaves whilst in the possession of the plaintiff; and it is further ordered, that the defendant pay the cost of the appeal and the costs to this date in the lower court, any future cost which may accrue to abide the event of the further litigation in this case.

SAME CASE.

To entitle a party to the extraordinary remedy of a supersedeas to stay a writ of possession, issued from the District Court on a judgment of this court, he should show affirmatively that the writ of possession issued in contravention of the terms of the decree of this court.

ON application for a supersedeas to stay a writ of possession.

SPOFFORD, J. The defendant in the above cause, determined by this court in May last, asks for a *supersedeas* to stay a writ of possession which issued from the District Court upon the judgment of this court remanded for execu-

tion. He bases his application upon the Art. 629 C. P. and upon the authority of the cases of *Cox's Executors* v. *Thomas*, 11 L., 367, and *Lovelace* v. *Taylor*, 6 Rob., 92.

His affidavit avers that the plaintiff in whose favor the writ of possession issued, still keeps in his possession, in the State of Mississippi, seven of the slaves which this court, by its decree aforesaid, intended he should deliver to the defendant, before any execution should issue, to wit: the slaves *Joe*, *Isaac* and *Ann* and her four children.

The language of our decree upon this branch of the case is as follows: "And it is further ordered, that no writ of possession issue until the plaintiff deposit with the Clerk of the lower court his written release, under seal, in favor of the defendant, of all interest and claim to the girl *Ann* and her children, bequeathed to said *Saloam Allen* by *Waterman Crane*, also all interest and claim in and to the slaves *Joe*, *Isaac*, *Anarcha* and *Little Sarah*, and any increase since they have been in the possession of the plaintiff, with a special warranty against his own acts, as affecting the title to said slaves since November, 1847.'

The affidavit does not deny that the plaintiff has executed the release in conformity to this decree.

We are without power to relieve the defendant. Our judgment, heretofore rendered, is final upon this subject, and cannot be amended or enlarged, even by ourselves. That judgment is silent upon the subject of the delivery of the slaves in question.

To entitle himself to the extraordinary remedy asked for, the defendant should have shown affirmatively that the writ of possession issued in contravention of the terms of our decree. He has not done so.

Petition praying for a *supersedeas* dismissed, at appellant's cost.

GIROD'S LEGATEES *v.* A. D. CROSSMAN et als.

Parties to a judgment homologating a tableau of distribution cannot sustain an action against one who was also a party, to recover the amount decreed to him as legatee, on account of his incapacity to receive the legacy.

Where a testator left $100,000 to the Mayor of the city, to be used in the construction of an orphan asylum in the city of New Orleans, and after his death his estate was so reduced as only to pay one-fourth of this amount—an amount insufficient to fulfil his intention—an investment of the sum at interest by the Mayor, with a view to raise the requisite amount, did not forfeit the legacy.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Soulé and *Janin*, for plaintiffs and appellants.

Biron and *Train*, for intervenor, cited:

Prevost v. *Martel*, 10 R. 511; *Compton* v. *Prescott*, 12 R. 56; *Succession of Langley*, 5 A. 199; Toullier, vol. 5, p. 637, Nos. 677, 678, 679, &c.: Paillet, notes under Article 1043, C. N.; *Accroissement*, C. N. 1044, 1045; C. C. 1696, 1697; C. C. 1702, 1703.

Donations *inter vivos* are liable to be revoked or dissolved on account of the following cause: the non-performance of the conditions imposed on the donee. C. C. 1546.

Livingston, for defendant:

Judgment of homologation obtained has the authority of the thing adjudged

GIROD v. CROSSMAN.

against all creditors who were placed on the bilan. 7 N. S. 183; 11 L. 571; 12 L. 121; 14 L. 241; 3 A. 664, 532; 4 A. 450.

The legacy is valid.

The validity of the legacy was attacked in argument on one ground, and that was want of certainty. Charities are always uncertain—that is, the recipients of the donor's bounty are uncertain. The charity is for orphans. Who can tell who will become orphans? Who can foretell, when an epidemic decimates our city, who will be called upon to mourn the loss of parents? The very purpose of a charity is to succour the unfortunate, to aid and comfort the distressed, and to cheer the afflicted. It is intended, in the present case, to reach those who, from no fault of theirs, are deprived of their natural protectors. There is, of course, an uncertainty as to persons, and for this very reason it is a charity, and should be protected. The authorities are numerous—2 Vesey, 273; 7 Vesey, 76; 17 Vesey, 371; 1 Vernon, 248; 5 Rawle, 151; 7 Cranch, 45; 6 Peters, 436; 2 Peters, 256; 2 Howard, 127; *Vidal et al.* v. *Girard's executors*, Story's Equity, sections 1169, 1170, 1181. There must be a certainty as to the object. It may now be considered an established principle of American law that the court of chancery will sustain and protect such a gift, bequest or dedication of property to public or charitable uses, provided the same is consistent with local law and public policy, when the object of the gift or dedication is specific and capable of being carried into effect according to the intention of the donor. 6 Paige, ch. 649; 2 Kent, 286; 4 Kent, 508; 2 Peters, 566; 3 Peters, 99; 7 Vermont, 241.

The object is certain and specific. It is to build an asylum, to be named after the donor, for the benefit of French orphans. See 17 L. 52, *Milne's Heirs* v. *Milne's Executors; The Succession of Mary*, 2 Rob. 440; *State* v. *McDonogh*, 8 An. 171. In all these cases the object was certain, but the persons to be benefited were uncertain.

The legatee is certain.

This objection has been answered. If the city is considered the legatee, he had official capacity. C. C. 1536. Suppose he had no official capacity, that would be no reason why the charity should fail. Courts of Chancery will never let a charity fail for want of a trustee. Story's Equity, 1165, 1166, 1167, 1168. Even where a charity is given that there can be no objects, the courts will order a new scheme to execute it, 1170. It was admitted at bar in the case of *Cincinnati* v. *White*, 6 Peters, 436, that dedication of land for charitable and religious purposes, and for public highways, were valid without any grantee to whom the fee could be conveyed. 2 Dan. 177. Our courts hold the same doctrine, which comes to us from the civil law. See Domat, sections 3588, 3590, 3590¼.

If the fund is too small, it is not the fault of the legatee, and neither will the legacy lapse for any such cause. If the identical, the specific object cannot be accomplished, according to the *cy pres* doctrine of Chancery and recognized here, the fund would be applied in such a manner as to carry out as nearly as possible the intention of the donor. 2 Story's Equity, 1169, 1170 *et seq.*; *Lewis* v. *Perpetuity*, 426, 454; 4 Kent, 508, notes; *Coster* v. *Lorrillard*, 14 Wendell, 265.

MERRICK, C. J. *Nicholas Girod*, who died in the latter part of the year 1840, left an olographic will, wherein he recognized eighteen "bons," or acknowledgement of debts to become due by his estate, to as many legatees, to whom he bequeathed $710,000, which was then supposed to be but a part of his large estate. 18 L. R. 394, *Girod's Heirs* v. *Girod's Executors*. This controversy arises out of the first of the dispositions of the will, which recognizes the "bon," executed by *Nicholas Girod*, in favor of the Mayor of the city of New Orleans. It is mentioned in the will in these words, viz:

"Un bon à Mr. le Maire de la ville de la Nouvelle Orléans, pour la somme de $100,000, pour être appropriée à la construction d'un édifice portant le nom de *N. Girod*, dans la paroisse d'Orléans, pour recevoir et venir au secours des orphelins Français, habitant de la Louisiane."

The bon reads as follows: "Bon à Mr. le Maire de la Nouvelle Orléans en

règlement de ma succession pour la somme de cent mille piastres, pour être appropriée à la construction d'un édifice portant le nom de *N. Girod*, dans la paroisse d'Orléans, pour recevoir et venir au secours des orphelins Français, habitant l'Etat de la Louisiane.

Nouvelle Orléans, 23 Décembre 1837.

(Signée,) N. GIROD."

The unfortunate termination of a suit in chancery, instituted after the death of *Nicholas Girod*, diminished his estate to that extent, that on a final settlement, it only paid twenty-eight per centum upon the bons or particular legacies. See *Michaud et al.* v. *Girod et al.*, 4 Howard, 503.

The dative testamentary executor, therefore, not having sufficient funds to pay the particular legacies, distributed the assets under a tableau of distribution, to which all the legatees were made parties, and which was duly homologated.

Under these tableaus there were paid to the Mayor of the city of New Orleans, eighteen thousand dollars at one time, and ten thousand dollars on another occasion, making $28,000.

The Mayor thinking this sum insufficient to commence a building, which would carry out the intention of the testator, concluded to invest the fund and accumulate the same by interest, until it should be sufficient. To this end he invested the $28,000 in city bonds, and from 1846 to March 1854, the capital and interest had accumulated to the sum of $46,350 48. Nevertheless, the investment was still continued in city bonds.

This suit is brought by fifteen of the particular legatees, against the former and present Mayors, to compel them to pay over, under the direction of the court, to the other legatees, this fund, to be distributed among them. The present and former Mayors answer the interrogatories on facts and articles propounded to them, and the city of New Orleans appears and answers the petition and defends the suit.

Jean François Girod intervened in the suit, as an heir of *Nicholas Girod*, alleging that the will had been faithfully executed, and that the legacy was valid, and joined the defendant in the defence of the action, but prayed, nevertheless, if the legacy should be declared null and void for want of acceptance or capacity in the donee, that it should be paid to intervenor and his co-heirs.

Afterwards, the dative testamentary executors intervened, and alleged the legacy to be a *fidei commissum* and substitution, and pray that the fund may be paid to them for distribution directly, and not under the direction of the Probate Court.

The District Judge dismissed the plaintiffs' demand.

The plaintiffs and intervenor, the appellants, urge as grounds of reversal of the judgment, "that the condition restricting the legacy having never been complied with, the executors discovered that the benificent intention of the testator was destined to be frustrated, both by the incapacity of the devisee to receive and apply it as directed by the will and by other defects, which render it in many respects utterly inexecutable."

That "the payment to *Crossman*, having therefore been made in error, the executors and legatees, and one of the heirs of *N. Girod*, claim the sums paid and the interest accrued to the same, to be refunded to the estate and applied to its liquidation."

They contend that the legacy is null, because:

"1st. Of the want of power in the Mayor of New Orleans to receive it."

"2d. Of the impossibility of its being carried in furtherance of the views of the testator."

"3d. Of the refusal of the devisee to comply with the condition on which it is made to depend."

The first and second of these grounds may be considered together. It is not important to decide whether or not a bequest to the Mayor is a bequest to the corporation of New Orleans; nor whether the Mayor, whose office is perpetual, though constantly changing its incumbent, has capacity to accept donations on behalf of the city or the office which he holds; nor whether there is uncertainty as to the class of persons intended to be benefited by the bequest. We consider that as between the parties to this suit, these questions are no longer open to contest. The plaintiffs and legatees and the executors were parties to the decree of homologation, which directed the payments to be made to the Mayor; they are concluded by the decree which admits that the Mayor was the proper person to receive the fund, and whether he received it for the city, or merely as Mayor, that he has capacity to carry into effect the intention of the testator. The decree has this effect, because it is conclusive upon the question of the Mayor's right to receive the legacy; the thing has been adjudged in his favor. In regard to the intervention of *Jean François Girod*, it does not appear that he was a party to the decree of homologation of the tableau, but whether he were or not, his allegations in his intervention estop him also from contesting the legacy which he has alleged to be valid and to have been legally accepted at the time. Indeed, it is difficult to perceive what interest the heirs can have in contesting a bequest which, if invalid, could not be retained by them, but would necessarily be distributed among the particular legatees, who have received so small a portion of the amount bequeathed to them.

On the third ground, it may be admitted so far as this case is concerned, that the *modus* or charge upon the legacy is in the nature of a condition, and subject to the rules which govern other conditional legacies. Moreau & Carleton Partidas, 2 vol. 739, Law 6; 3 Savigny, 230, book 2, chap. 3, sec. 128. We concur also with plaintiff's counsel, that in order to ascertain how the condition conceeding it to be one, should be performed, we should look at the intention of the testator.

Cum in conditionibus testamentorum voluntatem, potius quam verba considerari oporteat. Law 101, tit. 1, Dig. 35. See also Law 19, same title.

If, then, we look at the intention of the testator, we find no difficulty in discovering that he intended to found an institution worthy of his estate, and which should bear his name. It was to be a monument which, while it perpetuated his name, should furnish a home and protection to the French orphans from every part of Louisiana. Twenty-eight thousand dollars were not sufficient for such a purpose. The testator had determined upon one hundred thousand dollars, and it was the first object which presented itself to his mind, when he sat down to draw his will. The legatee, fully impressed with the intention of the testator, that $100,000 should be applied to this purpose, determined to invest and accumulate the fund until it amounted to $100,000. He has prosecuted his object with such success, that he has increased the fund more than eighteen thousand dollars in eight years.

But it is urged, that the city has appropriated the fund to her own use; to

the payment of her debts, and, therefore, the executors or heirs have a right to recall it, on account of the non-performance of the condition upon which it was bequeathed. C. C. 1546, 1703. Had the executors or the heirs paid over to the legatee the one hundred thousand dollars bequeathed by the testator and placed it in the power of the legatee at once to fulfil the condition, all would have been done on their part, and they would have occupied a much more favorable position in questioning the right of the legatee to retain this money. Then they might, perhaps, have complained that the condition had not been complied with. The argument, however, that the funds have been used by the city, is somewhat incompatible with the petition, which demands the funds *as invested;* the bonds and the interest. We see no reason why the Mayor could not invest in city bonds as well as in any thing else. They were not, properly speaking, a debt of the city, as they had a long period to run before maturity. The investment must be considered safe, because the entire wealth of the city is pledged for its future redemption.

It is therefore unnecessary to consider whether the legatees can sue or not. The case is with the defendants on the merits.

Judgment affirmed.

HEIRS OF LEJEUNE *v.* R. R. BARROW.—WRIGHT et al. cited in Warranty.

However informal the act of a family meeting may be, parties to it, who are *sui juris* at the time, as well as their assignees, are bound by their declaration therein, and estopped to deny the title of a person in whom the act declared it to exist.

Continuous and unequivocal possession for ten years, under title, is necessary to prescription.

To entitle plaintiff to payment for fruits and revenues accruing before the institution of a suit, it must be shown that defendant possessed in bad faith.

As to value of improvements, the judgment of the District Judge will not be disturbed unless there be manifest error.

Where the vendee calls his vendor in warranty, and there is a decree against the plaintiff in the action for improvements put upon the land, the distribution of the amount awarded must be made between the vendee and the warrantor, according to the estimated value of the improvements made by each.

APPEAL from the District Court of Terrebonne, *Cole*, J.

Bush, *Gentile* and *Malliot & Mills*, for plaintiffs. *J. C. & A. Beatty* and *Mercer*, for defendant.

SPOFFORD, J. The plaintiff brought a petitory action against the defendant, *Barrow*, and recovered judgment for a tract of 320 22-100 superficial arpents, situated upon the Bayou Terrebonne, in the parish of Terrebonne.

Barrow cited his vendor, *Wright*, and divers other parties were successively called in warranty.

The defendant and the warrantors, who have appealed, complain of the judgment on the main question of title, and allege certain errors therein as to the question of improvements.

The plaintiffs also ask an amendment in their favor upon the subject of improvements, fruits and revenues.

The very minute and searching examination which the facts in the history of an ancient and obscure title have received from the District Judge renders it

unnecessary for us to do more than express the conclusions to which we have come upon this branch of the case.

We are of opinion then that the particular tract for which the plaintiffs have obtained judgment was included in that larger tract which, by the act passed before *Guyol*, Parish Judge, on the 16th June, 1823, (styled proceedings of a family meeting) was declared to be vested in full property and possession in *Alexis Lejeune* and his heirs or assigns forever.

We are of opinion that however informal this act may have been, as the act of a family meeting, the parties thereto, who were *sui juris* at the time, are bound by their declarations therein, and especially that *Henry S. Thibodaux*, and all those who claim under him (including the defendant) are estopped to deny that, on the execution of that act, *Alexis Lejeune* was the owner of the land in dispute.

We are of opinion that the title of *Alexis Lejeune* to the land in question, as acknowledged and recognized by the members of the so-called family meeting, was not divested or impaired by the authentic act of sale from *Marie Rose Lejeune* (*widow Minon*) and her son *Pierre Minon* to *Henry S. Thibodaux*, and their confirmation to *Alexis Lejeune* in the same act, passed before *Leufroy Barres*, Parish Judge, on the 19th day of December, 1826.

We are of opinion that the defendant has not established a title by prescription, no continuous and unequivocal possession for the term of ten years under title having been shown.

The judgment as to title is therefore correct.

In their answer to the appeal, the plaintiffs have prayed that the defendant be condemned to pay for fruits and revenues from the year 1845, when he took possession, and not merely from the date when the suit was instituted, as allowed by the District Judges.

The amendment cannot be granted, because it is not established that *Barrow* was a possessor in bad faith.

As to the value of the improvements made by the defendants respectively, and the rate of allowance for rents, the District Judge had better means of arriving at a correct estimate than we have, and although this part of the judgment has been somewhat complained of, no such manifest error has been pointed out as to require our interference.

One question alone remains, that is as to the rule of distribution between the defendant, *Barrow*, and his warrantor, *Wright*, of the compensation allowed for improvements.

The Judge apportioned the money which the plaintiffs were condemned to pay for the useful improvements put on their land by the adverse possessors ratably between *Barrow* and *Wright*, according to the estimated value of the improvements made by each.

This seems to be equitable, and we have been referred to no authority which sanctions a different doctrine.

Wright has to refund to his vendee, *Barrow*, the price which the latter paid him for the land as improved by the former. The improvements then existing enhanced this price in proportion to their value. If, on the eviction of his vendee, *Wright* has to restore the whole price, and to receive nothing in return for his improvements, whilst *Barrow* recovers of the plaintiff the value not only of his own improvements, but of those made by his vendor, it is obvious that *Barrow* would be twice paid for the same thing.

It is, therefore, ordered and decreed, that the judgment appealed from be affirmed, the costs of the appeal to be paid in equal proportions by the several appellants.

MARGARET BUSH, f. w. c., *v.* MARGARET DECUIR AND HER HUSBAND.

Proof that in the ordinary transactions of life one has acted as the agent of another does not show a power nor furnish presumptive evidence of a power to accept donations.

That defendant's ancestor once lived in a state of concubinage with the plaintiff will not defeat an action brought by the latter against the former to carry out an act of donation, *inter vivos*, made by defendant's ancestor to plaintiff, "of movables not exceeding one-tenth part of the whole value of his estate." C. C., 1468.

In an action against the wife, service of citation on husband or wife is sufficient to interrupt prescription. C P., 192. The fact that the husband was not personally cited, and the wife not authorised to defend the suit until after the term of prescription pleaded had elapsed, did not destroy the effect of a legal service of citation upon the wife.

C. C., 3484, 3516.

APPEAL from the District Court of Pointe Coupée, *Robertson*, J.

W. H. Cooley, for plaintiff and appellant. *Provosty & Farrar*, for defendant.

SPOFFORD, J. It does not appear that any evidence in the power of the defendant was rejected in consequence of the disallowance of the amended answer. As the defendant herself insists that the nature of the defence could not have been altered by the amendment, and that the issue would be substantially the same, only more explicitly stated, we cannot see any good ground for remanding the cause in the fact that the proposed amendment was refused.

The refusal of the District Judge to permit the plaintiff's counsel to be examined as to his having been employed by *Samuel Bush* works no injury to the defendant. If the facts were as alleged in the bill of exceptions, they would not affect the merits of the case.

There was no error in the refusal of the Judge to hear testimony to the effect that *Samuel Bush*, in the ordinary transactions of life acted as the plaintiff's agent. That could not have given him power, or furnished even presumptive evidence of a power, to accept donations or to make contracts of the nature sought to be established by the defendant.

We think the declarations of *Jean Baptiste Decuir* and his conversations with *Bush* out of the presence of plaintiff were improperly received as evidence for his universal heir, who in this suit occupies the position of *Decuir* himself.

The interrogatory put by the plaintiff's counsel in cross-examination merely opened the question of concubinage, but did not authorize the introduction of incompetent evidence upon that question.

Rejecting the evidence that was improperly received, there is nothing in the defence upon the merits but the simple fact that the defendant's ancestor once lived in concubinage with the plaintiff.

By a positive provision of the Code that fact did not incapacitate him from making a donation *inter vivos* to her of movables not exceeding one-tenth part of the whole value of his estate. C. C., 1468.

The act of donation was most formal; it was absolute and irrevocable; it was of a sum of money not exceeding the limit prescribed in Article 1468; it was accepted by the plaintiff in a formal act, and the acceptance notified to the donor before his death.

The suit is founded upon the act of donation, not upon the note; the donation was of a specific sum of money, not of the note; that was given, as the act states, merely to facilitate the donee in disposing of the amount donated, should she wish to do so; she has not done so, but now sues for it, and we think the heir is bound by the act of her ancestor.

Prescription had not accrued when citation was served upon the defendant, a married woman; service of citation, so as to interrupt prescription, could have been lawfully made upon either husband or wife. C. P., 192. The fact that the husband was not personally cited, and the wife not authorized to defend the suit until after the term of prescription pleaded had elapsed, did not destroy the effect of a legal service of citation upon the wife. C. C., 3484, 3516.

It is, therefore, ordered that the judgment of the District Court be reversed; it is further ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of two thousand dollars, with eight per cent. interest thereon from the 31st March, 1849, until paid, and costs in both courts.

HARMON DOANE *v.* NEW ORLEANS AND OHIO TELEGRAPH COMPANY.

Where property is seized under attachment, and the property is bonded, the surety, in proceedings against him, will not, after judgment unappealed from by defendant, be allowed to show that the attorneys who filed an answer for the defendant were not authorized to represent the defendant.

A surety is bound to ascertain his principal, and where, by mistake, he signs a bond for the lessee of the owner, instead of for the owner himself, to release property from attachment, he will be bound; for, if he had not signed the bond, the property would not have been released and the attachment dissolved.

Where, in such a case, judgment has been rendered against the owner, and execution has issued against him, and has been levied on his property, and his lessee enjoins the sale, the surety on the attachment bond, being also surety on the injunction bond, cannot set up his mistake as a defence to proceedings against him. He should not be allowed to aid in defeating the levy, and then set up his own act as matter of defence.

A rule against a surety on an attachment, if taken after the actual return of an execution against the principal, is regular, even though taken before the return day named in the execution.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

L. L. Levy, for plaintiff. *Semmes & Edwards* and *T. Hunton*, for defendant and appellant.

MERRICK, C. J. The appeal is taken in this case by the surety on an attachment bond, he having been condemned to pay the judgment rendered against the defendant, the Telegraph Company.

Four grounds are relied on by the appellant for the reversal of the judgment.

I. The first ground is that "there was no valid judgment against the defendant, because *Semmes & Edwards*, the attorneys, were employed by *Mr. Brother*, the agent of the *lessees* of the telegraph, and not the agent of the defendant." *Messrs. Semmes & Edwards* having filed the answer in the original attachment suit in which judgment was rendered against the Telegraph Company, offered

on the trial of the rule against the surety to prove by *Thomas J. Semmes* that the firm of *Semmes & Edwards*, who filed the answer to plaintiff's petition, were employed by *Mr. Baker*, the manager of the lessees of the Telegraph Company in this city; that they had no connection, direct or indirect, with the defendant, or its President or Directors, and that the distinction between the lessees of the company and the company itself did not occur to counsel. This testimony was rejected in the lower court, and the defendant in the rule reserved his bill of exceptions. Had the testimony been received, we do not think it would have affected the question before the court. There was another party interested, whose rights the defendant in the rule seems to have overlooked, and that was the plaintiff in the suit. He, so far as it appears, commenced his suit regularly by attachment; the defendant was regularly in court to the extent, at least, of the property attached. Now it would be trifling with his rights to permit persons who have undertaken to represent the defendant to say that they did so by mistake. Such persons might render themselves responsible in damages to the defendant, but it would be an extraordinary case which would induce the court to hold, in a collateral proceeding, a judgment rendered even in an attachment suit, void, where property of the defendant has been attached. So long as the defendants, whose property had been attached, have not appealed or in any manner disapproved of the acts of the counsel who represented them, it is to be presumed that they were satisfied with the same. The testimony offered, unsupported by the oaths of the officers of the company, and the agent, *Mr. Brother*, would have been without influence on the result of this case, even if the testimony were deemed admissible. 3 Ann., 558.

II. The second ground is that "the surety expected, when he signed the bond, that his principal would be the New Orleans and Ohio Telegraph Company, instead of that, it turns out to be the bond of the lessees."

The principal named in the bond is the "New Orleans and Ohio Telegraph Line." It is signed, however, by "*S. D. Baker*, manager of the New Orleans office for the lessees of the New Orleans and Ohio Telegraph Line." The question before us is one between the surety and the plaintiff. It is clear that if the surety had not signed the bond the attachment would not have been dissolved, and the plaintiff deprived of his privilege upon the property attached. If there is any loss it ought to fall upon the surety and not upon the plaintiff, for it is by the intervention of the surety in the bond, such as it is, that the plaintiff has been deprived of his security upon the property attached. Moreover, the defendant in the rule was bound to ascertain who was his principal in the bond, and whether the *lessees* of the Telegraph Company, or the Company itself, is the principal, is a question which concerns himself more than it does the plaintiff.

III. The third ground urged is, that "the execution (issued against the principal) shows that property was found, and that plaintiff, by countermanding his own execution, released it." The return on the *fi. fa.* shows that the Sheriff was enjoined from seizing and taking into his possession the furniture, fixtures and movable effects of the Telegraph office at the corner of St. Charles and Gravier streets, in this city, and from interfering with the possession and use thereof by the lessees, and the Sheriff returned the writ by order of plaintiff's attorney, "no other property having been found after due demand made of the parties."

It is true by the Act of 1839, amending Article two hundred and fifty-nine,

it is provided that the plaintiff may proceed on the attachment bond against the surety "on the return of the Sheriff that no property has been found, and on exhibiting to the court said obligation duly transferred to him." Acts 1839, p. 162. But in this case we find, on an examination of the injunction bond that *Logan McKnight* is surety on that also. He ought not to be permitted to aid in defeating the levy of the execution, and then set up the want of such levy as the reason why he should not pay the attachment bond.

IV. The fourth objection is that the rule on the surety was taken before the return day mentioned in the writ. It was sufficient that the rule was taken after the return of the writ, although the writ was returned before the return day. *Guay* v. *Andrews*, 8 Ann., 141; *Holmes* v. *Steamboat Belle Air*, 5 Ann., 523.

Judgment affirmed.

SAMUEL DAVIS *v.* JOHN FLETCHER.

The claim of C. to a tract of land was confirmed. Plaintiff employed at his own expense, and without the knowledge of the heirs of C., a surveyor to locate the claim confirmed to C. on other land, and entered the C tract as subject to private entry, and obtained his patent therefor. The defendant, who claimed under C.'s title, was quieted in his possession by final judgment of the Supreme Court.

APPEAL from the District Court of the parish of Concordia, *Cooley*, J.

Shaw, for plaintiff and appellant. *Farrar* and *Elam*, for defendant.

MERRICK, C. J. The tract of land in controversy in this case is the same just decreed to belong to the defendant in the case of *Otho Farmer's heirs* against him.

The plaintiff claims under a patent issued on a certificate of entry and purchase. The defendant claims under a confirmation by Act of Congress in the name of *Ferdinand Leigh Claiborne*, No. 70. class B. Statutes at Large, vol. 3, p. 239, sec. 1.

The view which we take of this case will render it unnecessary to decide whether the patent or the Act of Congress confirming class B is the superior title.

The proof satisfies us that the plaintiff was aware of the claim and probable possession of *Claiborne* of the land in controversy. With this knowledge he employed a surveyor at his own expense, unknown to the heirs of *Claiborne*, to locate the *Claiborne* confirmation on the west side of Lake Concordia. He then entered the *Claiborne* tract as subject to private entry, and obtained his patent therefor. In the meantime it was discovered that the survey of the *Claiborne* tract which he had caused to be made did not correspond with the description of the tract. The survey was rejected, and a new one ordered. The new survey has been made, and embraces the original settlement of *Otho Farmer*, the land possessed by *Claiborne*.

We think a court of chancery, under these circumstances, would compel the plaintiff to convey the land to the defendant, even if he had no legal title. *Stoddard* v. *Chambers*, 2 Howard, 318; *Bodely* v. *Taylor*, 5 Cranch, 191; *Kettridge* v. *Brand*, 4 Robinson, 83.

Under our system of jurisprudence, we can grant relief by a final judgment in favor of the defendant, quieting him in his possession and ownership of the land.

Judgment affirmed.

C. W. MUNCASTER *v.* M. W. BLAND.

When the co-plaintiff or co-defendant dies, pending a case in the High Court of Errors and Appeals of Mississippi, the practice is to suggest the death on record, and to let the cause proceed.

APPEAL from the District Court of Tensas, *Farrar*, J.

Stacy & Sparrow, for plaintiff. *Farrar* and *Short & Parham*, for defendant and appellant.

BUCHANAN, J., This is a suit brought upon a judgment rendered by the Circuit Court of Claiborne county, Mississippi.

The defence is, that the judgment of the Claiborne Circuit Court was reversed, on appeal, by the High Court of Errors and Appeals of the State of Mississippi.

The judgment of the Circuit Court, rendered October, 1847, was, "that plaintiff in execution (*Charles W. Muncaster*) recover of *Maxwell W. Bland*, and *Emeline Bland*, his wife, and *Thomas Evans* and *George O. Wilson*, their securities on their claimants bond, the negro slaves *Jim*," &c.

From this judgment, a writ of error was sued out of the High Court of Errors and Appeals, (being a court having appellate jurisdiction in the premises,) by all the four parties cast at the December term, 1847.

Pending this writ of error, and after transcript of the record filed in the appellate court, at the January term, 1850, the death of *Emeline Bland* was suggested, and it was ordered by the court, that the writ of error abate, as to the said *Emeline Bland*. Afterwards, and at the same term of the court, the cause was argued and submitted to the High Court of Errors and Appeals; which, at the April term, 1852, rendered the following judgment: "that the judgment of the Circuit Court of Claiborne county, rendered in favor of said defendant in error, on the 9th day of October, in the year 1847, be and the same is hereby reversed, and the cause remanded to that court for a new trial; and further, that the plaintiffs in error do have and recover of said defendant in error, the costs of this cause in this court expended, to be taxed."

The ground on which plaintiff seeks to maintain this action is, that the writ of error having abated as to *Mrs. Emeline Bland*, by order of the High Court of Errors, the subsequent judgment of that court was a nullity as to the interest of *Mrs. Bland* in the subject-matter, for want of jurisdiction. And of this opinion are six members of the Mississippi bar, who have been examined as witnesses in relation to the law and practice of Mississippi. But on the other side, thirteen members of the same bar, among whom are three actual or late Judges of the High Court of Errors and Appeals of that State, testify to their opinion, that the judgment of the Circuit Court has been annulled, by that of the High Court, and can no longer have any effect against *Mrs. Bland's*

representives. The views taken by thy learned gentlemen who have been examined, may be summed up in the following brief extracts from their depositions:

William Sellers, examined for plaintiff, says: "After abatement as to her, (*Mrs. Bland*,) the case stood upon the writ of error of *Bland* alone, precisely as though he had sued it out alone, *ab initio*."

And *William T. Martin*, on the same side: "*Mrs. Bland* having died pending the writ of error, and the High Court having ordered that the writ of error should abate as to her, and her representatives not being made parties, the High Court had not jurisdiction to pronounce judgment as to those no longer before the court."

On the other side, *George L. Potter*, examined for the defendant, says:

"Of a judgment of reversal, thus broad and general in its terms, the effect was, in my opinion, to annul and vacate the entire judgment of the Circuit Court, as to both *Bland* and wife, unless it can be shown that said judgment of reversal was void in whole or in part; and I understand the rule of law to be, that a judgment, however erroneous, if rendered by a court of competent jurisdiction, must stand as conclusive between the parties, until reversed or vacated by the proper tribunal, upon a direct proceeding for that purpose. Its validity cannot be impeached in any collateral proceeding."

Thus far the witnesses, *pro* and *contra*.

In *Borden* v. *Fitch*, 15th Johnson, 141, which was a suit in New York, in which the validity of a Vermont judgment of divorce pronounced against a defendant residing in Connecticut, was collaterally drawn in question, the Supreme Court of New York said: "To give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person, and of the subject-matter; and the want of jurisdiction is a matter that may be always set up against a judgment, when sought to be enforced, or when any benefit is claimed under it." And the court thereupon proceeded to review the cases in the different States, from which it clearly results that the want of jurisdiction spoken of, which would authorize the court of one State to treat the judgment of the court of another State of the Union as an absolute nullity, must be an original and radical want of jurisdiction. For, where jurisdiction has once attached, as is remarked by the Supreme Court of the United States, in the case of *Elliott* v. *Piersol*, 1st Peters, 340, "the court has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court." And the same doctrine is thus enunciated by the same high tribunal, in the case of *Voorhies* v. *The Bank of the United States*, 10th Peters, 474. "The errors of the court do not impair the validity of its proceedings; binding, till reversed, any objection to their full effect, must go to the authority under which they have been conducted." "The line which separates error in judgment from the usurpation of power, is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence," &c. Ibid, p. 475.

The original jurisdiction of the High Court of Errors over the parties and the subject-matter, is not disputed; but it is contended, that the jurisdiction was lost, by the abatement of the writ, as to one of the plaintiff's in error; and that the cause of action of that plaintiff in error did not survive to the

others, under the Statute of Mississippi, and that of William 3d, from which it is taken. In all the remarks of the learned gentlemen examined for plaintiffs, upon this question of survivorship, the fact seems to have escaped attention, that there were two other plaintiffs in error besides *Bland* and wife namely, *Evans* and *Wilson*, the securities upon the forthcoming claimant's bond, given by *Mrs. Bland* and her husband; and who, by a proceeding analogous to our injunction law of 1831, were included in the verdict and judgment against *Mrs. Bland* in the court below. There would seem strong color of reason for the opinion, that the cause of action of *Mrs. Bland* in error, which was an erroneous forfeiture of said bond to her prejudice, survived to her securities in the bond, co-plaintiffs with her in error, even conceding that it did not survive to her husband, by reason of the Mississippi Statutes of 1839 and 1846. But after all, this seems to be a question of practice, which cannot be here examined collaterally, however palpably wrong the decision of the High Court of Errors may have been. Did we consider ourselves under an obligation to examine it, or even vested with authority to do so, we should be very much inclined to consider the late distinguished Chief Justice of Mississippi, Sharkey, as the very best authority extant upon the practice in the High Court of Errors of that State. In his deposition on file in this case, Judge Sharkey says: "I believe it has been the invariable practice of the High Court of Errors and Appeals, in case of the death of a co-plaintiff or co-defendant in error, to have the death suggested on the record, and to let the cause proceed."

It is therefore adjudged and decreed, that the judgment of the District Court be reversed; and that there be judgment for defendant, with costs in both courts.

HENRY MARKS *v.* HARMAN STEIN.

A contract, however inartificially or obscurely drawn, by which two persons agree to furnish merchandise "to the concern" and stipulate that one should act as salesman and the other pass as the proprietor, and that both should share equally in the expense and profits, constitutes a partnership between the parties.

And one party cannot sue the other upon an account for any specific sum, until the affairs of the partnership have been liquidated.

APPEAL from the District Court of the parish of Carroll, *Snyder*, J.

Selby, for plaintiff and appellant. *Caldwell & Dubose*, for defendant.

SPOFFORD, J. We concur with the District Judge in regarding the contract between the plaintiff and defendant, as one of partnership.

The instrument in which they sought to embody their agreement is inartificially and obscurely drawn.

But it appears that both were to contribute merchandise to "a certain concerns," as they styled it; that the defendant was to be the salesman; that the plaintiff was to pass as the proprietor; and that both were to divide the expenses and partake equally of the profits.

This being the substance of the agreement, the defendant's exception to the suit was well taken.

The plaintiff has not sought a liquidation of the partnership affairs, but has brought an action upon an account for goods furnished, as the bills themselves recite, "to the upper store."

Even as to these goods, we find it difficult to reconcile the allegation of the petition.

The plaintiff claims to be the owner of them, and calls the defendant his agent; still he does not demand the goods themselves, but their value, as charged in his bills against the upper store, and he asserts a privilege on the goods, which he procured to be sequestered.

It is needless to consider the motion to dissolve the sequestration, as that must fall with the principal demand.

The plaintiff complains that he was condemned to pay costs, and that the defendant summoned over six witnesses, so that the costs allowed are more than he is bound to pay.

The judgment for costs is only a judgment for legal costs, which are to be taxed by the inferior courts. There is no showing in the record, that illegal costs have been taxed.

The judgment is affirmed, with costs.

WM. E. LEVERICH, Curator, *v.* AMOS ADAMS et als.

Plaintiff sued for the nullity of a judgment, and for an injunction to restrain the execution of a *fi. fa.* issued under it. The defendant in the injunction and the owner of the judgment directed the Sheriff to release the seizure, and afterwards made a motion in open court for the release of the seizure, which motion was allowed, but the District Court went further, and ordered the suit to be dismissed. *Held:* that the order dismissing the suit was improperly made, the plaintiff having a clear right to a trial of the issue of nullity of the judgment.

APPEAL from the District Court of East Baton Rouge, *Burke*, J. *Morgan*, for plaintiff. *R. & H. Marr*, for *McCalop's Executor*. *J. M. & J. E. Elam*, for *Adams*.

BUCHANAN, J. A plantation and slaves belonging to the succession of *Edward J. Walsh*, administered by plaintiff, having been seized and advertised for sale in execution of a judgment obtained by *James S. Bailey* against *Amos Adams*, this suit was instituted for the nullity of the said judgment, as also of another judgment against *Adams* at the suit of his wife, on the ground of the said judgment being fraudulent and collusive. And the petition prays in the alternative for judgment in warranty against *Walsh's* vendor, and the vendors of his vendor, up to *Amos Adams*, who formerly owned the property in question. The plaintiff also prayed for the conservatory writ of injunction, which was issued upon a proper affidavit and bond given. All the parties, plaintiff and defendant, to the judgments sought to be annulled, as well as the different warrantors mentioned in the petition, were cited as defendants herein.

One of the parties cited in warranty (the executor of the last will of *James McCalop*, deceased,) filed an exception, which was sustained by the court, and the suit dismissed as to him, by judgment signed the 15th December, 1852.

On the 20th June, 1854, the following rule was entered on the minutes: "On motion of *J. M. Elam, Esq.*, of counsel for *Clara L. Stuart*, universal legatee of *James S. Bailey*, deceased, authorized by her husband *Amos Adams*, that the property enjoined from sale be released from seizure, the Sheriff having been ordered to return the *fi. fa.*, the execution whereof was enjoined, ordered that the motion be entered for hearing," and on the 22d June, 1854, the follow-

ing judgment was entered on said rule: "In this case it is ordered, adjudged and decreed, that the motion of *Clara L. Adams*, universal legatee of *James S. Bailey*, deceased, to release from seizure the property enjoined from sale be sustained, and in consequence thereof it is further ordered, adjudged and decreed, that this suit be dismissed, and that the plaintiffs in seizure pay the costs of suit."

The next day, June 23d, 1854, plaintiff moved for a suspensive appeal, which was granted, and complains in this court that the release of the seizure of the property by one of the defendants, although it put an end to the necessity for the conservatory process of injunction, yet it by no means extinguished the various causes of action set up in the petition.

The appellant is clearly entitled to relief, and so much the more, as the rule taken by the representative of *Bailey* did not even ask that the suit should be dismissed. It merely asked leave to release the seizure of the plaintiff's property, which it would have been the undoubted right of the party to do, even without an order of court. But the object of this suit was more than the simple release of this seizure. The plaintiff demanded the nullity of the judgment under which the seizure was made. And this cause of action subsists as fully in the absence of a seizure as if the seizure remained in force. But if the suit be dismissed, what is there to prevent the representative of *Bailey* from issuing another *fi. fa.* and seizing the plaintiff's property again? The appellant has a clear right to a trial of the issue of nullity, which, if decided in his favor, will quiet him finally in the possession of this property.

The appellant has asked us to reverse not only the judgment of the 22d June, 1854, dismissing his suit generally, but that of the 15th December, 1852, dismissing it as to the succession of *James McCalop*.

But we cannot consider this appeal as taken from the latter judgment. The plaintiff had suffered more than a year to elapse after that judgment, and had thereby lost the right of appealing from it, according to Article 593 of the Code of Practice.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that this cause be remanded to the said court, to be proceeded in according to law, as to all the defendants, except the succession of *James McCalop*; the costs of this appeal to be paid, in solido, by *Clara Adams* and *Amos Adams*, appellees.

JAMES D. HILL *v.* J. H. MADDOX.

Facts: An act of sale declared not to have effect as such, because there was no real price. A contract decreed to be usurious because borrower paid rent in addition to interest.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Estlin, for plaintiff and appellant. *Durant & Hornor*, for defendant.

BUCHANAN, J. The District Court did not err in receiving parol proof to explain the very vaguely written conventions of the plaintiff's ancestor and defendant.

The true nature of the contract between the parties is proved to have been

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a loan, for which the borrower (defendant) gave his promissory note to the lender, (plaintiff's ancestor,) which note included interest to maturity on the amount loaned, making the sum, principal and interest, thirty-five hundred dollars. Simultaneously with the making of this note, defendant made plaintiff a written sale, purporting to be for the price of thirty-five hundred dollars cash, of his library, furniture, plate, &c., in his dwelling-house, and subscribed an obligation to pay to the lender a yearly rent for the use of the articles thus sold.

Very clearly this contract is not valid as a sale, for want of a real price. For plaintiff holds defendant's note for that sum, which, in the pretended sale, is declared to be the price paid by plaintiff's ancestor; and the witness, through whom the arrangement was made, swears that the bill of sale and the note were one transaction. The pretended sale was thus an informal pledge, and we take the obligation to pay rent for the furniture to have been intended between the parties as a badge of possession in the plaintiff's ancestor, which is essential to constitute a pledge; and as between the parties it may possibly have that effect; upon which point we need not express any opinion at this time.

Under the evidence, and retaining possession of defendant's note, as the plaintiff does, he cannot be allowed to treat the contract as a sale which has passed to himself the ownership of the effects sequestered herein.

Neither do we think the plaintiff's claim for rent can be maintained. The rent stipulated, $250 a year, is about 7½ per cent, on $3,500, or within a half per cent. of the highest rate of conventional interest. But it is proved that interest has already been received by plaintiff's ancestor, in the shape of discount, upon the amount loaned defendant. The stipulation of $250 rent must, therefore, be viewed, under the circumstances, as usurious.

Judgment affirmed, with costs.

WARD BRACK *v.* SAMUEL WOOD.

Action of revendication for a slave.

The object of the possessory action is to enable the person clothed with possession to maintain that possession, and compel his adversary to exhibit and recover on his title.

The rule in Art. 44 C. P., that plaintiff must recover on strength of his own and not the weakness of his adversary's title, applied.

The testimony of witnesses as to identity of a slave, when the slave is before them, preferable to that of witnesses who describe him from memory only, though the presumption be strong that the latter testify as to the same negro.

The plaintiff to a petitory action must not only make his case probable, but legally certain. *In pari casu potior est conditio possidentis.*

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Wolfe & Singleton*, for plaintiff. *Ogden & Chilton*, for defendant.

MERRICK, C. J. This is an action of revendication brought to recover a slave.

It has been made a question whether the circumstances of the case did not throw the burden of proof upon the defendant, he having taken the slave out of the plaintiff's possession a short time previous to the commencement of this suit. The very object of the possessory action is to enable the person clothed

with possession to maintain that possession and compel his adversary to exhibit and recover upon his title.

The plaintiff seems to have supposed that he had not possession which would enable him to bring the possessory action against the defendant who resumed the possession of the slave after an interval of only seven months.

We see no reason to introduce an exception in this case to the rule expressed in Article No. 44 of the Code of Practice, which has been recognized almost as often as there have been petitory actions tried, viz: that the plaintiff in this kind of action must recover upon the strength of his own title and not upon the weakness of that of his adversary.

It will be unnecessary in this case to consider the objections raised as to the introduction of testimony.

The main difficulty in this case arises from a question of identity as to the slave, whether the testimony of both plaintiff's and defendant's witnesses all point to the same object, or whether or not there have not really been two negroes so similar in appearance as to bear the same description, both of which have been in the possession of plaintiff and his vendors, and one only in the possession of the defendant.

The testimony of defendant's witnesses has this advantage over those of plaintiff; they had the slave before them when they testified, and they speak positively as to the identity of the negro. On the other hand, the plaintiff's witnesses describe a negro with such marks as to create a very strong presumption that they testify to the same negro, although they had not seen him for some months, and as to some of the witnesses, perhaps years previous to the commencement of the suit.

The defendant's testimony establishes these facts, viz: that the identical negro which he has in possession was in the possession of one *McDonald* as owner from 1836 to 1840 and 1841, when *McDonald* left Natchez; that in 1848 he was lodged in jail as a runaway; that he was seized under an execution at the suit of one *Izad* as *McDonald's* property, and bought by the defendant, on the 5th day of June, 1848, for $475; that from that period the slave remained in defendant's possession, on his plantation in Louisiana, up to October, 1851, when he ran away, and that the defendant recovered his possession of the negro in August, 1852, by taking him from the steamboat Florida, where he had been hired.

The plaintiff's testimony proves that, in 1839, a negro boy, answering to the description of the one in controversy, was lodged in jail in Helena, Arkansas, where he remained until December, when a man by the name of *Errart* presented himself, with a written title from one *John Weymouth*, dated September, 1838, identified the negro as his property, and sold him the same day to *Miller Irvine* for $810. In 1844 *Irvine* sold to *Wm. Polk* for ——. On the 19th day of March, 1846, *Polk* sold to *John Trigg*. About February, 1848, the slave absconded. In October, 1851, *Trigg* regained a negro, which plaintiff's witnesses identify as the one runaway, having taken him out of the jail in Gallatin, Mississippi, where he had been lodged as a runaway. The slave absconded again in January, 1852, and having been recaptured the same month, he was sent to New Orleans, and sold as the property of *John Trigg*, at auction, and bought by the plaintiff. Plaintiff had hired the slave upon the steamboat Florida, from which the defendant took the slave which he possesses as owner. It will be observed that neither plaintiff nor defendant exhibit in their vendors

any title except possession. The plaintiff's possession is traced back to 1839, that of the defendant to 1836. Who had been the previous owner of the slave or slaves is not shown.

It is possible, notwithstanding the positive character of the testimony of the witnesses and their number, that the slave which *McDonald* had in his possession from 1836 to 1840 was the same which *Ervart* sold to *Irvine*, and that there is a mistake of the witnesses in regard to the dates. But were this so, still the plaintiff fails in his proof, because he would then claim through *McDonald*, and having failed to show title from *McDonald*, his action fails.

It is not enough for the plaintiff in the petitory action to make his case probable, he must make it legally certain.

So far as it concerns the testimony in this case, to say the least of it, that of the defendant is as cogent and consistent as that produced by the plaintiff. *In pari casu potior est conditio possidentis.*

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment in this case against the demand of the plaintiff and in favor of the defendant, and that the plaintiff pay the costs of both courts.

ALPHONSE DORVIN *v.* AIMÉE WILTZ.

A defendant, in an action for the partition of community property, who demands in reconvention a judgment for one-half of the charges incurred in supporting the slaves in controversy, will be precluded from asserting title to plaintiffs' interest in the property, as a "*dation en paiement.*"

Parol evidence of plaintiff's admission that he promised to abandon the slaves in question to the defendant, although received without opposition, will not have the effect to entitle defendant to assert such title.

When a judgment of separation from bed and board is rendered, the husband ceases to be the head of the community, and one undivided half of the property thereof vests immediately in each of the spouses, who thereby become joint owners; the wife having in this case continued to possess *nomine communi*, is accountable for the fruits of the property.

A claim, by the wife, for expenditures prior to the dissolution of the community, is inadmissible. It being neither alledged or proved that those expenditures were made with her separate or paraphernal funds.

The Supreme Court will give effect to evidence which would have been inadmissible under the pleadings, but to which no objection was made. BUCHANAN, J., dissenting.

The income of the separate estate of one of the spouses belongs to the community. C. C. 2371. BUCHANAN, J., dissenting.

A verbal quit claim of slaves, amounting to an informal settlement of a community, will avail as a *dation en paiement*, notwithstanding it was not reduced to writing. BUCHANAN, J., dissenting.

Where the wife bore all the charges of the support of the family and the education of the children, she is entitled to claim one-half of the amount from the husband, on a settlement of the community. BUCHANAN, J., dissenting.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

St. Paul & Bouny, for plaintiff. *Magioni*, for defendant and appellant.

VOORHIES, J., (BUCHANAN, J., dissenting.) This is an action for the partition of property belonging to the community, which formerly existed between the parties.

The defendant claims the reversal of the judgment rendered against her on several grounds.

"First. The evidence shows that plaintiff had made a *dation en paiement*

in his half interest in the slaves to the defendant, and he is bound by the evidence by which it is sought to be sustained."

The only question which this ground presents is, whether the plaintiff has been divested of his title to the undivided half of the slaves claimed as community property. We think not. A demand in reconvention is the only plea interposed by the defendant. She alleges in substance, that she was married to the plaintiff in October, 1825, with whom she had two children, *Theophile* and *Emma Dorvin*, the former being born on the 30th of October, 1826, and the latter on the 28th of February, 1830; that in June, 1831, she and her children were abandoned by him, without any just cause; that on the eleventh of July, eighteen hundred and thirty-eight, she obtained a judgment against him for separation from bed and board, on the ground of abandonment, in which the right was reserved to establish their respective claims against the community; that the only property of the community then, consisted of the negro woman named *Anaïs* and her two children, *Claire* and *Cecile*, the former aged about three years and the latter about twenty months; that the other two children of *Anaïs*, *François* and *Carmelite*, born subsequently, are now aged, one about twelve and the other thirteen years; that *Anaïs* had nine children, five of whom died quite young; that she had to defray the expenses incident to the birth, burial, &c., of the children of *Anaïs*, which amounted to upwards of $150, as a charge against the community; that she paid $103 for parish and municipal taxes on the slaves, from the year 1842 to that of 1850, inclusive, which was due by the community; that the plaintiff is bound to her for one-half of the expenses for the clothing and support of the slaves of the community, at the average rate of $4 per month, to be reckoned as follows, to wit, *Anaïs* from June, 1831, *Claire* from July, 1834, *Cecile* from September, 1835, *François* from February, 1838, and *Carmelite* from February, 1839, until the final settlement of the community; that when she was abandoned by the plaintiff, her daughter *Emma*, an infant, was lying dangerously ill, and continued to remain so upwards of twenty months; that the plaintiff, having made no provision either for her support or that of her children and their education, she was compelled to labor in order to procure the necessary means for that purpose; that *Emma* and *Theophile Dorvin*, both died of lingering diseases of many months, the former on the 11th of April, 1849, and the latter on the 30th of May, 1851; that the plaintiff, although legally and morally bound, never paid or contributed any thing for the support and education of his children; that he is bound for the reimbursement of the expenses incurred by her for that purpose, at an average rate of $20 per month for each of them, from June, 1831, to the period of their respective deaths, and also for the sum of $223 50, their funeral expenses; and that she is entitled to a privilege for the reimbursement of her claims, which greatly exceed the interest of the plaintiff in said community property. She concludes, by praying for judgment against the plaintiff, *with privilege on his half interest in the community property*, for the reimbursement of the sums thus claimed by her, &c.

In answer to her reconventional demand, the plaintiff pleaded a general denial, and specially, that the claims set up by her was compensated by the hire of the slaves which remained in her possession; and also claimed as a charge against the community, the sum of $2,790 74, alleged to have been inherited by him from the successions of his father and grandfather, and converted to the use of said community.

DORVIN v. WILTZ.

We think it is clear, under these pleadings, that the defendant is precluded from asserting title to the plaintiffs' interest in the property as a *dation en paiement*. Parol evidence of the plaintiffs' admission that he promised to abandon the slaves in question to the defendant, although received without objection, is not entitled, in our opinion, to the effect contended for by the appellant's counsel. The cases on which he relies to sustain his position, do not appear to us to be analogous to the present.

"Second. The court erred in allowing wages for *Anaïs* from the 11th of July, 1838, date of separation, and for the four children from their fifteenth year, because wages should have been allowed only from the date of the institution of the present suit."

We do not think the judgment is erroneous in this respect. The plaintiff ceased, by the effect of the judgment of separation from bed and board, to be the master and head of the community, and one undivided half of the property thereof vested immediately in each of the spouses, who thereby became joint owners. The defendant having continued to possess *nomine communi*, was clearly accountable for the fruits of the property, more especially as she claimed in reconvention such charges as those sought to be recovered by her.

"Third. The court erred in deciding that the services of slave children to the age of fifteen years compensated for the expenses and trouble of raising them. Because there are no proofs and facts which can be taken as the basis for the foundation of such a rule; and because, on a separate examination of the pleadings, the evidence, and a decision of the late Supreme Court, the very reverse of the proposition will be made evident."

The only question which this ground of defence presents, is one of fact, and, as is usual in such cases, generally founded on speculative opinions. It does not appear to us from the evidence, that the Judge erred to the prejudice of the defendant. Neither do we understand that his decision establishes any rule of compensation in regard to the raising of the children of slaves, as urged by the defendant's counsel. His conclusion that the defendant would be compensated for the trouble and expense, by charging her with the hire of the slaves only from their fifteenth year, appears to us to be fully sustained by the evidence.

"Fourth. The court erred in disallowing under the above erroneous principle, the third item of defendant's claim, being for the food, clothing, &c., of the four children and of *Anaïs* herself, because the claim was admitted by the pleadings to be correct, and was fully sustained both by defendant's and plaintiff's evidence."

We do not think that the plaintiff's answer to the demand in reconvention contains any such admission. In adjusting the claim for the hire of the slaves, we infer from the evidence that the Judge must have taken this claim into consideration.

"Fifth. The court erred in not allowing for the expenses of rearing *Theophile* and *Emma*, from 1831, date of the abandonment, instead of the 11th of July, 1838, date of dissolution of the marriage; because plaintiff's plea in compensation admitted their correctness, and because he is as much bound by law for the expenses incurred prior, as for those incurred subsequent to the separation from bed and board; and if not legally, then he is by a natural obligation."

We do not think, as already observed, that the plaintiff's answer contains

any such admission. The defendant's claim for expenditures prior to the dissolution of the community, is clearly inadmissible. It is neither alleged nor shown by her, that those expenditures were defrayed with her separate or paraphernal funds. C. C. 2371.

The plaintiff has prayed for an amendment of the judgment in his favor, by allowing him the amount of his alleged inheritance as a claim against the community. We concur in the opinion of the Judge *a quo*, that the evidence is insufficient to show that any part of it was ever brought into the community. Nor is it even shown by him that the notes which he received as his share in those estates, have ever been paid or any part of their proceeds applied to the purchase of *Anaïs*, as alleged by him.

It is urged, that the affirmance of the judgment will prejudice the appellant, by compelling her, in the event of becoming the purchaser of the property, to deposit the purchase money into court. We do not understand that such will be the effect of the judgment. Either party, in becoming the purchaser of the property, will have the right to retain in his or her hands, the portion of the price coming to him or her, the defendant to retain first the amount awarded in her favor as a creditor of the community by this judgment.

It is therefore ordered and decreed, that the judgment of the court below be affirmed, with costs.

BUCHANAN, J., (dissenting.) The plaintiff brought suit on the 19th January, 1852, for the settlement of a community of acquets, which was dissolved by a judgment of separation of bed and board, rendered on the 11th July, 1838, or thirteen years and six months previous to the institution of this action.

The following facts were established by evidence, received without objection or the reservation of any bill of exceptions on the trial of the cause in the District Court. Plaintiff and defendant were married in New Orleans in the year 1825, of which marriage there was issue two children, a son, born in 1826, and a daughter, born in 1830. In 1831, plaintiff abandoned his wife and his children, without any allegation or pretext of a cause, and lived with a woman who had been his mother's slave; from the moment of his abandonment never seeing his family nor contributing anything whatever to their support. The whole charge of supporting herself and children devolved upon the defendant, who had no resources save her labor and that of a slave girl *Anaïs*, purchased in 1828, for the sum of three hundred and fifty dollars cash, and which had been left with her by plaintiff, when he abandoned her. In 1837 defendant sued plaintiff for a separation of bed and board, on the ground of abandonment.

On July 14th, 1838, judgment was rendered in said suit, decreeing a separation of bed and board between the parties: that the plaintiff (defendant herein) recover of the defendant (plaintiff herein) twenty-five dollars monthly, from the 25th July, 1837, to the date of judgment, as alimony, with costs, the court reserving to each party the right of establishing their rights in the community property.

Shortly after this judgment was pronounced, a brother of defendant went to plaintiff on her behalf, and told him that he was going to proceed against him, and sell *Anaïs* and her two children, *Claire*, then aged three years, and *Cecile*, aged two months, (being the whole property of the community at the date of the judgment,) to effect a partition of the community. Plaintiff told him not to do so; that he had no idea of ever making any claim to these slaves; that

he wanted to leave them to his wife and children. This interview terminated with a mutual understanding that plaintiff should make an act before a notary to that effect; but defendant's brother was never able to see plaintiff afterwards to consummate this settlement, plaintiff having removed to the parish of St. Charles.

The plaintiff often told *Mr. Schexnaider* that he had abandoned all claims in the slaves to the defendant, because she had raised the children.

After this defendant continued to support plaintiff's two children until their death, which occurred, that of the daughter in 1849, and that of the son in 1851. She paid the expenses of their sickness and burial. The plaintiff never came near them, nor incurred the slightest expense on their account. The institution of this suit was the first indication of any desire on his part to disturb the arrangements proved by the witnesses, *Wiltz and Schexnaider*, or to consider the settlement of the community as an open question. In the meantime the slave *Anaïs* had given birth to two more children, *Carmelite* and *François*, who are living, and to five others, who are dead. In his petition plaintiff claims that the slave *Anaïs* and her children, *Claire*, *Cecile*, *Carmelite* and *François*, be inventoried as property of the community, and a partition made of the same between himself and the defendant.

The first position assumed in the argument of the counsel for defendant in this court is, that from the evidence it appears that plaintiff has made to defendant a *dation en paiement* of his half interest in the slaves.

The opinion of the majority of the court holds defendant to be estopped from asserting title to the slaves in herself, as resulting from acts and declarations of plaintiff given in evidence, because such an assertion of title is inconsistent with her pleadings.

Even were the question of practice at this day an open one, I should doubt much the right of the court to raise a question of estoppel as applied to evidence in the record, received without opposition in the court below, and against which no argument is offered in this court. Both of these features distinguish the present question. The evidence upon which this part of the defendant's case rests was so far from being opposed by plaintiff in the District Court, that an important portion of it (the testimony of *Schexnaider*) is the subject of an admission made in the note of evidence on trial. And although defendant's brief, in which this point is elaborated, was on the files of this court before plaintiff's brief was filed, the counsel of plaintiff has urged no objection to it, on the score of inconsistency with the pleadings. I can understand that when some great principle of morality is offended, or some palpable violation of law shown by evidence received without opposition and without comment, the court will, *proprio motu*, dismiss from its consideration a subject tainted with such radical vices. But it is no part of the duty of a court to originate purely technical objections. Least of all am I disposed to do so in aid of a claim which to me appears both stale and inequitable.

The general principle, sanctioned by many decisions, is that the Supreme Court will give effect to evidence which would have been inadmissible under the pleadings, but to the reception of which no opposition was made in the court of the first instance. "It is a well settled rule," says Judge Simon, in delivering the opinion of the court in *Powell* v. *Aiken & Gwinn*, 18 L. R. 328, "that a party who, without opposition, suffers evidence to be adduced, contrary to or beyond the allegations contained in the pleadings, is bound by its effect."

And the same principle is reiterated with approbation in the case of *Gayarré v. Tunnard*, 9 An. 254. A leading case upon this point is *Bryan and wife* v. *Moore's heirs*, 11 M. 26, where plaintiff claimed as heir of her husband, but recovered upon another title, upon proof received without opposition, the court observing: "the mistake in the allegations may be waived or cured by the evidence in the case." 9 M. R. 317; 6 N. S. 86; 1 L. R. 301.*

The doctrine is no less well settled, that a party is bound by parol proof of a title to real estate or slaves, in case he has suffered such proof to be given without objection to its admissibility. 1 N. S. 459; 4 L. R. 22.†

Upon this well established rule of practice, I am of opinion that we would be bound to give effect to the evidence of a quit claim by plaintiff in favor of defendant, of his half interest in the slaves *Anaïs* and her children, even if palpably inconsistent with her pleadings. But I do not find such inconsistency. It is true that there is an admission in defendant's answer that the said slaves belong to the community. But the whole of this answer should be taken together. It is far from acknowledging that plaintiff has anything to recover from the community. It is a demand in reconvention, in which, after stating her charges against the community in detail, the defendant avers that "the pretensions set up by the said *Dorvin* to deprive this respondent of his half of the community property are unworthy of being listened to, but ought, on the contrary, to be frowned down by this honorable court, for said plaintiff knows full well that the charges and expenses, both at the time of the separation from bed and board and up to this period, for raising his children and maintaining the slaves far exceed his half interest in said community property."

And again: "Further answering, says, that the half interest which plaintiff *pretends* in said slaves as property of the community is bound for all the aforesaid expenses which she has incurred, both for the slaves and the plaintiff's children, and that said charges far exceed the interest of plaintiff in the slaves above mentioned, and that she has privilege in said slaves for all the expenses aforesaid."

These allegations are in entire harmony with evidence that plaintiff made an informal settlement of the community immediately after its dissolution, in which he relinquished his half interest in *Anaïs* and her two infant children (which interest is proved to have been only worth at that time four hundred dollars) to the defendant, in discharge of a balance justly due by him upon such settlement.

It must not be forgotten that he had been living seven years separate from his family, in the country, where the expenses of living are less than in town, having a good trade (that of carpenter) by which he may be reasonably supposed to have made something more than his expenses, and that the income of his separate estate (consisting of a mortgage of two thousand dollars, undoubtedly bearing interest) also belonged to the community. C. C. 2371. It is not at all improbable that the supposed *dation en paiement* was advantageous to the plaintiff.

Upon this evidence plaintiff should go out of court. After thirteen years he should not be allowed to disturb this settlement, however informal. In the

* See case of *Webb* v. *Deeson*, decided Feb. 25, 1855, (Op. Bk., 26, 179,) where the court of the first district allowed evidence, against and beyond the pleadings, for the purpose of justice, and this court held that the evidence was properly admitted. See bills of exception in record of that case.

† *Lockett* v. *Toby*, decided in May, 1851, and in January, 1852, (Op Bk., 21, p. 192, and 22, p. 28,) [10 Ann. Rep. 713,] where parol title to real estate, received in the absence of the party against whom it was offered, was held to conclude him.

case of *Hermann* v. *Theurer*, we refused to allow an inventory of the community to be contested after *eight* years of silence, although the wife was not present at the inventory, neither had it been followed by a partition. The party condemned by a judgment of separation and of divorce in that case, as in the present, sued for the settlement of the community many years after its dissolution, but was held to be concluded. Acquiescence in an informal settlement was presumed from lapse of time.

By the Article 2389 of the Code the defendant was bound to accept the community within thirty days from the separation finally pronounced, in default of which she would have been presumed to have renounced it. She appears to have signified to plaintiff her acceptance, and proposed to have an inventory made, and a regular settlement according to the forms of law. But the plaintiff disclaimed all interest in the slaves, and abandoned them to the defendant, in the words of the admission, "because she had raised the children." This verbal quit-claim was an informal settlement of the community, or *dation en paiement*, which will avail defendant, although not reduced to writing. The case of *McNeely* v. *McNeely*, 1 N. S. 646, is in point. See also the cases referred to in that case.

But if the strict rules of pleading prevent us from giving effect to this evidence, the same strictness of practice should apply to plaintiff; who has answered defendant's petition in reconvention by pleading *compensation* to the claims set up by her therein.

Compensation is a mode of extinguishing a debt, and takes place, by mere operation of law, where debts equally liquidated and demandable are reciprocally due. From this definition it follows, and is a long established rule of procedure, that the plea of compensation waives the general issue, and throws the *onus* upon the party who pleads it of proving that the indebtedness is extinguished. Hennen's Digest, 1193, No 3, 1209, No. 16, 1212, No. 12, 1228.

The party may qualify his plea by acknowledging only a part of his adversary's claim to be due, and setting up an offset against that portion. But this has not been done in the case at bar. The compensation is pleaded against the reconventional claims of defendant generally.

In this state of pleadings the defendant is entitled to judgment, for plaintiff has failed to show that the amount received by him from the successions of his father and grandfather (two thousand dollars) was ever put into the community as alleged, and allowing him all that he claims for the hire of the slaves, to the date of the filing of the supplemental petition, this would amount upon an accurate calculation to..... $5,071 00

Whilst the aggregate amount of the defendant's claims in reconvention to the same date is..... 13.413 00

The difference of these two sums is..... $8,342 00

for one-half of which plaintiff would be the debtor of defendant, upon the supposition that the plea of compensation, without qualification, admits the correctness of defendant's claims, as I maintain.

But upon the contrary supposition, and considering all the reciprocal claims of the parties as open questions under the pleadings, there is a manifest error in the judgment of the District Court, in not allowing defendant to charge the community with the expense of supporting and educating the children of the marriage from the time of her abandonment by her husband (June, 1831,) to the institution of her suit for separation (July, 1837.)

The husband is obliged to furnish his wife with whatever is required for the conveniences of life, in proportion to his means and condition. C. C., 122.

Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining and educating their children. C. C., 243.

From the obligations recognized by these Articles of the Code, results a right of action for alimony on the part of the wife and children who shall have been deserted by their husband and father. Alimony is defined in Article 346 of the Code to be what is necessary for the nourishment, lodging and support of the person who claims it. It includes the education, when the person to whom the alimony is due is a minor. Alimony shall be granted in proportion to the wants of the person requiring it, and the circumstances of those who owe it. C. C., 247. In the present case alimony was not sued for, and consequently was not allowed by a judgment for the time of plaintiff's abandonment of his family, previous to the institution of the suit for separation of bed and board against him. But his obligation to support his wife and children did not the less exist, and there is no question of his having totally failed to fulfil that obligation during all that period, and that upon the wife devolved the whole charges of the support of the family and the education of the children. For one-half of a reasonable estimation of these charges, therefore, the plaintiff was debtor of the community at the time of its dissolution.

Pothier, Traité de la Communauté, No. 582, says: "Après la dissolution de la communauté on doit liquider les créances que chacun des conjoints a contre la communauté, et les dettes, dont chacun des conjoints est débiteur envers la communauté. Cette liquidation est nécessaire, en cas d'acceptation de la communauté par la femme ou ses héritiers, afin que chacun des conjoints puisse, au partage qui se fera des biens de la communauté la reprise de la somme dont il se sera trouvé créancier de la communauté, déduction faite de ce qui lui est dû par la communauté; et que, dans le cas où l'un ou l'autre des conjoints se serait trouvé débiteur de quelque somme envres la communauté, déduction faite de ce qui lui est dû par la communauté, cette somme dont il s'est trouvé redevable envers la communauté, lui soit, au partage, précomptée sur sa part."

And further, (No. 607): "On peut aussi établir, pour principe général, que chacun des conjoints est, lors de la dissolution de la communauté, créancier de tout ce dont il a enrichi la communauté à ses dépens, pendant qu'elle a duré."

Applying these principles to the case at bar, we find that, as already observed, the plaintiff was in possession of a good trade, the earnings of which belonged to the community; and secondly, that he had a capital of two thousand dollars, "biens propres," invested in mortgage security of the best kind in the parish of St. Charles. The rate of conventional interest allowed by law at that time was ten per cent., and it is notorious that this was the rate universally paid upon such investments. As no account has been rendered by plaintiff, the legal presumption is that such was the revenue received by him from his separate capital. But the fruits of all estates of which the husband has the administration belong to the community. C. C. 2371. "Les fruits des héritages et autres biens propres de chacun des conjoints, qui sont perçus, nés, et échus durant la communauté, sont la troisième espèce de choses qui composent la communauté légale." Pothier, Tr. de la Comm., No. 204.

It follows that the defendant has, in the words of Pothier, enriched the community at her expense, during six years of its duration, from 1831 to 1837, to the extent of the expenses defrayed by her, and which should have been de-

frayed out of the plaintiff's earnings as a mechanic, and the income of his separate estate. Or rather, to bring these legal propositions into an appreciable form, the wages of a journeyman carpenter in New Orleans have always been two dollars and a half a day. Giving three hundred as the number of working days in the year, plaintiff earned at his trade seven hundred and fifty dollars per annum. Add two hundred for the interest of his separate estate invested in mortgage notes, and we have nine hundred and fifty dollars per annum of community property received by plaintiff, out of which (upon the footing of the alimony allowed by the court subsequently, pending the suit for separation, without objection from plaintiff,) there would have been twenty-five dollars a month expended had plaintiff fulfilled his legal obligations towards his family. This would make, for the six years of abandonment before suit instituted, a total of eighteen hundred dollars, to which extent the community has been enriched at the expense of the defendant; which is a legitimate claim against the plaintiff, and should be added to the allowances made by the District Court in settlement of the community.

And this is not in the least inconsistent with the principle of the opinion of the majority of the court, as developed in the following passage of that opinion: "The defendant's claim for expenditures prior to the dissolution of the community appears to us to be clearly inadmissible. It is neither alleged nor shown that those expenditures were defrayed by the defendant with her separate or paraphernal funds. C. C. 2371."

The doctrine here enunciated is, that defendant was bound to give her labor and her income to the support of herself and family during the existence of the community, because that labor and that income belonged to the community by the terms of Article 2371 of the Code. But it is not said, nor do I think it was intended to be said, that while the whole common property at the disposition of the wife, was liable for the common charges, the labor and income of the husband, which were also common property, could be lawfully released from contribution to the common charges.

I agree with Mr. Justice Voorhies, that the form in which the defendant has stated her claim for the period of time during which the community existed, is objectionable. But the error is entirely one of form. The fact is proved that the community, that is to say, the portion of it in the hands of the husband, has been enriched by the wife at her expense, pending the existence of the community, and the only means afforded by the evidence of establishing a just balance, is that adopted by me above, to wit: charging the husband with a contribution equal to the alimony which was allowed by the judgment of separation, and which contribution has been shown to have been reasonable, being less than one-third of his income by the calculation made above.

In the settlement of this community, all the legal and equitable presumptions are against plaintiff. The tie which bound these parties having been many years severed by a dereliction of natural and legal obligations on the part of plaintiff, for which he has offered no apology nor extenuation, he presents himself at this late day, and holds the defendant to the strictest accountability, while he has withheld all information of his own gains during the period of his desertion of his wife and infant family. We are thus put in possession of the fact, that in the six years, which elapsed between his marriage and his desertion of his family, the plaintiff, although he had a family to support, was enabled to buy two slaves, for whom he paid six hundred and fifty dollars cash. But in the six years which elapsed

between his desertion of his family and the institution of the suit by his wife for separation, although he had no family to support—at least, no legitimate family—it does not appear that he purchased any property whatever.

For these reasons, I am of opinion that there should be judgment against plaintiff and in favor of defendant, and that defendant should be recognized as owner of the slaves *Anaïs* and her children.

J. M. ELAM, Under Tutor, *v.* MRS. NOLAN.

The defendant, a tutrix, made a declaration of her intention to change her domicil from the parish of West Baton Rouge to New Orleans. The declaration was filed and recorded, and a copy served on the under tutor, who, in answer, set up various grounds on which he prayed that the tutrix be decreed to be unworthy to retain the tutorship; that the order confirming her as natural tutrix be rescinded, and that if deemed worthy, she be appointed dative tutrix, on giving security, &c., &c. *Held:* that these issues presented to a simple declaration of intention for a change of domicil, which the party had a clear right to make, are utterly inadmissible, and has no parallel in the jurisprudence of this State.

C. C. 43, 327, 341, 350, 351.

APPEAL from the District Court of West Baton Rouge, *Robertson*, J.

M. & H. H. Taylor and *Graves*, for *Mrs. Nolan*, appellant. *Elam*, under tutor, *pro se*.

VOORHIES, J. The defendant, *Louisa Jane Russell*, widow of *John M. Taylor*, contracted a second marriage with *John Nolan*, in the month of April, 1852. She had by her former marriage two children, *Emma L.* and *Mary F. Taylor*, both being still minors. On the 31st of August, 1852, *John Nolan* died testate, leaving nearly the whole of his large estate to his wife *Louisa* and her two children. The heirs of the testator brought suit to annul his will on various grounds. *James M. Elam* was appointed tutor *ad litem* to represent the minors. That suit terminated in a compromise between the parties, authorized by a family meeting as to the minors, which was homologated on the 24th of December, 1853. On the 10th of December, 1853, the widow was confirmed as natural tutrix of her minor children, and *James M. Elam* was appointed their under tutor.

On the 22d of January, 1854, the *Widow Nolan* presented to the Judge *a quo* a declaration in writing of her intention to change her domicil from the parish of West Baton Rouge to the parish and city of New Orleans, praying therein that the Judge should order the same to be filed and recorded according to law. The Judge ordered the declaration to be filed, and a copy served on *James M. Elam*, as under tutor of the minors, to show cause why the application should not be granted.

The under tutor filed an answer, in which he recognized the right of the tutrix to remove from the State with her children and their funds, but averred that her children had no guarantee in the faithfulness of her administration of their estate resulting from the mere presumption of natural affection. After setting forth in his answer the grounds urged in the suit for the nullity of the will, and the proceedings which led to the compromise, the under tutor avers that on the trial of his opposition to its homologation, the tutrix offered in evidence the petition in the suit of nullity, and opposed the introduction of evidence to negative the charges therein set forth against her. That if the interest of the

minors required that such serious charges against her should remain uncontradicted, then she was unworthy of the trust as their tutrix, and should be removed therefrom. But in case a different opinion should prevail, then he avers that her appointment as natural tutrix is illegal and void; that if retained as tutrix, it should be only as dative, on giving security for the faithful administration of the funds to be received for the minors under the compromise, inasmuch as there is reason to believe that she intends to withdraw from the jurisdiction of the District Court of West Baton Rouge; that her right, which had been forfeited, to be retained as natural tutrix, depended on a family meeting, which had not been obtained. He concludes by praying that she be decreed to be unworthy to retain the tutorship; that the order confirming her as natural tutrix be rescinded, and that, if deemed worthy, she be appointed as dative tutrix, on giving security. He also prays that *Henry W. Allen*, *William Nolan* and *John T. Nolan* be enjoined from paying her the amount of their indebtedness to the minors under the compromise.

The injunction was granted as prayed for, and the parties ordered to deposit the amount thus stated in the Branch of the Louisiana State Bank at Baton Rouge, subject to the order of the court.

The widow pleaded her domicil in abatement, and also moved for the dissolution of the injunction, with damages. Both of which having been overruled, she filed an answer to the under tutor's demand, in which she denies that she ever took a rule on him to change her domicil, as such a proceeding is unknown to the law. She avers that she has been legally confirmed as natural tutrix, and that the judgment homologating the proceedings relative to the compromise has now the force and effect of *res judicata;* and that in consequence of the illegal proceedings of the under tutor in this case, she has been prevented from receiving the funds of her wards for investment and for their support, &c. She, therefore, prays for the dissolution of the injunction, &c.

The tutrix is appellant from a judgment ordering her to make an investment of the funds of the minors, and rejecting her application to change her domicil, &c.

This case has, we believe, no parallel in our jurisprudence. A simple declaration of intention for a change of domicil, which the party had a clear right to make, and against her will, has been converted into a suit involving a number of issues which appear to us to be utterly inadmissible. "A change of domicil is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there." C. C. 43. "This intention is proved by an express declaration of it before the Judge of the parishes, from which and to which he shall intend to remove. This declaration is made in writing, is signed by the party making it, and registered by the Judge." C. C. 44. Under provisions so clear and unambiguous, it is difficult to perceive how proceedings, such as are presented in this case, could possibly have been ingrafted on the appellant's declaration, made merely for the purpose of proving her intention to change her domicil, the effect of which could in no manner whatever have impaired the rights of the minors.

But admitting, for argument sake, that this anomalous mode of proceeding may be justified, has the under tutor presented such a case as warrants the judgment rendered against the appellant? We think not. It is made the duty of the tutor, whether by nature, by will, by the effect of the law, or by the appointment of the Judge, to administer the estate of his ward as a prudent administrator would do, otherwise to be responsible for damages. C. C. 327. The

rules by which he is to be govered are to be found in section x, title viii of the Civil Code. We are not aware of any provision of law which authorizes the Judge to order the tutor to make an investment of the minor's funds, under such a state of facts as is presented in this case, or to enjoin the payment of such funds to the tutor. The tutor, it is true, is bound to make an investment of the revenues exceeding the expenses of the minor, whenever such revenues exceed $500. But the only penalty which he incurs for the inexecution of the obligation thus imposed upon him, is fixed by the law, *i. e.* the payment of legal interest on such excess. C. C. 341; Session Acts of 1825, p. 198, § 1. His neglect to make such investment does not, in our opinion, involve the forfeiture of his right of administration on his ward's estate. The tutor is bound to give an account of his administration only at the expiration of his tutorship. We do not think the Judge has any authority, except in certain cases provided by law, to order an account to be rendered by the tutor previous to the expiration of the tutorship. C. C. 350; 8 N. S. 665; 10 L. R. 319.

It is urged by the under tutor that the rights of the minors are in danger, as he has reasons to apprehend that it is the intention of the appellant to remove from the State. The remedy in such cases is expressly provided for under Art. 351 of the Civil Code.

The appellant has strenuously pressed upon our consideration her claim for damages on the dissolution of the injunction. We do not think that her claim falls within the operation of the statutes of 1831 and 1833. Whether her claim for damages, resulting from the harsh proceedings against her in this case be well founded or not, is a question which will have to be determined in a direct action.

It is, therefore, ordered and decreed, that the judgment of the court below be avoided and reversed, that the injunction in this case be dissolved, reserving the appellant's right to claim damages in a direct action, the appellee to pay the costs in both courts, without prejudice to his rights for the reimbursement of the same against the estate of the minors if entitled thereto.

Jeanette Mock *v.* Kennedy et als.

A State Court may enjoin the United States Marshall from seizing the property of one person under an execution against another.

A married women on proof of the insolvent condition of her husband, and on proof also that she has skill and industry to earn a separate livelihood, has a right to a separation of property, whether at the time of marriage she had or had not property.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

G. & C. E. Schmidt, for plaintiff. *A. G. Semmes*, for defendant and appellant.

Lea, J. In this case the plaintiff has proved that the judgment, decreeing a separation of property between her husband and herself, was based upon sufficient considerations in law and fact. It is shown that, at the date of her marriage with *Rose*, she had a separate industry and a considerable amount of property; that after the marriage *Rose* took possession of her effects, and that he afterwards became insolvent, and was sued by several of his creditors. These

facts, which have been established by evidence taken contradictorily with the defendants, justified the application for a separation of property and the decree maintaining it. We think, moreover, that the evidence fully establishes the plaintiff's right of property in the goods seized.

The stock of merchandise appears to have been purchased originally with funds borrowed upon her credit and lent to her individually. The store was not only carried on in her name but was managed by her, and supported by her personal credit, and at her individual resposibility. The evidence in support of these facts was satisfactory to the District Judge, and we are unable to say that his conclusions were erroneous.

This view of the case brings us to the consideration of the exception taken to the jurisdiction of the court, on the ground that a State Court has no right to enjoin the execution of a writ emanating from a Federal tribunal. The question presented is one of title, which is wholly independent of the proceedings in the Federal court. Every court, whether State or Federal, has, as a general rule, an exclusive control over the enforcement of its own process, except so far as it is subject to the revision of an appellate tribunal. This court cannot inquire into the validity of the judgment upon which the execution issued, or the validity of the execution itself. But the plaintiff, without inviting any inquiry into the validity of these proceedings, to which she is not a party, invokes the protection of the court against an illegal seizure of her property, made by the officer charged with the enforcement of the writ of execution against a third person. She tenders an issue of title which has no connection whatever with the proceedings had in the Federal tribunal. This question, we think, the State tribunal may lawfully examine and determine, as it involves no conflict of jurisdiction. The writ, emanating from the Federal court, commands the Marshall to seize property belonging to the defendant in execution. The decree, perpetuating the injunction, commands the Marshall to abstain from the commission of a trespass, by the seizure of property which does *not* belong to the defendant in execution.

The legal doctrine governing such a case, is concisely expressed in 1st Kent's Commentaries, page 411. "If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject matter, then the inquiring into the validity of the seizure belongs exclusively to the Federal courts; but, if there be no jurisdiction in the instance in which it is asserted, as if a Marshall of the United States under an execution in favor of the United States against A, should seize the person or property of B, then the State courts have jurisdiction to protect the person and the property so illegally invaded."

For a further illustration of this subject, see *Slocom* v. *Mayberry*, 2d Wheaton page 1; *Bruen* v. *Ogden*, 6th Halsted, 370; *Robb* v. *Wagner*, 5th Annual, 111; also *Dunn & Wife* v. *Vail*, 7th Martin, p. 436.

We find the evidence too vague and unsatisfactory to constitute a proper and sufficient basis for a decree awarding damages, the plaintiff's right to recover damages should, however, be reserved.

It is ordered that the judgment appealed from be amended so as to read as follows: It is ordered that the injunction herein sued out be maintained and made perpetual; that upon the plaintiff's claim for damages there be judgment, as in case of non suit. It is further ordered that the costs of suit in the District Court, together with the costs of this appeal, be paid by the defendants and appellants.

SAME CASE ON A RE-HEARING.

LEA J. In this case the only question is, whether the judgment for a separation of property obtained by the plaintiff against her husband is valid or not. It is to be remarked, that the wife is not seeking to enforce any moneyed claim upon her husband's property adversely to his creditors; if this were the case, it would be incumbent upon her to establish affirmatively the validity of such claim. But the question presented is one of title. Does the property seized in execution belong to the plaintiff, as her separate property, or not? If the judgment of separation is valid, it is her property, for it has been acquired by her in her own name and upon her personal credit, since the date of the judgment. Every one of the witnesses who knew the plaintiff prior to her marriage with *Rose*, testifies to the fact that she had a separate industry. She kept a clothing store. Now, it matters not whether her husband took possession of this store or not, it is equally immaterial whether she had or had not property at the time of her marriage, so far as this liquidation is concerned, as she is not seeking to enforce a paraphernal claim; it is sufficient for a married woman to prove that she had the skill and industry to earn a separate livelihood, which she had exercised, whether as a seamstress, teacher, milliner, or, (as in the case at bar,) a shopkeeper, is not material: she is entitled, under the humane spirit of our jurisprudence, upon proof of this fact accompanied by proof of the insolvent condition of her husband's affairs, to call upon the court, by a judgment of separation, to protect the fruits and earnings of her separate industry from being squandered by her husband, or seized by his creditors See *Davock* v. *Darcy*, 2 Rob., page 343.

Re-hearing refused.

LEVIN K. PERSON *v.* C. M. RUTHERFORD.

Facts—under which, acts of agent were held to bind principal.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Clark & Bayne, for plaintiff and appellant. *Olcott & Smith*, for defendant.

SPOFFORD, J. We would not disturb the judgment of non-suit in this case, if we could view the conduct of the defendant's agents in the same light in which it appears to have been considered by the District Judge.

On the evidence as it stands, we think the defendant ought to be bound by the act of his agents, whom he left in charge of his slave-mart in New Orand who, on an order given by the plaintiff's factors in favor of *Rutherford* himself, took the slave in question from the steamboat and again put her on the market for sale.

At any rate, when the plaintiff had thus given notice that he returned the slave on account of a redhibitory vice, and when the defendant's agents had received her and offered her for sale to others, if the sale was really cancelled, it was the manifest duty of the defendant to have notified the plaintiff's agents, residing in New Orleans, of her serious illness, to have given her all requisite medical attention and as it could so readily have been procured to have had a *post mortem* examination.

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The conduct of the defendant's agents in these particulars has shifted the burden of proof from the plaintiff's shoulders to his own; and, in spite of the obscurity of the evidence as to the malady, we think, under the peculiar state of facts, that the plaintiff should recover.

The girl was sold at $750, and the plaintiff's expenses were $25.

It is therefore ordered and decreed that the judgment of the District Court be reversed, and that the plaintiff recover of the defendant the sum of seven hundred and seventy-five dollars with legal interest from judicial demand and costs in both courts.

CHARLES CLAPP v. HENRY SEIBRECHT.

A surety on a bond given for the release of property sequestered by the vendor to satisfy his privilege is liable to the vendor, notwithstanding the property was seized and sold to satisfy a judgment rendered to inforce the lessor's privilege for rent of premises in which the property had been stored, and which existed on the property at the time the sequestration was sued out. The obligation of the bond was "faithfully to present the property to answer the judgment in the case;" it was no compliance with the condition of the bond to present the property to satisfy the execution of a third party.

It is a complete answer to a suit upon a bond for the release of the sequestration to show that the plaintiff's right upon the property has been overridden and extinguished by a superior right existing at the time and prior to the sequestration.—SPOFFORD, J., and LEA, J., dissenting.

APPEAL from the Third District Court of New Orleans, *Lea*, J.

Rawle, for plaintiff and appellant. *Roselius & Ducros*, for defendant.

MERRICK, C. J. The plaintiff, a creditor of *Lefort* with the vendor's privilege upon certain furniture, obtained a writ of sequestration on the 28th day of June, A. D. 1850. The furniture was in a certain store filled with confectionary etc., belonging to *Lefort* on which one *Blondeau* had the lessor's privilege for rent; seven hundred and fifty dollars of which (for five months) were then due.

The defendant *Seibrecht* in order to enable *Lefort* to continue his business signed his bond and thus released the property from plaintiff's seizure.

Blondeau had in April previous instituted his action for three months rent, but no seizure was made, nor judgment by default taken.

Feeling perfectly secure on account of the property in the store subject to his rent, *Blondeau* suffered it to run on until it had accumulated to the sum of $1,800, when, in January, 1851, he instituted his second action, wherein, after judgment he seized the remaining of stock of goods in trade and the furniture sold by *Clapp* to *Lefort* not paid for, which had been previously sequestered. *Clapp* obtained judgment against *Lefort* after answer filed on the 18th February, 1851, decreeing him his privilege on the sequestered property. *Blondeau* took final judgment *by default* in both actions on the 7th of February, 1851, and sold the property seized in his second suit, it being insufficient to pay the amount due him. Of course, when *Clapp's* execution issued there was no furniture to seize and the fi. fa. was returned *nulla bona*.

This suit is brought against *Seibrecht*, the surety on the sequestration bond, to compel him to pay the amount of the judgment obtained by the plaintiff against *Lefort*.

Seibrecht in our opinion is responsible, unless he shows that the principal in the obligation complied with it, or was prevented by overpowering force or a fortuitous event. The latter is not pretended.

Let us examine how far there has been a compliance. There has not been a literal compliance, because the obligation of the bond was *faithfully to present the property to answer the judgment in this case. Baker* v. *Morrison*, 4 Ann. 373.

It was no compliance therefore with the condition of the bond to present the property to satisfy the execution of some third party.

But it is said there was a substantial compliance, because the property was subject to the lessor's privilege at the time the sequestration was issued and was seized by the Sheriff on account of rent. But at the time of the sequestration the "shelves were full" and there was doubtless enough to have paid vendor and lessor both: for seven months after, and after the establishment had been in the hands of managers, creditors of *Lefort*, of whom *Seibrecht* was one for three or four months, these managers endeavoring to make their money out of the concern, the effects remaining were sold at Sheriff's sale for $994.

There is nothing therefore in this record which shows that there was any inducement on the part of the lessor to interfere with plaintiff's seizure, based as it was upon the strong equity of the vendor, and if he had interfered, it does not appear but there was property sufficient to have paid both privileges.

If the lessor had suffered the property to remain under seizure fifteen days it would have been freed from the lessor's privilege. If *Seibrecht* or some one else had not gone security for *Lefort* in ten days the plaintiff would have been at liberty to have given his bond for the property. The effect of defendant's bond therefore was to prevent the vendor from securing the lessor's lien, and to place the property in a situation where the extent of the privilege upon it was increased by the account both of *Lefort* and himself: 1st. By the sale of the other property subject also to the privilege, and 2nd. By seven or eight months rent in addition.

Now what is the difference, so far as the vendor of movables is concerned, (who is endeavoring to inforce his privilege,) whether the defendant who has bonded the property breaks and destroys it or places it where a lessor's privilege attaches to it and the proprerty is sold to pay the same? The one is no more destructive to his rights than the other. If either of these acts prevent the original debtor from presenting the property to the Sheriff, under the execution, the surety is as much responsible in our opinion in the one case as the other.

So in the case before us the debtor was finally unable either literally or in substance to comply with his bond. But his inability had been occasioned by his own acts and those of his surety and his surety ought to answer for him.

We think the party to whom property is delivered on his bond under a sequestration, is bound not only for his malfeasance but also for his nonfeasance.

If the building takes fire or leaks he is bound to remove the goods. If taxes have become due he is bound to pay them and suffer the goods to be sold.

In like manner we think it is an act of nonfeasance, for which he and his surety is responsible, if he suffers rent to accumulate or does not pay that

CLAPP v. SEIBRECHT.

which is already due. He might as well, with reference to the vendor, suffer the property to burn or be destroyed by exposure to the rain as to be absorbed by legal claims and rent.

The obligator is not released from his obligation, from his want of ability or *means* to perform it. C. C. 2028. Had he or his surety paid the rent, the condition of the bond could readily have been complied with. A party cannot be released from one obligation because he has incurred a more onerous one to some one else.

Again one of the common incidents of personal property is that it is transmissible by delivery and subject to privileges and seizure in the hands of the debtor: and one of the most obvious risks which the surety signing the sequestration bonds runs is from acts of this kind. We think therefore it is very questionable whether under any circumstances the court ought to listen to an excuse arising from these most apparent risks of the bond. See *Morgan* v. *Furst*, 4 N. S., 122. But if it be admitted that such defences can be set up by the surety, the burden of proof should be upon him to show that had the seizure continued the plaintiff would equally have lost his debt. So far as this action is concerned, as already observed *non constat*, that the lessor would have interferred with the seizure, or if he had, that there was not property enough to pay both lessor and vendor. Moreover it is shown that in the interval the stock in the store was repeatedly sold out and replenished.

The equity of the case is also with the plaintiff: the defendant, a creditor of *Lefort*, was anxious to keep him in business in order to secure his own debt, *and for three or four months, during which this rent was accumulated, Seibrecht and his co-managers were conducting the establishment for the benefit of themselves and other creditors.* Instead of paying the rent out of their own pockets, as they ought to have done, this act is made one of the grounds of the release of *Seibrecht* from his bond to the plaintiff. To release *Seibrecht* under the circumstances, seems to us, not only in conflict with the letter but the spirit of Art. 280 of the Code of Practice, prescribing the condition of the bond.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed and that the plaintiff *Charles Clapp* do recover and have judgment against the defendant *Henry Seibrecht* for the sum of four hundred and seventy dollars and twenty-five cents, with five per cent interest thereon from the 28th day of June, 1850, until paid, and that said defendant and appellee pay the costs of both courts.

SPOFFORD J., (dissenting.) The object of an attachment is to obtain a security for the payment of a money demand; the object of a sequestration is to preserve the property in dispute, *in statu quo*, pending the litigation.

An attachment confers a right to be paid by preference out of the property in favor of the attaching creditor; a sequestration does not.

To release an attachment, the defendant must give bond "to satisfy such judgment as may be rendered;" C. P., 259; to release a sequestration, the condition of the bond, prescribed by law and unalterable by the parties or the courts, is, not to send the property sequestered out of the jurisdiction, nor to make an improper use of it, but faithfully to present the same, after judgment, in case there be a decree for its restoration. C. P., 280.

Quo ad the property sequestered—the plaintiff acquires no greater right than he had before, by the process of sequestration. *Duclere* v. *Crebassol*, 19 93. *Bank of Alabama* v. *Hozey*, 2 R., 153.

Accordingly, it must be a complete answer to a suit upon a bond for the release of the sequestration to show that the plaintiff's right upon the property has been overridden and extinguished by a superior right existing at and prior to the moment of sequestration.

I, therefore, concur in the view of this case presented with force and brevity by the following opinion of the District Judge.

"The plaintiff's sequestration was an invasion of landlord's superior right. If the property had not been bonded, the sequestration would unquestionably have been thwarted by the vigilance of *Mr. Blondeau*.

The defendant's inability to comply with the condition of his bond, was a necessary result of an infirmity in the plaintiff's title. The defendant cannot be taken to have guarantied against that."

For these reasons. I think the judgment appealed from should be affirmed.

Mr. Justice Lea is of this opinion.

BOYKIN & LANG *v.* HOLDEN WRIGHT.

A duly certified copy of an act under private signature, recorded in the office of conveyances, is admissible in evidence, in lieu of the original, when the latter is lost, and due diligence has been used in searching for it and publishing the loss.

Where the affidavit of the subscribing witness, upon which the act under private signature was admitted to record, stated that the affiant was present when the act was executed, and saw the parties sign the same, it was a substantial compliance with Art. 2250 C. C. It is the recording of the title in the proper office which is notice to third parties, and not the testimony upon which the instrument was admitted to record.

The fee-dockets of Clerks of Court are official records authorized by Art. 776 of the Code of Practice, and copies from them, duly certified, are admissible in evidence. The fact of their serving as account-books for the fees of the Clerk, does not lessen their authenticity as records of the proceedings had in suits.

APPEAL from the District Court of Terrebonne, *Cole*, J.

C. A. Johnson, for plaintiffs. *J. C. & A. Beatty*, for defendant and appellant.

MERRICK, C. J. This is a petitory action. There was the verdict of a jury and judgment of the court in favor of the plaintiffs, and defendant appealed.

Both the plaintiffs and the defendant are claimants of portions of the same original grant, which was confirmed by government to *Robert Martin*, and by him sold to *James Bowie*. They both claim through mesne conveyances from *James Bowie*. The original title of the plaintiff is the oldest, but both his location and the title itself, originally and through its various links, is contested.

In order to understand fully the merits of the objections, it is necessary to examine the situation of the land and the description of it, in the respective titles of the parties.

The upper line of the Robert Martin tract, 202 chains in length, crossed the Bayou Black (probably in order to adapt it to the large grant of land above,) in such a manner as to form an acute angle on the one side, and an obtuse angle on the other, on a line drawn with the general course of the bayou through the Robert Martin tract. In 1826, two years before *Bowie* sold to

Bowie v. Wright.

Isaac Thomas, the original vendor of plaintiffs, he sold on the left bank of the bayou, out of the David Martin tract, to *J. D. Smith*, one thousand acres, described as follows: "to begin at a point where Bayou Duburge makes out of said Bayou Black, and running up and down with equal distances from said point of Bayou Duburge and fronting on Black, so that when the side lines are run out as far as the land of said *Bowie* extends, the [tract] shall contain one thousand acres; provided these side [lines] shall be run at the usual way of surveying those lands on said bayou."

The first act of sale from *Bowie* to *Isaac Thompson*, was made through the intervention of an agent acting under a power of attorney, and by notarial act passed before the parish Judge of Terrebonne, bearing date the 28th day of January, 1828.

The tract transferred is described as "one thousand arpents of land situated in said parish, on Bayou Black, to be taken from the upper end of the tract conceded by the Spanish government to *Miguel Satarnino*, and confirmed by the government of the United States in the name of *Robert Martin*. ****** The said concession and confirmation being for fifty arpents front on each side of said Bayou Black with the ordinary depth of 40 arpents **** and it is further understood that the land herein conveyed to said *Thomas* is so to be laid off and set apart as to make his lower line parallel with the upper, and have equal width on each side of the bayou."

On the 30th day of January, 1828, the agent of *James Bowie*, by an act under private signature, recorded in the parish Judges' office, March 6th, 1828, after reciting the substance of the notarial act of 28th of January, 1828, and the description of the land, proceed to declare: "Now if the calls in the said conveyance to said *Thomas* should interfere with lands previously sold to *Dr. J. D. Smith*, of Concordia, it is understood and agreed, that said *Thomas'* thousand arpents shall be laid off adjoining said *Smith's* lower line, agreeably to the principles established and laid down in said *Thomas'* conveyance above referred to."

James Bowie, on the 17th day of February, 1829, by notarial act, not recorded in the parish where the land lies, ratified the two acts of his agent to *Isaac Thomas*.

The deed under which the defendant claims bears date April 25th, 1828, and appears to have been recorded the 29th of the same month. This also was passed by an agent of *James Bowie*. The description of the land conveyed is, "a certain tract or parcel of land measuring three hundred superficial arpents, situated in the parish of Terrebonne, on the north side of Bayou Black, at about five miles from the Bayou Terrebonne, bounded above by the lands of *John Minor* and *James Dinsmore*, below by other lands of said *James Bowie*, and back by a line running north sixty-four degrees and sixteen minutes east, and separating the same from vacant or Congress land."

Taking it for granted for the present, that the acts from *Bowie* to *Thomas*, were formal, we will first consider the question as to the location of the tracts of land under their conveyances. The plaintiff contends that there was not one thousand arpents in that part of the Robert Martin tract, lying above the tract conveyed to *J. D. Smith* (which last tract takes precedence of both plaintiff and defendant). To this, defendant replies that there is no sufficient proof to show this fact, taking the Smith tract as claimed by the present occupants; but that the Smith tract, instead of being laid out at right angles with

the Bayou Black, should have been laid out, so that the side lines would be parallel with the upper line of the Robert Martin tract; that this location would have diminished the Smith tract nearly one-half of its front and left the 1,000 arpents for the plaintiff's vendors above.

There is testimony in the record which shows that the J. D. Smith tract of land has been laid out as was usual and customary in that section of the State, that is, that it was laid out as nearly as practicable at right angles with the bayou. It is shown also by the same witness, who himself had been a surveyor, that there was not one thousand arpents in that part of the Robert Martin tract, lying above the Smith tract, to give the plaintiffs their quantity. But this witness had not measured the land, and only spoke from observation by frequently passing and the maps before him. We cannot say that the jury erred in giving full weight to the testimony of the witness in both of these particulars. The survey at right angles with the bayou would be much more natural and better calculated to give value to the lands, than the one contended for by the defendant, which would divide the tract into inconvenient portions. For example, were plaintiffs land laid off, as the defendant contends it should have been, it would be eighty or one hundred arpents in length and ten or twelve in width. The Smith tract, instead of being in a regular shape, would be narrow, and terminate in an acute angle on the bayou, at its lower corner, and in a like angle at the upper corner on the back line. In regard to the quantity above the Smith tract, an inspection of the surveys would tend to confirm the statement of the witness.

We see, therefore, no error in the conclusions of the jury, in regard to the place where plaintiffs' land is found, nor in the manner in which it was to be laid off. What we have here said, applies with equal force as to the manner in which defendant insists that plaintiffs' tract of land ought to be laid out, if his pretensions to have it set off to him below the Smith tract be admitted.

We will now consider the objections raised to plaintiffs' title.

I. A copy of the act under private signature, certified by the recorder, was offered in evidence. It is objected, that there was no proper evidence of the loss of the original adduced. We think the search made and the publication of the loss in the newspapers, showed sufficient diligence to discover the original, and that after the lapse of so many years, and the unavailing search made, secondary evidence was properly received.

II. The act under private signature was proven by one of the subscribing witnesses only, before the parish Judge. The witness testified that "he was present when the said deed was executed, and saw the parties sign the same." It is objected, that this affidavit does not authenticate the instrument, so as to make proof of it against the defendant, and that it did not authorize the parish Judge to record it, and therefore it can have no effect against third parties.

It is the recording of the titles in the proper office which is notice to third parties, and not the testimony upon which the parish Judge or Recorder may have admitted the instrument to record. *Hampton* v. *Morgan*, 9 Ann. 547.

In the instrument before us, we think the parish Judge had substantially complied with Art. 2250, C. C., when he admitted this instrument to registry.

A loss of the original act having been shown, we think that after a lapse of more than twenty-seven years from the execution of the act under private signature and its registry, accompanied by constructive possession for the whole

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period, and actual possession for twenty years, of the large portion of the tract of land conveyed, and a former possession of a part of the tract in controversy, that the instrument was admissible in evidence, and the Judge did not err in receiving it.

IV. It is objected, that the recognative act was not registered, and should have been excluded from the jury. As sufficient notice was given to all the world, by the registry of the original act of sale, and the act *sous seing privé*, no registry of the act of ratification was required.

V. It is further objected, that "the power of attorney from *James Bowie* to *S. Bowie*, authorized him to sell, but did not authorize him to exchange lands or buy back a tract of land already sold, and give in exchange for it another tract of land."

It will be observed, that the power of attorney to *S. Bowie*, was not simply to sell one thousand arpents to *Isaac Thomas*, but to sell to any person any part or all of his, *James Bowie's*, lands in the parish of Terrebonne. Now, as the authority under the power of attorney did not terminate with the notarial act to *Thomas*, for he was to sell all the lands, and as it is apparent that this act did not convey to *Thomas* the one thousand arpents intended, the agent and *Thomas* were authorized to remove the obstacle in the way of a perfect sale and to correct the description of the land, so as to carry out their original intentions. Until this was done, he had not made a complete sale, and his power over the object had not terminated.

VI. The next objection which we notice is raised by a bill of exception to the introduction of testimony.

It appears that *Thomas* sold to *W. Bogart*. *Bogart* went into forced insolvency in the Commercial Court of New Orleans. Plaintiff alleges that *Joseph Fowler*, through whom he claims, bought at the syndic's sale. In support of this averment, he proves that the original insolvent proceedings are lost, with the exception of the schedules and the entries on the minutes of the court, the most diligent search having been made to find the same.

The plaintiff offered in evidence these portions of the record, and also certified copies of other portions which had been used as evidence in other courts, together with a certified copy of the fee docket, showing that such papers had been filed and certain orders made in the insolvent proceedings.

The defendant objected to the introduction of parts of the record, and to the introduction of a copy from the Clerk's docket, wherein he had entered his fees, because it was not a book which was recognized by law.

The plaintiff had established a basis by his proof for the introduction of secondary evidence. Of secondary evidence, he was obliged to produce the best in his power. The portions of the record extant, were the best evidence of the kind, and their non-production would probably have been fatal to plaintiff's case. The copy from the Clerk's fee book was also admissible. The Code of Practice, Art. 776, requires him to keep a book, in which he shall set down in order the titles of all causes depending between the court, mentioning the date of the filing of the petitions and answers, and the names of counsel employed by the parties. The fact, that this book is also commonly used as a fee docket, cannot lessen its authenticity.

An order found on the minutes, recognizing *Fowler* as the purchaser, together with the *procès verbal* of the auctioneer, referring to an order of sale, and an act of sale from the syndic, with the testimony of the witnesses and other

portions of the record produced, furnished to the jury sufficient data from which to infer, that an order of sale had been regularly made, particularly as the party now questioning the proceedings, does not pretend to claim under *Bogart*.

In conclusion, we remark that the whole matter has been submitted to a jury, and we discover no such error in the proceedings of the lower court as to require us to disturb the judgment there rendered.

Judgment affirmed.

STATE v. JOHN MELVIN.

The Act of May 29, 1856, authorizing juries, in capital cases, to qualify their verdicts of guilty by adding "without capital punishment," did not change the pre-existing jurisprudence which held it to be good cause of challenge on the part of the State in such cases, that the juror had conscientious scruples about inflicting capital punishment.

The following bill of exceptions was taken to the charge of the District Judge. "Be it remembered that on the trial of this cause, the Judge, in his charge to the jury, and at the beginning and in the course of his said charge, stated to the jury that cases of murder were fearfully numerous in this city; that a conviction on a charge of murder had ceased to be a cause of excitement, and had become a common affair of almost daily occurrence; that confinement in the State penitentiary for life, was no adequate punishment for the crime of murder, and that juries had no right to qualify their verdict unless there were mitigating circumstances; that convicts in the penitentiary seldom served out their term, when confined there for life; that a late Governor of this State had pardoned almost every body, and that convicts were always in the hope that after a few years they would appeal to a clement executive, and that none but capital punishment would put a stop to the practice now common of man and woman killing; that he, the Judge, on a late visit to the penitentiary, had been told by parties sentenced by him, inmates of the State prison now, that they hoped in a short time to come out; to which charge the counsel for the defendant objected, &c." *By the Court:* It is obvious that the charge as above detailed embraced several matters of fact within the personal knowledge of the Judge, which would not have been admissable in evidence, had they been offered on the trial, which did not contribute in any way to the elucidation of the law applicable to the case, and which yet had a tendency to influence the finding of the jury by motives extraneous to the cause before them.

Under the statutes of this State, the Judge should carefully avoid giving the jury any indication of his own opinion touching the facts of the case, or the guilt, or innocence of the prisoner.

The qualification of the verdict in capital cases should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility—which is to do their whole duty to the State as well as to the accused.

APPEAL from the First District Court of New Orleans, *Robertson*, J.

Morse, Attorney General.

Saucier, for appellant:

It is contended that, when the prisoner has accepted a juror tendered to him by the State, and the juror is sworn, that juror becomes one of his judges and can not be taken from him.—He is one of a branch of the Court. The State having once waived the right to enquire into the qualifications of a juror, upon the voir-dire examination, before presenting him to the accused, waives with it every objection which it might have urged to the juror. 2 Bay's Rep. 155. Graham on New Trials. *State* v. *Kennedy*, 8 Rob. Rep. 596.

In the case of the *State* v. *Cummings*, 5 Annual Rep. 332, wherein the objection was merely that the State had challenged a juror, after he had been accepted by the accused, but before he was sworn, this court said: "It seems to us most proper that the State should first exercise the right of challenge, for cause or peremptorily, and present the juror to the accused as a good and lawful juryman; that the accused should then exercise his rights, and that the State should not be allowed to challenge, after the juror has been accepted by the prisoner.

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But the rule for which counsel contends, namely, that the State is not allowed to challenge a juror after he has been sworn, is laid down in all the books. "The King can not challenge a juror after he is sworn, unless it be for a cause arising after he is sworn." Trials per Pais, page 190. 1 Chitty, 545–546. Hawkin's Pl. of the Cr. v. 2, page 568. Graham on New Trials, ch. 2, under the head, "For irregularity in empannelling the jury":—"If a juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworn. 3 Thomas' Coke, p. 524." It is indeed useless to cite further authority on this point: it is supported by every work that treats of the trial by jury."

The court claims the power, in order to "attain" and "maintain justice," to order jurors to stand aside, even after they have been sworn, and for a cause that existed before they were sworn. It is submitted that the court has no such power, and that the best way to "attain" and "maintain justice" is to follow the rules and forms of the law.

But assuming that the objection to the two jurors, set aside in this case, was not too late, the defendant contends that it is not valid. They were ordered to stand aside, because they were opposed to capital punishment. Now, sentence of death does not necessarily follow conviction on a charge of murder; another punishment is provided by law; namely, confinement at hard labor, in the penitentiary, for life, when the jury return a qualified verdict, i. e. "Guilty without capital punishment," which it is lawful for them to do in all cases, where the punishment donounced by law is death. (Acts of 1846, No. 139, p. 118.) The said jurors were then "good for the State," and should not have been discharged from the consideration of the case.

As to the point embodied in bill of exceptions, marked B, that the Judge *a quo* admitted, in evidence against the accused, the dying declarations of the deceased, when it appeared in evidence that she was not, at the time of declaring, in a condition to realize the sense of impending dissolution, which is supposed in law to supply the place of an oath, it is submitted to this court, on citing Greenleaf on Ev. 156, 157, 158.

Again, the Judge said to the jury that they had no right to qualify their verdict, unless there were mitigating circumstances in the case. The law says: "That in all cases where the punishment denounced by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto "without capital punishment." Acts of 1846, p. 118. The judge, in an addition to the bill under consideration, says he did not say that the jury had no right to qualify their verdict, unless there were mitigating circumstances in the case, but that he said "it was not right to qualify their verdict, &c." Counsel is confident that, on examining the record on this point, this court will take the facts to have been as stated in the body of the bill.

SPOFFORD, J. An unqualified verdict of guilty having been found against the prisoner, under an indictment for murder, he was sentenced to death.

Having appealed to this court, he seeks to reverse the sentence and to procure a new trial, for various alleged errors in the proceedings below.

We are of opinion that the Act of May 29, 1846, authorising juries, in capital cases, to qualify their verdicts, by adding "without capital punishment," has not changed the pre-existing jurisprudence which held it to be good cause of challenge on the part of the State, in such cases, that the juror had conscientious scruples about inflicting the punishment of death. *The State* v. *Kennedy*, 8 Rob. 594. If the Legislature intended to change the law in this respect, such intention should appear by necessary implication from the statute itself.

The statute allows jurors, in a specified class of cases, to render a verdict in two forms; if they have conscientious scruples against either form, they cannot carry into effect the whole law, and therefore do not stand indifferent between the State and the accused.

But, while we do not think the court erred in allowing their challanges for cause, we find error, which may have prejudiced the prisoner, in that portion

of the Judge's charge to the jury, which is embodied in the following bill of exceptions: "Be it remembered that on the trial of this cause, the Judge, in his charge to the jury, and at the beginning and in the course of his said charge, stated to the jury that cases of murder were fearfully numerous in this city; that a conviction on a charge of murder had ceased to be a cause of excitement, and had become a common affair of almost daily occurrence; that confinement in the State Penitentiary for life, was no adequate punishment for the crime of murder, and that juries had no right to qualify their verdict unless there were mitigating circumstances; that convicts, in the penitentiary, seldom served out their term when confined there for life; that a late Governor of this State had pardoned almost every body, and that convicts were always in the hope that, after a few years, they would appeal to a clement executive, and that none but capital punishment would put a stop to the practice now common of man and woman killing; that he, the Judge, on a late visit to the penitentiary had been told, by parties sentenced by him, inmates of the State Prison now, that they hoped in a short time to come out; to which charge the counsel for the defendant objected, &c."

It is obvious that the charge as above detailed, embraced several matters of fact within the personal knowledge of the Judge, which would not have been admissible in evidence, had they been offered on the trial, which did not contribute in any way to the elucidation of the law applicable to the case, and which yet had a tendency to influence the finding of the jury by motives extraneous to the cause before them.

If there could be a doubt under the English common law, with regard to the propriety of such a charge in a criminal case, the legislative enactments of Louisiana would compel us, however reluctantly, to say that it was erroneous. The Act of April 30, 1853, (Sess. Acts, p. 249,) declares "that in his charge in criminal cases, the Judge must limit himself to giving the jury a knowledge of the law applicable to the cause submitted to them." And the Act of May 30, 1846, (Sess. Acts, p. 118,) had previously declared "that in all cases where the punishment denounced by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto "without capital punishment," and that whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall only be sentenced to hard labor for life, in the State Penitentiary."

Under these statutes, the Judge should carefully avoid giving the jury any indication of his own opinion, touching the facts of the case, or the guilt or innocence of the prisoner.

And the qualification of the verdict should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused.

We are not insensible to the public evils, deprecated by the District Judge, and which naturally provoked the strong expressions contained in his charge.

But we are sitting as Judges, to apply the laws as they are to a particular controversy, growing out of facts, not as legislators to originate and prescribe general rules for the future. If existing laws are found to work badly, the remedy is to be sought at the hands of the power which enacted them. Whilst they remain upon the statute-book, they must be obeyed by the courts without reference to their expediency.

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It is, therefore, ordered that the judgment of the District Court, in the case of the *State* v. *John Melvin*, be avoided and reversed, the verdict of the jury set aside, and the said cause remanded for a new trial, according to law.

MOONEY & VAIL *v.* BRIG HONDURINO AND OWNERS.

Privilege for wages of crew is prescribed by sixty days. The rule is the same as to the furnishers of supplies. Such items of both as fall within sixty days are allowed, rateably. C. C. 3206.

APPEAL from the Second District Court of New Orleans, Morgan, J. *Mix*, for plaintiff and appellant. *G. & C. E. Schmidt*, and *Race & Foster*, for defendant.

BUCHANAN, J. The plaintiffs seized the Brig Hondurino and have a privilege by their seizure which entitles them to be paid first, unless some other creditor has a higher right by the nature of his claim: and such, are the claims for wages. But wages are only privileged for sixty days previous to seizure. See case of *Blanchin* v. *Fashion*, 10th Ann. There is no privilege in favor of the seamen, for their return passage to Omoa. After the wages, the privileges of the appellees *Barrois*, and *Marshall & Coxe*, for supplies, (also limited to sixty days,) are to be paid rateably with plaintiffs, according to Art. 3205 of the Civil Code. The claim of *Marshall & Coxe* is wholly within sixty days, but that of *Barrois* is within that time only for about one-half of its amount.

It is therefore decreed, that the judgment of the District Court be amended, and that the proceeds of the Brig Hondurino be distributed according to the annexed schedule, the appellees and appellants, paying each one-half the costs of appeal.

Distribution of proceeds of Brig Hondurino:

1st.	Costs of court and Sheriff's fees	$	
2d.	Wages—Willlam Smith	70 00	
	James Brown	30 00	
	James Rooney	30 00	
	Fred. Jones	30 00	
	Henry Ducknel	30 00	
	Pedro Chaburria	30 00	
	Reed Green	30 00	
3d.	Supplies—V. Barrois	92 38	
	Marshall & Coxe	238 29	
	Mooney & Vail	1927 27	$2257 94

Abraham Levi *v.* A. G. Penny.

Certain slaves were sequestered and bonded by intervenors, on the written consent of plaintiff's counsel that the slaves should be delivered to intervenors, "they having given bond for said negroes as co-administrators, the plaintiff being satisfied that the negroes would be forth-coming at the termination of the suit." A second writ of sequestration was granted for the reasons set forth in the first application and on motion it was dismissed.—*Held:* The second sequestration was properly dismissed—because, by the bond on file which the plaintiff approved, the property sequestered had been released, and no additional grounds had been shown to authorize the subsequent seizure of the same property.

APPEAL from the District Court of East Feliciana, *Ratliff*, J.

Muse & Hardee, and *McVea*, for plaintiff and appellant. *G. S. Sawyer*, for defendant.

Lea, J. (Merrick, C. J., recused himself.) In this case the defendant is sued upon certain promissory notes, secured by an act of mortgage, executed by him and bearing upon several slaves which have been seized under a writ of sequestration issued herein. The suit is brought against the defendant directly, in his own name, for a debt alleged to be due by him, which the plaintiff seeks to enforce upon property, as the petition sets forth, belonging personally to the defendant.

The defendant, appearing in his capacity of natural tutor of his minor children, moved the court to set aside and dissolve the sequestration on the ground: 1st. That the reasons set forth in the petition are insufficient to create any reasonable apprehension that the defendant intended to remove the said property out of the State; 2d. On the ground that the defendant did not intend to remove the slaves out of the State and that said *Levi* had no legal mortgage in said negroes, or that, if the same ever existed, it has been cancelled and annulled by the sale of the negroes at Sheriff's sale; 3d. That the negroes sequestered belong to the succession of *S. A. Penny*, the deceased wife of the defendant, and that they are held by the defendant in his capacity of natural tutor of her minor children and that the plaintiff should have proceeded by the hypothecary action.

It is further urged on behalf of the defendant that five of said slaves were the separate paraphernal property of said *S. A. Penny*.

The under tutor of the minor heirs of *S. A. Penny*, and one of the heirs of age (*Mrs. Foster*) also intervene and, joining in the motion to dissolve the writ, urge the further ground that there is no legal bond to serve as a basis of the writ, the same not being signed by the plaintiff, nor by any one authorized for him. At a subsequent period of the proceedings *Ann L. Foster* and her husband, appearing in the capacity of co-administrators of the estate of *S. A. Penny*, intervened, alleging title in the succession administered by them to the sequestered slaves and claiming the same. They join in the motion to dissolve and adopt and reiterate the grounds set forth by the defendant and under tutor. In the mean time however, on a motion to be allowed to bond the slaves, made by *Mrs. Foster* and husband as co-administrators of the succession of *Mrs. Penny*, the plaintiff's counsel gave their written consent that the slaves sequestered at plaintiff's suit should be delivered to *Foster* and wife, they "having given bond for said negroes as co-administrators, the plaintiff being satisfied that the

negroes would be forth-coming at the termination of the suit." Neither the bond nor a copy of it is on file, we must assume however, that it was such a bond as the law requires on the release of sequestered property, the plaintiff having admitted its existence and expressed himself satisfied therewith. Acting upon this consent, the property was released by the Sheriff.

But, subsequently thereto, the plaintiff filed another petition in which he alleges that for the reasons set-forth in his first petition he prays for an alias writ of sequestration, which was accordingly granted. It is unnecessary to recapitulate all the grounds urged by the co-administrators and by the defendant in support of the motion to set aside this second writ of sequestration.

We concur with the District Judge that the written consent of the plaintiff's counsel furnished a judicial recognition, (at least for all purposes affecting the legal custody of the slaves,) of the capacity of co-administrators and of their rights as third persons in possession, who had been permitted to bond property under sequestration after having furnished bond with satisfactory security as provided by law.

No new fact is set forth in the second petition showing any change in the condition of the parties which would justify a second resort to the conservatory process of the law. It has been urged that the written consent was not acted upon, that the property was not delivered to the co-administrators by the Sheriff, but to the defendant *Penny*. To meet this argument, it is sufficient to refer to the fact that the intervenors recognize their liability on the bond and claim the property in virtue of their possession under it. It cannot be pretended that they would not be liable upon the bond thus given and thus judicially recognized.

We think there was no sufficient ground for the issuance of the second writ. Under the pleadings and judicial admissions on file the possession of *Penny* must be considered that of the intervenors. As respects the proceedings had upon the first writ we think no action on the part of this court is required, the second writ alone was set aside by the decree of the court. The first writ as we understand the decree is maintained inasmuch as the property is ordered to be delivered up to the possession of the administrators of the succession of *A. Penny* to be held "according to the terms of the written consent of the plaintiff, to be found on file in this suit, of date of the 1st May, 1855," and the appellees have not asked for any amendment of the decree in their favor.

We think this fact should however be so embodied in the decree as to relieve the parties from all uncertainty with reference to their respective rights.

It is, therefore, ordered that the decree appealed from be amended so as to read as follows:

It is ordered that the alias writ of sequestration issued herein be set aside and that the property sequestered by the Sheriff be delivered into the possession of *J. Foster* and wife, co-administrators of the estate of *Mrs. Sarah A. Penny*, deceased, to be held by them according to the terms of the written consent of the plaintiff on file, dated 1st May, 1855, and that the plaintiff pay all costs of proceedings incident to the said alias writ of sequestration, together with the costs of this appeal.

Heirs of Stephen Henderson *v.* Rost & Montgomery, Executors.

For former decisions as to the construction of the same will, see 12 Rob. 549; 5 An. 441; 7 A. 692.

In this case the court determined to abide by every thing decided in the above recited cases, as having settled the law for the parties to this suit.

At the death of the testator the slaves, which he directed by his will to be emancipated, acquired instanter the condition of *statu liberi*, and every child of a woman who had been his slave followed the condition of its mother, and became free when she became free. Such child would be free at the time fixed for the emancipation of its mother, even had she died before that time. C. C. Art. 196.

Under the terms of the testator's will, and the above recited decisions of the Supreme Court, these *statu liberi* would become free at the expiration of the time designated by the testator without any formal manumission, but upon the express condition that, upon their refusal to go to Liberia at the time fixed for their emancipation, or upon their return after having gone thither, they should forfeit to the heirs of the testator the disposition of his will, and become slaves again.

APPEAL from the Fourth District Court of New Orleans, *Strawbridge*, J. *Briggs*, for plaintiff and appellant. *P. Soulé*, for defendant.

Buchanan, J. The will of *Stephen Henderson* has been the subject of several decisions of this court. See 12 Rob. 549; 5 An. 441; 7 An. 692.

The only matter which is supposed to still require adjudication in relation to this testament is the validity and effect of its 6th, 7th and 8th articles.

The whole will is copied in a note to page 458 of the 5th volume of the Annual Reports, to which we refer for the details of the articles of the will in question. They treat of the management of the testator's slaves after his death; his intention being evident, that his slaves should be kept together, and worked according to a sort of socialist scheme of his own upon one of his plantations, which was to remain, in perpetuity, a part of his succession. In the theory of the will, this socialist community of blacks, thus established in the midst of our slave population, was divided into two classes: one of which was composed of all the testator's slaves in existence at the time of his death, of certain other slaves in which he had an undivided half interest, (the other half being owned by *Henry Doyal*,) and of all children born of the testator's slaves within five years after his death.

The second class was composed of the children and descendants of the testator's slaves, to be born after the expiration of five years from the date of his death.

As to the first of these two classes, the will provided for its gradual conditional emancipation in the following manner: Five years after the testator's death, ten slaves, five females and five males, were to be selected by lot, and furnished with a free passage to Liberia, and one hundred dollars in money, provided they were willing to go to that country. At the end of ten years, twenty others were to be drawn and sent off in like manner. At the end of twenty-five years from the testator's death, all the survivors of the slaves born before his death, and all their descendants born within five years after his death, being the whole of the first class remaining in the hands of his representatives, were to be sent off to Liberia, provided they would consent to go.

As to the second class, they were to remain forever attached to the Destrehan plantation, or Dunblane, as a part of the socialist community of that projected industrial emporium.

HENDERSON v. ROST.

We are spared, by the labors of our predecessors, the decision of some very important questions in relation to the emancipation of *Henderson's* slaves, which would have offered great difficulty in their solution, and upon which, we are free to confess that, we doubt whether we should have come to the the same conclusion as they have done had the points been of first impressions. But we have determined to abide by everything that has been said by our predecessors in this particular case, considering their decisions as having settled the law for these parties. Thus, Judge Martin, as the organ of the court, in 12 Rob. 451, says: "The draft and transportation, as ordered by the testator, were legitimate objects of his last will and testament."

Under this dictum, we consider the legality of the dispositions of the will in relation to the drawing of lots at the expiration of five and ten years, and the transportation to Liberia of the successful competitors, as no longer an open question.

Again, in 5th Annual, 468, we read: "And it is further decreed, that the provision in the said will contained, touching the liberation of the slaves attached to the Houmas plantation, if they should hereafter be decreed valid, can only operate upon such portions of said slaves as may, on a proceeding in the nature of a judicial partition in kind, fall to the succession of *Stephen Henderson*, the testator, and not upon the portion of said *Doyal*." We take it to be here settled, that the projected emancipation of all the slaves in which the testator had an undivided half interest, is to be construed (upon the principle *ut res magis valeat quam pereat*) into an emancipation of those slaves only, which, upon a partition with the other co-proprietor, should enure, in full and undivided ownership to *Henderson's* succession.

Considering these points as settled, which, as already observed, would have offered great difficulties to our minds had we felt ourself called upon to decide them, we now proceed to deal with the status of the slaves of *Henderson* under the very peculiar dispositions of his will. And at the threshhold we are met by the principle of law *le mort saisit le vif*. The moment the breath left *Mr. Henderson's* body, he ceased to be owner of everything which it had been the labor of his life to accumulate, his slaves included. By last will, he could enfranchise his slaves, either absolutely or *sub modo*. It was his pleasure to do so *sub modo*. At the moment of his death, therefore, the condition of his slaves were fixed. They were *statu liberi*—the females were *statu libera*. Every child born after the death of *Henderson*, of a woman who had been his slave, and who, consequently, was an object of his testamentary dispositions, followed the condition of its mother. It became free when its mother became free. And by the humane dispositions of our law, such child would become free at the time fixed for the enfranchisement of the mother, even if the mother should die before that time. C. C., Art. 196.

We are next to examine what were the conditions annexed by *Henderson* to the enfranchisement of his slaves. By the terms of his will, as construed by us and by our predecessors, the *statu liberi* were all to be free at the expiration of twenty-five years from the testator's death. But they were only to be free on condition of going to Liberia with their own consent. Let them refuse to go to Liberia, and they remain slaves. And it is to be remarked that the testator has declared his will to be, that they return to slavery, if ever they return back to this country. Upon this clause Judge Martin seems to have based his conclusion (12 Rob. 552,) that the provisions of the will render a formal manumission of these slaves

unnecessary. In fact, a formal emancipation of the slaves would, perhaps, have rendered their subsequent reduction to slavery, in case of their return from Liberia, impracticable, as the law stood at the date of the will. Whereas, the simple transportation of the slaves, with the express condition that they were not to return, while it would ensure to them the possession of their liberty in a country where slavery did not exist, would in no manner deprive the owner of the right of reclaiming their services, if they should violate the condition upon which alone he had consented to dispense with his legitimate claim to those services.

It is, therefore, adjudged and decreed, that all the slaves of which the late *Stephen Henderson* was the undivided proprietor at the time of his death, and all those of whom he was co-proprietor, by undivided halves, with *Henry Doyal*, and which, by partition in kind with said *Doyal*, have fallen or may fall, in an undivided ownership, to the succession of *Henderson*, shall be sent to Liberia by the executors of *Henderson*, at the expiration of twenty-five years from said *Henderson's* death, and at the costs of his estate, provided they consent to go. But if any of said slaves should refuse to go to Liberia, at the expiration of the term aforesaid, and upon the conditions in the will specified, then the slave so refusing shall be deemed as having forfeited all claim to this disposition of *Stephen Henderson's* will; and it is further decreed, that the transportation of any of said slaves to Liberia, as aforesaid, shall not bar the heirs of *Stephen Henderson* from claiming the said slaves as their property, in case he or she shall thereafter be found within the limits of the State of Louisiana. It is further decreed, that the costs in both courts be paid by the succession.

C. Dufour applied for a re-hearing, which was refused.

BROWN *v.* UNION BANK.

L., a member of the firm of S. P. & Co., pledged to B. 300 shares of Union Bank stock. *Pickersgill* obtained judgement against S. P. & Co., and seized and sold the stock. B. bought it by his agent. The agent refused to comply with the terms of adjudication, and gave his written consent to let the Sheriff resell. S. G. & Co. purchased it at the second sale; but, as the bank refused to transfer the stock, the Sheriff returned the writ, "nothing realized." After the sale, B. filed his third opposition in the suit of *Pickersgill* v. S. P. & Co., claiming the proceeds under his act of pledge. He obtained judgment, which was appealed and affirmed. S. G. & Co. tendered the price of their bid to the Sheriff, and demanded the transfer.

B. sued the bank for the dividends, and to have the stock transferred to him. The bank called S. G & Co. in warranty.

Held: 1st. That the letter of B.'s agent consenting to the resale of the stock was a waiver by him of all objections to the sale, and the adjudication to S. G. & Co. was legal.

2d. The stock being so adjudicated, could not be divested from S. G. & Co. without a neglect or refusal to comply with the terms of the sale. The fact that they held the money in their hands while the opposition was pending, could not be construed into such refusal. It was not their fault that the bank refused to transfer the stock to them, and the Sheriff's return of the writ did not affect their title; the *mere act of adjudication* invested the purchasers with title—and the writ having performed its office, its return was a matter of course.

APPEAL from the Third District Court, of New Orleans, *Kennedy*, J.

L. Pierce and *Benjamin & Micou*, for plaintiffs and appellants. *R. H. Denis*, for defendants.

MERRICK, C. J. *James Brown*, the plaintiff, being a creditor (to a very large

amount) of *Peter Lapice*, among other things, to secure himself took a pledge of three hundred shares of the stock of the Union Bank. *Pickersgill & Co.* having obtained judgment against *Sylvian Peyroux et al.*; *Lapice*, being one of the firm, issued an execution on the same, and on the fifth day of March, 1850, seized upon the stock as the property of *Lapice*.

The bank stock on the 22d day of March, 1850, was adjudicated to *Levi Pierce, Esq.*, per account of *James Brown*, for thirteen dollars per share, but, he refusing to comply, it was, with the written consent of *Levi Pierce*, dated 27th day of March, 1850, as attorney for *James Brown*, re-offered for sale.

On the 23d day of March, four days previous to *Mr. Pierce's* letter, *James Brown* filed his third opposition to the Sheriff sale, and claimed the proceeds of sale under his act of pledge.

Shortly after the filing of the third opposition, viz: on the sixth day of April, 1850, the stock "was adjudicated to *James Sager*, for account of the firm of *Sager, Gardner & Co.*, at the price and sum of twelve dollars per share, making the sum of three thousand six hundred dollars."

To this part of the return, the Sheriff appends on the return of the writ on the 15th day of November, 1851, the following, which "amount (the price) the purchaser never paid: *Mr. Frey*, the cashier of the Union Bank, having positively refused to permit me to transfer the said shares on the books of the bank to the purchaser, I therefore say nothing was realized by the adjudication made on the 6th day of April, 1851." (1850).

The opposition of *James Brown*, in the case of *Pickersgill & Co.* v. *Sylvain Peyroux & Co.*, was decided in June, 1851, and judgment signed on the 8th day of November of that year, maintaining his opposition and decreeing that "the Sheriff pay over to the opponent the nett proceeds of the three hundred shares of the Union Bank stock *sold under* execution herein, after the payment of the costs."

Pickersgill & Co. appealed to the Supreme Court, and the judgment of the lower court was affirmed with costs.

On the third day of July, 1852, *James Sager*, through the agency of a Notary Public, tendered the amount of his bid to the new Sheriff, and demanded that he should make out a certificate of the adjudication in their favor, which the Sheriff declined to do, as he knew nothing personally of the affair.

It appears that *Gardner, Sager & Co.* were the agents of *Pickersgill & Co.*

On the 9th day of July, 1852, *P. M. Lapice* directed the Union Bank to pay to *James Brown* the dividends upon the stock, and to transfer the stock upon the books of the bank to him, as pledgee and purchaser of the stock, and at the same time notifying the bank that the adjudication to *Gardner, Sager & Co*, on the 6th of April, 1851, (1850,) had become null by the abandonment of the purchase and the return of the writ.

The suit is against the bank to compel the payment of the dividends and the transfer of the stock. *Gardner, Sager & Co.* were cited by the bank in warranty. Judgment was rendered in their favor, and *Brown* has appealed.

The court is of the opinion:

1st. That the letter of *Levi Pierce, Esq.*, as the attorney of *James Brown*, the pledgee of the stock, wherein he expressly authorized the Sheriff to proceed to the re-sale of the stock under the execution, was a waiver of all objections to the sale, if any existed, and the adjudication of the stock to *Gardner, Sager & Co.* was legal.

2d. That the stock being so legally adjudicated to *Gardner, Sager & Co.*, their interest could not be divested without a neglect or refusal to comply with the terms of sale on their part; that the holding the money in their own hands, they being the agents of *Pickersgill & Co.*, during the pendency of the opposition, without objection of any of the parties, cannot be construed into a refusal to comply with the sale; that the refusal of *Frey*, the cashier of the Union Bank, to transfer the stock on the books of the bank was not a fault attributable to *Gardner, Sager & Co.*, and that the Sheriff's return of the writ was without influence on their rights, because the *mere act of adjudication* by the Sheriff had invested the purchasers with title; and the writ, to the extent of the seizure made under it, had performed its office by the sale, and its return afterwards was a matter of course. *Perkins* v. *Dickson*, 4 Rob., 413.

Judgment affirmed.

GEORGE D. FIELDS *v.* HIS CREDITORS.

Articles 880 and 890 C. P. contemplate an amendment of the judgment in favor of the appellee, under an answer, only as against the appellant, and not as between one appellee and his co-appellees. If either of the appellees is dissatisfied with the judgment, he should appeal against his co-appellee.

Legal charges and wages of the captain and crew of a vessel are superior in rank of privilege to the claim for repairs of the boat. C. C., Art. 3204.

A contractor with the owner of a boat for its repairs, after repairing it, voluntarily delivered it to the Syndic of the owner who since the contract had gone into insolvency. *Held*, that this was an abandonment of the contractor's right to detain the boat until the debt due for repairs should be paid, and that he must look to his privilege alone.

C. C. 3204, C. P. 888, 890.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

T. Gilmore, for appellants. *Cox & Breaux*, for the insolvent. *Hennen, Ogden, Waples & Waples*, *Ivy* and *Collins & Wooldridge*, for opponents.

MERRICK, C. J. Shortly before the surrender of *Geo. D. Field*, he placed the steam towboat *Fashion*, then owned by himself, in the hands of *Hyde & McKie* to be repaired. While the boat was in their hands, he made a surrender of his property to his creditors, the only asset surrendered being the steamboat.

Hyde was appointed Syndic, and the boat was sold for cash. His partner, *McKie* became the purchaser, the price of the boat ($2,000) being left in his hands by order of the Syndic.

By the judgment upon the tableau of distribution but $614 99 were decreed to *Hyde & McKie*, although the repairs made by them upon the boat were estimated at $5,455 38, the Judge of the lower court having been of the opinion that certain other privileges enumerated in Article 3204 of the Civil Code were superior to that of *Hyde & McKie*.

Since the case has been before this Court on appeal, the opponent, *M. Gauthier*, has filed his answer to the appeal, claiming to be allowed $954 50 as a privilege for wood furnished the boat, and to be paid by preference over all other creditors.

FIELDS v. CREDITORS.

We think that Articles 888 and 890 of the Code of Practice contemplate an amendment of the judgment in favor of the appellee, under an answer only in those cases where the parties are all in relation to each other appellants and appellees, and not where the answer prays for an amendment of the judgment in favor of one appellee against his co-appellees as well as the appellant. If *M. Gauthier* was dissatisfied with the judgment, he ought to have appealed. It is therefore useless to examine his pretensions to an amendment of the judgment in his favor.

Hyde & McKie contend that in addition to their privilege they had a right to detain the boat in their possession, at the time of the surrender, against all persons, until the repairs made by them were paid for. They cite Article 2748 of the Civil Code and the case of *Gayarré* v. *Tunard*, 9 An. 254, Abbott on Shipping, &c., in support of this opinion.

It is not necessary to determine in this case whether the contractor, who repairs a steamboat, has the right to detain the boat or not under the law and authorities cited until he is paid, for we are of the opinion that when the boat was delivered to the Syndic, for sale, without objection, and sold by him, this right was abandoned and the parties relied upon their privilege alone.

The Judge of the District Court, we think, properly classed the appellants, under No. 8 of the Article 3204 of the Civil Code, and that legal charges, &c. and the wages of the captain and crew, &c. were superior in rank to the privilege of the appellants. *Scott* v. *His Creditors*, 3 An. 41.

Captain Miller's testimony was inadmissible to reduce the claim of opponents, but as in other respects he was impartial, or at most testifying against his interest, we do not think that the rejection of the inadmissible portion of his evidence can change the result.

Judgment affirmed.

ROBERT MCMASTER *v.* R. A. STEWART.

In an action of revendication for a slave, the parol declarations of defendant in regard to plaintiff's title, are inadmissible. The plaintiff cannot recover by the weakness of defendant's title it must be by the strength of his own.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J. *Foulhouse*, for plaintiff. *J. Henderson, Jr.*, for defendant and appellant.

MERRICK, C. J. This is an action of revendication brought to recover of the defendant a slave.

We think justice requires that this case should be remanded for a new trial. While the defendant complains that injustice has been done him by reason that he has been prevented from having a curator *ad hoc* appointed to represent the defendant in his demand in warranty, we find that the plaintiff has not adduced that clear proof which will enable him to recover, although the testimony makes it highly probable that such proof exists.

In this action, the plaintiff must recover on the strength of his own title. In the present case, the plaintiff has not shown title to the slave in controversy in

Rutherford, nor that he has himself *possessed* said slave long enough under his title, to acquire said slave by prescription. This defect in his testimony the plaintiff may be able to supply on a new trial.

In regard to the bills of exception, this controversy is between one of the parties to the act of sale from *James McMaster* to *R. A. Stewart* and a third person. The act of sale being set up by the defendant in his answer, is open to every means of defence in the hands of the plaintiff, without pleading the same otherwise than orally on the trial. We see therefore no reason why the plaintiff could not call upon the notary to prove any fact (the same being in other respects legitimate testimony) which is not contradictory to any statement made by him in the act, and we do not consider the testimony given contradicts anything stated in the act. Had the testimony of the notary been objected to on the ground that the parol declarations of *James McMaster* could not be offered in evidence to prove title in the plaintiff, it would have presented the question which we have to consider in the second bill of exceptions.

This bill was taken to the admission in evidence of the parol declarations of the defendant in regard to the plaintiff's title. We think this testimony should have been excluded. The plaintiff, as already observed, cannot recover by the weakness of his adversary's title, it must be by the strength of his own. Nor can the plaintiff perfect his title by the verbal admissions of his adversary; such proof being inadmissible. *Adams* v. *Gaynard*, 5 N. S., 250.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this cause be remanded to the lower court for a new trial, with leave to the defendant to amend by filing his demand in warranty and praying for and requiring the appointment of a curator *ad hoc* to represent the absentee, and it is further ordered that the plaintiff pay the costs of the appeal.

Mrs. Augustine Swain *v.* R. J. Barrow and William Elam—Swiney, Green & Co., Intervenors.

E constructed buildings for B. under a contract which was duly recorded. Afterwards, S., G. & Co. purchased the property and buildings at Sheriff's sale; E. drew a draft in favor of Mrs. S., on B., which was accepted by B. in consideration of the amount due for the buildings. Mrs. S sued E. and B. on the draft and claimed a privilege on the buildings; S., G. & Co. intervened. *Held:* E. had the right to claim from B. the amount due him for constructing the buildings, independent of the draft, and therefore no subrogation was necessary by payment of the draft or otherwise to enable E. to assert any rights which he might have asserted, had no such draft been given. There was no novation of the debt and no payment. E's rights against B.'s vendee were those of a mortgage creditor against property in the hands of a third person. Mrs. S. was entitled to judgment against B. and E. on the draft, but without privilege; E. to judgment against S., G. & Co., and with privilege.

APPEAL from the District Court of West Feliciana, *Merrick*, J.

U. B. & E. Phillips, for plaintiff. *Brewer & Collins*, for intervenors and appellants.

Lea, J. The plaintiff, the holder of a draft for the sum of $483, drawn by *William Elam* upon *Robert J. Barrow*, and accepted by the latter, claims from the drawer and acceptor the amount of the draft, with privilege for the payment thereof upon certain works or buildings constructed by *Elam* on the plantation of *Barrow*.

SWAIN v. BARROW.

The privilege is claimed on the ground that the consideration for which said *Barrow* accepted and promised payment of said draft, was a debt due by *Barrow* to *Elam* for the construction of the buildings hereinbefore referred to.

For answer, *Barrow* pleads the general denial and avers that the property upon which the privilege is sought to be enforced, was passed into the hands of *Swiney, Green & Co.*, of New Orleans, they having purchased the same at Sheriff's sale, on the 26th November, 1853.

The defendant *Elam* pleads the want of a legal presentment for payment at maturity, and moreover avers that the consideration of the acceptance of the draft was for work and labor done on the plantation of *Barrow*, under a contract duly recorded on the 26th March, 1853, the contract itself being dated on the 5th of the same month, by reason whereof he avers that he has a lien and privilege upon the work, buildings and materials on said plantation, which he prays may be enforced in case he should be held liable to pay the draft sued upon; that the purchasers of the plantation acquired the same with full notice of his recorded claim, and are therefore liable to pay the same; and in case he should be decreed to be liable upon the draft, he prays for judgment against *Barrow* for the amount of the draft, as also against *Swiney, Green & Co.*, who are intervenors herein, with privilege upon the buildings erected under his contract with *Barrow*, on the plantation purchased by them.

Swiney, Green & Co., by an intervention filed in the proceedings, contest the privilege of the plaintiff on the ground that *Elam* himself, under whom they claim, had no privilege, and if he had, that the same has been extinguished by novation. For answer to the petition of intervention, the plaintiff alleges the simulation of the sale to the intervenors and the continued possession of the defendant *Barrow* as owner.

Upon these numerous issues, the Judge of the District Court rendered judgment in favor of the plaintiff and against *Barrow* and *Elam* in solido, for the amount of the draft sued upon, but rejecting her claim for privilege and a further judgment against *Swiney, Green & Co.*, and in favor of *Elam*, for the like sum, with mortgage on the buildings situated on the property purchased by the said intervenors, with stay of execution until he shall have paid the debt sued upon or become otherwise subrogated to plaintiff's rights therein.

Swiney, Green & Co. have appealed.

It is unnecessary to enquire whether there is any error in the judgment rendered, except as far as it affects *Swiney, Green & Co.*, the appellants, the parties having acquiesced in the judgment so far as they are concerned.

No exception having been taken to the form of the proceedings, though somewhat irregular, and the case having been tried upon the issues as presented upon evidence received without objection, the question to be determined, as presented to this court by the appellants, is, whether *Elam* has a claim upon *Swiney, Green & Co.* for the amount of the draft sued upon, with mortgage as allowed by the judgment.

There is no privity between the plaintiff and the appellants. The liability of *Elam* to the plaintiff cannot affect the rights of the former against the intervenors. It is true that if *Barrow* had paid the draft, the claim of *Elam* under the building contract would to that extent have been extinguished. The fact, however, that this draft was not paid, taken in connection with other testimony, shows that there remains an unsatisfied balance of that amount yet due to *Elam* upon *Barrow's* contract with him; but this liability is independent of

the draft, and therefore no subrogation is necessary by payment of the draft or otherwise, to enable *Elam* to assert any right which he might have asserted had no such draft been drawn. *Elam* had the right to claim from *Barrow* the balance due him at the time the draft was drawn, or at least at the time it matured. There was no novation of the debt and no payment. *Elam's* rights against *Barrow's* vendee were those of a mortgage creditor against property in the hands of third persons purchasing with notice, the building contract having been recorded in the mortgage office, some months prior to the purchase, by the intervenors, who at the time of the purchase retained in their hands, out of the price, a sufficient amount to liquidate *Elam's* claim. No change in the judgment has been prayed for in favor of *Elam* We are therefore unable to place him in a better position than he is placed by the judgment appealed from, and if the foregoing views are correct, the appellants have no ground of complaint.

Judgment affirmed.

THE STATE *v.* DUNN, Administrator, et al.

Suit against Sheriff's Surety, as Tax Collector for 1854.

The obligations of the sureties on the Sheriff's bond, held not to be affected by the erasure of the unmeaning phrase "for a like sum," nor by the interlineation of the names of the last two sureties.

The date of such instrument not being of the essence of it, a change of the date, so as to correspond with the date of its acceptance by the parish officers, could not invalidate it.

The sureties on such bond may recede before they have been accepted, and until they give notice of their wish to recede, they may be accepted After acceptance the contract was perfect, and no party could retract.

The addition of two other sureties separately bound, could not affect the liability of the first eight, who continued to be severally bound, each for the sum and upon the conditions he had specified, and no others.

Where a Sheriff, by failure to give bond as Sheriff within the time prescribed by law, had thereby forfeited his capacity as Tax Collector, and afterwards he executes a bond as Sheriff with sureties and is made Collector of Taxes by appointment of the Recorder of the parish—*Held:* That the sureties were bound to know that he had forfeited his right as Tax Collector at the time of the execution of his bond, and that he could only be restored by the Recorder's appointment, and were not therefore discharged.

A defaulting Sheriff may be appointed Tax Collector after exhibiting a discharge from the proper officer of the State.

Sureties on a Sheriff's bond cannot be permitted to plead ignorance of a defalcation of the Sheriff at the time they signed the bond. The records of the Auditor's and Treasurer's office are open to the public, and they might have inquired into the State of his account. It was not the duty of the Auditor and Treasurer, who were neither parties nor privies to the bond, to hunt up the sureties and serve them with a copy of the Sheriff's account.

In this contract with the sureties there was no warranty by the State that the Sheriff was not a defaulter; and an Act of the Legislature extending to the Sheriff time of payment, is no fraud on the sureties, who only guarranty his future fidelity.

Code, 3006.

APPEAL from the District Court of East Feliciana, *Ratliff*, J.

Kernan, for plaintiff. *Muse & Hardee* and *Pond*, for defendants and appellants.

SPOFFORD, J. The appellants, sureties on the bond of a late Sheriff of the parish of East Feliciana, seek to be relieved from liability for his defalcation as a State Tax Collector, under the assessment roll for the year 1854.

STATE v. DUNN.

We do not find that there was any material alteration in the bond. The sum for which, and the conditions upon which, each of the sureties bound himself severally, were in no wise changed by the erasure of the unmeaning phrase, "for a like sum," and the interlineation of the names of the last two sureties. The date of the acceptance formed no part of the instrument, as at first signed; that date, having been endorsed with reference to a subsequent acceptance to be made by the three parish officers to whom the approval of the bond had been confided by law, was properly changed, so as to show the true date of the acceptance.

The eight sureties who signed on the 14th of March, 1855, obviously signed with a view to the contingency that they might afterwards be accepted or refused by the officers, two of whom were absent when they signed. Until the officers accepted them, they were at liberty to recede; until they gave notice that they wished to recede, the officers might accept them; they gave no such notice, but left their proposition open until the officers finally and formally accepted it, on the 29th of March, 1855. Then the contract was complete and no party could retract.

The two other sureties came into a similar bargain, on the last named date, each binding himself separately for a like sum, could not affect the liability of the first eight who continued to be severally bound, each for the sum and upon the conditions he had specified, and no others.

But, it is contended by the sureties, that the bond is void as to them, because it recites, that "whereas the said *A. J. Law*, Sheriff, *and by law collector of State taxes* in the parish of East Feliciana, will receive the assessment roll for the parish, on the acceptance of this bond, and his producing to the parish Recorder his receipt from the proper officer, showing the full payment of the tax heretofore collected," &c. The objection is, that he was held forth to them as Tax Collector, by virtue of his office of Sheriff, or by law, when in truth he only became collector by the appointment of the parish Recorder, having lost his right under the law, by failing to give a timely bond. The sureties were bound to know the law. Knowing it, they knew, when they signed the Sheriff's bond, on the 14th and 29th of March, 1855, that his office as Tax Collector was already vacated, by his neglect to give bond and security on or before the first Monday of the preceding January. Act 21st March, 1850, sec. 40, p. 139.

They knew also that he could only be restored to the place of Tax Collector by the appointment of the parish Recorder, and they bound themselves for his faithful conduct, when he should be so restored.

But they say it was not competent for the Recorder to appoint him, on account of his previous default, and that as he was never lawfully Tax Collector, they are not bound for him.

If they could be permitted to set up such a defence, the facts would not sustain them. No law has been cited, which rendered the Sheriff, although he had been a defaulter, incapable to receive the appointment after producing a receipt for the public money with which he had been previously entrusted. He was not appointed until he produced such a receipt. The only restriction laid upon the parish Recorder, by the 30th section of the above cited Act is, that he "shall not issue the warrant for collection nor deliver the roll to any person who may have been previously charged with the collection of public money, *until* such person shall exhibit a discharge from the proper officer of the State."

Being a temporary defaulter, is not a perpetual bar to the right of holding office. The disability is purged by the production of a receipt, showing that the money has been paid. Constitution, Art. 28.

Again: the sureties contend that they entered into the contract through error, induced by the fraudulent conduct of the officers of the State, and that this should absolve them.

The substance of this branch of the defence, if analysed, amounts only to an assertion that when they signed the bond, they did not know that their principal was in default to the State for a portion of the taxes of the year 1853, but that certain officers of the State, knowing it, suppressed the fact.

But it is highly probable that the sureties knew it also; first, because their principal was so tardy in giving his bond, the law requiring it to be given on or before the first Monday of January; and, secondly, because the bond intimated upon its face, that he would only be entitled to receive the assessment roll upon producing to the parish Recorder his receipt from the proper officer, showing the payment of taxes heretofore collected, an expression which implies that no such receipt had yet been procured.

And if they did not know it, it was their own fault, and they cannot complain. If *Law* was not in arrears for the taxes of 1853, when they offered to go upon his bond, he must have had his tax receipt or quietus; they could readily have satisfied themselves upon the point by demanding its exhibition as a condition upon which they would become his securities; moreover, the records of the Treasurer's and Auditor's offices are open to the public, and they might have inquired into the state of his accounts there. They volunteered to indemnify the State for the future conduct of their principal; the Auditor and Treasurer, who knew them not, who were neither parties nor privies to the execution of the bond, were not bound to hunt them up and serve a copy of *Law's* accounts with the State upon them.

They complain that the Auditor of Public Accounts did not require the District Attorney to proceed by rule against the Sheriff for his former default, as prescribed by the 62d section of the Act of 21st of March, 1850, p. 144. If he had done so, *non constat* that they would have been the wiser; but this law is directory, and, as a general principle, *laches* is not to be imputed to the government. *United States* v. *Kirkpatrick*, 9 Wheaton, 735; *United States* v. *Van Zandt*, 11 Wheaton, 134. In the contract with the sureties, there was no implied warranty that the State had exhausted all its remedies against *Law* for previous defaults, or that there were no previous defaults.

The State had a right to extend the time for him to pay his taxes previously due, and release him from the penalty, although the policy of such special legislation may well be doubted. The Legislature exercised that right, and on the 14th of March, 1855, (the day the first sureties signed the bond,) an Act was approved for his relief (Session Acts, p. 207), allowing him thirty days from that date to settle, upon the same terms as if the taxes of 1853 had been paid in the time prescribed by law. In accordance with this Act, he made his settlement. The indulgence of the Auditor was thus approved by the Legislature. But this action cannot be construed as a fraud upon the sureties, who undertook to guaranty his faithfulness in future.

The Recorder, Clerk and President of the Police Jury, who accepted and approved the bond, practised no deceit upon the sureties, and had nothing to disclose, more than the sureties knew themselves.

The views we have expressed upon this part of the case, are amply supported by the cases of the *Police Jury of St. Landry* v. *Haw*, 2 L. 42, and the *State* v. *Hays*, 7 Ann. 118.

Finally: it is urged that the bond is void as to the sureties, because they assumed a more onerous obligation than their principal, the aggregate amount of their liabilities being larger than the sum for which the Sheriff was bound.

"The suretyship which exceeds the debt, or which is contracted under more onerous conditions, shall not be void, but shall be reduced to the conditions of the principal obligation." C. C. 3006. So this defence could not avail, if the allegation on which it is based were strictly true. But in reality, each of the sureties exercised the privilege of the law concerning official bonds of this class, and contracted a several obligation towards the State in a sum which he specified, and beyond which he could in no event be made liable. So that no surety has assumed an obligation more onerous than his principal; the sum specified by each being far less than that for which the Sheriff obligated himself.

It is unnecessary to notice the bills of exceptions.

Judgment affirmed.

GOVEY HOOD *v.* JOHN H. MARTIN.

A part of the internal improvement lands granted to this State by Act of Congress of September 4, 1841, were located by agents of the State, and for the sale of the unlocated lands an office was created by Act of the Legislature of 1844, the Register and Receiver being authorized to issue warrants for such lands. Under this Act and that of 1847, purchasers of these land warrants become the agents of the State for the location of so much of the internal improvement lands as was indicated by the warrant.

The patent issued, pursuant to the approval of such location, could only issue in favor of the person holding the warrant under which the location was made. It cannot be supposed that the Legislature intended to confer upon the Governor the power to grant a patent to any other person than him to whom the State had sold the warrant.

APPEAL from the District Court of Carroll, *Snyder*, J.

Selby, for plaintiff and appellant. *J. B. & C. T. Bemiss*, for defendant.

MERRICK, C. J. Both plaintiff and defendant claim title to the tract of land in controversy in this case by patents issued by the Governor of Louisiana.

The plaintiff's patents are the oldest in date, having issued on the 15th day of December, 1850. The defendant's patents bear date 23rd of December, 1851.

It is contended in this court, that plaintiff's patents were obtained by fraud and contrary to law and that therefore defendant's title ought to prevail against the plaintiff.

The tract of land in controversy has been in cultivation since 1828. In May, 1839, it was sold at probate sale as property belonging to the succession of one *Maulding*, and bought by one *Jones* in partnership with *J. N. P. Richardson*. *Govey Hood* appears to have attested the adjudication as a witness.

Jones remained in the possession of the place until his death. The defendant married the widow of *Jones*, and having put further improvements upon

the property, has been in the possession of it ever since. By an Act of Congress approved September 4, 1841, 500,000 acres of land were granted to the State of Louisiana to be sold at a price not less than one dollar and twenty-five cents per acre, and to be applied to objects of internal improvement, specified in the Act.

A part of these lands were located by agents of the State. In 1844, the Legislature created an office for the sale of the unlocated lands, under the direction of a Register and Receiver. It directed them to sell all of the internal improvement lands belonging to the State of Louisiana, under the same rules and in the same manner as the lands belonging to the United States are sold.

The Register and Receiver were authorized to issue their warrants for lands not yet located. The minimum price was fixed at three dollars per acre.

It was made the duty of the Governor to issue patents for all the lands located by warrants when contemplated to be sold by that Act, "whenever he shall be satisfied that the same have been properly located. Acts 1844, p. 61.

In 1847, another Act of the Legislature was passed, providing for the purchase of the internal improvement lands by pre-emption in certain cases.

The price of the located lands was reduced to one dollar and a quarter per acre, and the price of warrants to locate upon the remaining portion of the land granted by the Act of Congress and which had not been located by the State, was fixed at the same rate.

The seventh section of the Act is in these words. "Be it further enacted, etc., That it shall be the duty of the Governor of the State to issue patents to purchasers on the payment of the purchase money in case of pre-emption or private entry of lands already located and on the approval of the location in the case of the purchase of a land warrant." Acts 1847, p. 47. In 1855 certain sections of the Act of 1847 were re-enacted. Acts, p. 401. It will be seen from those Acts of the Legislature that the purchasers of this class of land warrants became the agents of the State for the location of so much of the lands granted by Congress to the State of Louisiana as was indicated by the warrant.

The course of proceeding seems to have been to locate the lands in the United States Land Office in the District where the same were situated. This location, the warrants being surrendered, was then communicated to the Commissionner of the General Land Office at Washington and by him referred to the Secretary of the Interior for approval. If the Secretary of the Interior approved the location, the Governor was notified of the same and the patent was issued.

The proof in this case establishes clearly that in August, 1850, more than four months previous to the issuing of the patents to the plaintiff, the defendant located the lands in controversy under warrants Nos. 415 and 607. They were embraced in list No. 25.

The approval of the Secretary of the Interior of list No. 25 was communicated to the Governor by the Commissioner of the General Land Office, but without the name of the defendant who had located the land.

By this means, the plaintiff was enabled to obtain a patent for the lands located by the defendant and designated as list No. 25.

This improper use of the location of the defendant's land warrants led to a correspondence between the respective departments, and finally patents were

issued in the name of the defendant, bearing date more than a year subsequent to the plaintiff's patents.

The act of the Governor in issuing the patent was only ministerial. It was to be issued "on the approval of the location, in the case of a land warrant." This we think should be construed to mean that the patent shall issue in favor of the person who held the land warrant under which the location was made. It cannot be supposed that the Legislature intended to confer upon the Governor the power to grant a patent to any other person than him to whom the State had sold the warrant, and who acting on the faith thereof had located the land and procured the approval of such location.

We, therefore, conclude that the patents held by the plaintiff issued unadvisedly, and that they cannot prevail against those held by the defendant. *Stoddard* v. *Chambers*, 2 Howard, 318. *Menard* v. *Massey*, 8 Howard, 309. *Kitridge* v. *Breaud*, 4 Robinson R., 82.

In regard to the first bill of exception, taken by the defendant as to the admission of testimony, we are of the opinion that the allegation "that the patents referred to by the plaintiff, upon which his suit is founded, are null and void and were issued and obtained in fraud and contrary to the laws of the United States and of the State of Louisiana," authorized the proof of what was done by the officers of the United States and of Louisiana and by the parties in the matter of the issuing of the land warrants, the location of the land, the acts of the respective departments thereon, and the issuing of the patents. We do not discover any testimony in the record, admitted under the above allegation, except on this point. The ruling of the Judge of the lower court has not injured the defendant in this respect.

From the view we have taken of the case, the instructions contained in the second bill of exceptions were immaterial and were they erroneous it would not be necessary to remand the case on that account.

Judgment affirmed.

B. MAGGOFFIN *v.* COWAN, DYKERS & SPALDING.

A planter shipped his cotton to defendants, merchants in New Orleans. He afterwards wrote to them to sell by the time his brother returned from Texas, a period fixed by a conversation had with him. Cotton was then worth 12½ cents. They did not sell for several months afterwards, when cotton fell to 7 cents. *Held*, that the letter was a positive instruction to sell, and that they were liable for the difference in the price. C. C. 2971, 2972.

The fact that he shipped a subsequent crop to the defendants was no ratification of their acts in the premises.

The prescription of one year to actions for *quasi offences* is not applicable. The case is one *ex contractu* and not *ex delicto*.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

T. Hunton, for plaintiff. *Dorsey*, for defendant and appellant.

BUCHANAN, J. The plaintiff, a planter, sent to defendants, commission merchants, his crop of cotton, 153 bales, of the year 1850, to be sold for his account. At the time of sending this cotton, he wrote as follows to them, under date of September 10th, 1850, in regard to the sale of the same: "You can dispose of it when you think proper. I have held up for two years, but my impression is

that the sooner sales are effected the better, but of this you will do as you think best, having determined to rely on your judgment in the matter."

On December 10th, 1850, plaintiff wrote again to defendants, as follows: "I take pleasure in introducing to your acquaintance my brother, *Samuel Magoffin*, who is on a visit to San Antonio, and will remain a short time in your city. I have drawn a draft in his favor on you for three thousand dollars, which you will pay when presented, out of the proceeds of my cotton. He will inform you when he will need the money, and you can make a sale to meet it at that time. As to the balance of the cotton, I would like that you would sell it all by the time he returns to your city on his way home, and send me the proceeds by him in drafts," &c. This letter was delivered to defendants by the person mentioned therein, on the 21st December, 1850, and in about one month after that time, *Mr. Samuel Magoffin* returned from Texas to New Orleans, and conversed with defendants, about the 24th January, 1851, just before leaving town on his return home, in relation to the sale of the plaintiff's cotton.

Defendants told him that they had thought it best not to sell the cotton, but would hold on to it with a view of getting a better price. It is proved that, about that time the defendants might have got 12½ cents a pound for plaintiff's cotton. They chose, however, to hold on until the month of October following, when they sold the cotton for 7 cents a pound. Plaintiff sues them for the difference between those two prices, say 5½ cents a pound, for disobedience of his instructions. The defendants contend, in the first place, that the plaintiff had left it discretionary with themselves when to sell his cotton, and if we had no evidence before us but the letter of September 10th, we would concur in that view. But we regard the letter of the 10th December as a distinct intimation from plaintiff to defendants that the latter must sell, at the latest, by the time that *Mr. Samuel Magoffin* would be on his return from Texas, a period about which there could be no uncertainty, since *Samuel Magoffin* had seen them on his way down to Texas, and delivered to the defendants his brother's letter. We regard the declaration of defendants, made to *Samuel Magoffin* on his return from Texas, that they would hold on for higher prices, as a direct refusal to obey the orders of their principal, for which they are liable to all the loss which the latter is proved to have sustained by the subsequent fall in the price of cotton in the market. C. C. 2971, 2972.

Defendants plead that the plaintiff has ratified the sales made by them of this cotton, and signified his satisfaction with their conduct as his factors, by consigning to them his two succeeding crops, of 1851 and 1852. It is proved that he sent them the crop of 1852. There is no proof in relation to that of 1851. We do not regard this fact as, of itself, a ratification of the defendant's acts in the premises. On the contrary, it is proved that plaintiff notified defendants, in 1852, that he would hold them responsible for the loss suffered by him by the depreciation of cotton between the time of his instructions to sell and the actual sales. Defendants, lastly, plead the prescription of one year, applicable to actions for *quasi offences*. The present action is one *ex contractu*, not *ex delicto*, and is not governed by the prescription in question. See 9th Rob. 296, *Palmer v. Smith*.

Judgment affirmed, with costs.

F. Lacroix et al *v.* The City of New Orleans.

The Common Council of New Orleans authorized the Mayor to appoint "a commissioner, expert or arbitrator" to meet an arbitrator of the plaintiff, and value a piece of land which plaintiff proposed to sell to the city. The two commissioners assessed the value at $10,000, and reported accordingly, and the Mayor recommended payment of that sum, but the city never paid it.

Held: there is a wide difference between an expert and an arbitrator, and between both and a commissioner. But in whatever capacity the referees acted, there was nothing in the record to show that they bound the city to pay anything.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Train* and *Collins*, for plaintiff. *Livingston*, for defendant and appellant.

Spofford, J. The petitioners allege that, in 1840, the city of New Orleans took possession of a tract of land belonging to them, and used it for opening, laying out and improving certain streets and public places; that on the 26th March, 1853, the Common Council of the city authorized the *Hon. A. D. Crossman*, then Mayor, to appoint a commissioner, expert or arbitrator, to meet an arbitrator or commissioner in behalf of plaintiffs, to view and examine said piece of land, and to value the same; that the two commissioners, under oath, assessed the value of the land at $10,000, and made a notarial report thereof, which is annexed to the petition; that afterwards *Mayor Crossman* recommended the payment of this sum, but the city never would pay it.

Wherefore, they pray that the city be cited to show cause why the report of these "experts, commissioners or arbitrators" should not be homologated according to law, and the defendant condemned to pay the plaintiffs $10,000, with legal interest from the 1st of January, 1840, and for the vendor's privilege on the said piece of land, costs, &c.

The city excepted to the petition, as disclosing no cause of action.

This exception being overruled, there was judgment conformable in all respects to the prayer of the petition, and the defendants have appealed.

We find no authority for these anomalous proceedings, and no sufficient allegations in the petition to show a cause of action.

It is not averred that the city ever promised to pay, or even acknowledged this stale demand, nor that the land was taken from the plaintiffs without their acquiescence, or against the laws in force at the time.

The plaintiffs themselves do not appear to understand in what capacity the two gentlemen acted who made an extra judicial report, which they now seek to convert into a judicial decree. There is a wide difference between an expert and an arbitrator, and between both and a commissioner. But, in whatever capacity they acted, their report, under the only resolutions which have been offered in evidence, binds the city to nothing.

Sec. 4 of the Act of April 3d, 1832, (Bul. &. Cur., p. 113,) gives no color to the plaintiffs' claim. It is not shown that any agreement was ever made to pay them a particular price.

If they had a claim, the value of the land now is no criterion of what it was worth in the semi-improved condition of the locality in 1840. The price they gave for it would rather lead us to infer that they willingly abandoned it for the sake of improving the neighborhood.

It is ordered, that the judgment of the District Court be reversed, and the plaintiffs' petition dismissed, they paying costs in both courts.

J. FIGUIERE *v.* HIS CREDITORS.

Article C. P. 283, relates to an arrest for debt simply, where there is an apprehension that the debtor will leave the State or the jurisdiction of the court. The arrest of an applicant for the benefit of the insolvent laws, is provided for by the Act "relative to the voluntary surrender of property, and mode of proceeding," approved March 15, 1855.

There is no authority in that Act which authorizes a change in the order of arrest, by requiring a bond to be given with other conditions than those imposed by the District Court.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *G. & C. E. Schmidt*, for insolvent and appellant. *Durand & Horner* for *Lefebvre*.

The following affidavit was made for the arrest of plaintiff: [REP.]

Fourth District Court.—Personally came and appeared before me *F. Lefebvre* who, being duly sworn, deposes and says, that the commercial firm, of which he is a member, is a creditor of the insolvent *Joseph Figuiere* in the sum of two thousand three hundred and forty dollars; that said insolvent filed his petition for a cession, on or about the 14th February, 1856, in this honorable court, but has failed to file his commercial books and papers, as affiant is informed and believes; and affiant further shews that he has strong reasons to believe and fear that the debtor *Figuiere* may avail himself of the stay of proceedings to keep his person from his creditors; and that the said *Figuiere* has not surrendered all his property to his creditors, but has concealed a large amount of cash, and personal and real effects from his creditors. That he has converted his property into money, with a view to defraud his creditors, and has knowingly omitted to declare, in his schedule, some of his rights, claims and property. That affiant's information and belief is based upon what he has heard from others, of the acts and doings and sayings of the said *Figuiere* prior to his making a cession herein, together with his own knowledge of the said *Figuiere*.

F. LEFEBVRE.

Sworn to and subscribed before me this 16th February, 1856.

K. LOEW, Dy. Clk.

Counsel for *Lefebvre* prayed the court to amend the judgment of the District Court, on the following ground [REP.]:

Now, into this honorable court, by his attorneys, comes *Joseph Lefebvre*, appellee herein, and joins in this appeal and shows that there is error to his prejudice in these proceedings, from which *Figuiere*, the insolvent, has appealed, which this appearer now prays may be amended in conformity to law.

That this error consists in an erroneous order of court, entered on appearer's petition, commanding the Sheriff to arrest the insolvent and hold him in custody till he shall give bond, &c. &c. &c., conditioned "that if the charge of fraud complained of be established, said securities shall be liable for the debt of the complainant, *F. Lefebvre*, in case the said insolvent shall have departed the State without the leave of our said court." Whereas appearer shows that under the law the order should have read: "conditioned that the said *Figuiere* shall not depart from the State until he has made a fair and full surrender of his property, and complied fully and fairly with the laws relative to voluntary surrenders," as set forth in appearer's petition; and that the bond taken by the Sheriff be made to conform thereto.

Wherefore appearer prays that the judgment appealed from, be amended in his favor, as above set forth, with all general and equitable relief.

SPOFORD, J. The order of arrest in this case was granted upon an allegation of fraud, and the articles of the Code of Practice cited by the appellant, are irrelevant. They relate to an arrest for debt simply, where there is an apprehension that the debtor will leave the State or the jurisdiction of the court.

The proceeding in this case, by *Lefebvre*, was authorized under the 22d section of the Act of March 15, 1855, "relative to the voluntary surrender of property, and mode of proceeding." Acts 1855, p. 436.

An answer to the merits of the petition of *Lefebvre* has been filed, and it would be premature for us to express an opinion thereupon, before that issue has been tried in the court of the first instance.

The appellee has moved to amend the order of arrest, by requiring a bond to be given with other conditions than those imposed already. We find no authority in the Act of March 15, 1855, (already cited,) which would justify such a change as that prayed for; and that Act purports to repeal anterior laws upon its subject matter.

The judgment is affirmed, with costs.

Counsel for plaintiff applied for a re-hearing:

The Act of 1855, while it repeals all other Acts in relation to voluntary surrenders, carefully maintains in full force the provisions of the C. C. and the C. P. But in the latter code, there is but one article, viz: the 223d *in pari materia*, and it provides, that "a debtor, though he has called a meeting of his creditors, in order to make a surrender of his property, and has obtained a stay of proceedings against his person or property, may, nevertheless, be arrested, if one or more of his creditors declare on oath, before the court in which the failure took place, that such debtor intends departing from the jurisdiction of the court, to secrete his person from his creditors; provided they set forth specially the circumstances which have induced them to form such a belief."

This law, as we have already shown, remains in full force, notwithstanding the Act of 1855, and it is applicable to the present case, in which the insolvent had obtained a stay of proceedings against his person and property. But if it be the law of the land, and applicable to the case, we can perceive no good reasons why the insolvent should not be entitled to the protection it affords. It is a law *in pari materia* with the 22d section of the Act of 1855, relied on by the court, and should, therefore, be construed so as to give effect to both. (C. C. Art. 17, 7 L. 166, 17 L. 407, 9 R. 531, 1. A. 54, 2 A. 919.) Indeed we consider it no longer an open question, that laws *in pari materia* are to be construed so as to give effect to all their provisions.—See succession of Hebert, 5 A. 121.

But as it is obvious that the 22d section of the Act of 1855 does not specify how the complaint should be made, and the 223d Article C. P. does, the provisions of that article must be considered as supplemental to, and making part of the 22d section above quoted, and that unless a creditor has complied with the provisions of both, he is not entitled to the arrest of the insolvent.

We presume it will not be contended that the arrest of a debtor is not a harsh remedy, and that it should be resorted to without a sufficient motive. But if the insolvent did not intend to depart from the jurisdiction of the court, there is no cause whatever for his arrest, and the resorting to it without even alleging that he had an intention to depart, is a wanton aggression on his personal liberty, employed for no other assignable reason than to vex and harass him.

It appears to the undersigned that the only question that can possibly arise in this cause is this: has the 223d Art. C. P. been repealed? for if it has not, its language is general and applies to all cases of arrest of insolvents who have surrendered their property and obtained a stay of proceedings.

We freely admit that we may have been remiss in not presenting the above considerations to the court, in arguing the cause, and we suppose that our citation of the 223d Art. C. P., in connection with the reserving clause of the Act of 15th of March, 1855, may have escaped the attention of the court; for we are persuaded the reasons we have assigned and the authorities we have quoted plainly justify our conclusions, and entitle us to a reversal of the order of arrest.

Re-hearing refused.

SPEARS *v.* SHROPSHIRE.

See 10 A. R. for decision remanding this case.

In Mississippi (as is admitted,) a settlement, *bona fide*, made before and in contemplation of marriage, is good not only against the husband but against his creditors and subsequent purchasers.

This rule is yet more inflexible, where, in anticipation of marriage, the wife has secured her own property to her own use and that of her children.

Even though, before the marriage settlement, the parties had been formally espoused, the husband having then a wife living (in Tennessee,) which espousals were by the law of Mississippi *void*; yet, a divorce having taken place between the husband and his first wife, and a second marriage, after such divorce, formally celebrated in Mississippi, between the husband and his second wife, in view of which this marriage contract was executed, the contract is as valid as if the first illegal marriage had never existed, as against subsequent creditors.

The contract must be governed by the law of Mississippi, where the parties resided at the time of the marriage. C. C. Art. 10.

APPEAL from the District Court of East Feliciana, *Ratliff*, J.

Smith and *Smiley & Perin*, for plaintiff. *Muse* and *Sharkey*, for defendant and appellant.

BUCHANAN, J. (MERRICK, C. J., recused himself.) This case was before us last year, and was remanded for the admission of a certain marriage settlement, which had been rejected by the District Court. See 10 Annual, p. 218.

The plaintiff had judgment in the court below, for the slaves mentioned in her marriage settlement and their increase. There was judgment against her on her money claim. Defendant appealed, and plaintiff has joined in the appeal, claiming that the judgment be amended, so as to conform to the prayer of the petition.

We were of opinion, when the case was previously considered by us, that the proceedings and decrees in Mississippi, do not on their face show that the marriage settlement has ever been adjudged in Mississippi fraudulent and void. After the full argument that this point has received upon the present trial, we adhere to our opinion as then expressed.

The law of Mississippi is admitted to be, that a settlement, bona fide, made before and in contemplation of marriage, is good, not only against the husband, but against his creditors and subsequent purchasers, and that this rule which applies to cases where property is settled on the intended wife by the intended husband, is yet more inflexible in cases where the intended wife, with the knowledge of her intended husband, secures her own property to her own use and that of her children.

But it is contended that the plaintiff cannot claim the benefit of this rule of law, because, 1st. This was not a settlement, bona fide, in contemplation of marriage: inasmuch as the parties were man and wife at the time of the settlement, and for years before—and 2d. Because the property conveyed was not, in truth, the property of plaintiff, as alleged in the settlement, but was really the property of defendant, having been paid for by him.

The evidence shows that the first marriage of these parties (in 1829,) was null by the laws of Mississippi—*Shropshire* being, at the time of such marriage, already married to a woman who was still living in Tennessee, from whom he was not divorced. Hutchinson's Miss. Code, 495, sect. 4.—6 Sm.

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and Marsh. Rep. 308. But a divorce had taken place between *Shropshire* and his first wife, previous to the contract of marriage with plaintiff, of October 2, 1832. The second marriage was therefore binding.

It seems probable, from the evidence, that the greater part of the shares mentioned in the deed of trust, or marriage settlement, although charged to *Mrs. Spear* by previous deeds from *Wren* and from *Gayelen* and *Wren*, had been paid for in reality by *Shropshire*. If so, the settlement, instead of being made by the plaintiff, must be viewed as made by the defendant *Shropshire*, who was a party to the deed; and such a settlement appears to be valid, by the law of Mississippi, against *subsequent* creditors. See case of *Wells* v. *Treadwell*, decided by the High Court of Errors and Appeals of Mississippi, at the April term, 1855, referring to 24 Mi. Rep. 181 and 25 Mi. Rep. 66.—*Armfield* v. *Armfield*, 1 Ch. Rep. Miss. 316.

The contract in question was executed in Mississippi, where all the parties resided, and was intended to have effect there. Its effect must, therefore, be governed by the law of Mississippi. C. C. Art. 10.

We find no error in the judgment of the District Court, rejecting the claim of plaintiff on account of money received by her husband, for land sold in Mississippi.

Judgment affirmed, with costs.

MERRICK, C. J. I have recused myself in this case and take no part in the decision.

DAVID TAYLOR & Co. *v.* WM. CLARK.—M. H. LAUGHTER, Intervenor.

The allegation "that plaintiff is about to subject the said schooner or the bond substituted for the release thereof, to the payment of said judgment," is vague, uncertain and in the alternative, and is insufficient to support a demand for an injunction.

Matters available in defense of a suit, will not authorize an injunction, at least in the absence of any showing, that an irreparable injury is about to be inflicted.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

A. N. Ogden and *Stansbury*, for plaintiff. *Smiley and Perin*, for intervenor and appellant.

LEA, J. The intervenor in this case is appellant, from a judgment dissolving an injunction which appears to have been improperly issued.

The appellant was allowed to bond the schooner Seventy-Six, which was attached as the property of *William Clark*, the defendant. Under the allegation that he is the owner of the schooner Seventy-Six he prays that the plaintiff, who has assumed a judgment against *Clark*, be enjoined from proceeding "*to satisfy his execution against Clark, out of the said vessel or the said bond*," but there is no positive allegation that the plaintiff is about to seize the vessel, or that she is under seizure, or even within the State. His complaint is that the plaintiff is about to *subject* the said schooner or *the bond substituted for the release thereof*, to the payment of the said judgment. The matter of complaint is vague, uncertain, and in the alternative.

It is certainly no ground for an injunction, that the plaintiff is about to bring suit upon the bond. Matters available in defense of a suit will not authorize an injunction, at least in the absence of any showing that an irreparable injury is about to be inflicted.

Moreover the affidavit is insufficient. There is no deposition to the truth of the allegation in the petition, and even admitting that the omission was a clerical error, it is not one which could be corrected or amended by the affidavit of the attorney of the intervenor, unless such affidavit was of itself a sufficient basis for the issuance of the writ, which it is not.

We think the injunction was properly dissolved, and that damages should be allowed.

It is ordered that the judgment appealed from, be amended, so as to read as follows: It is ordered that the rule taken herein, to dissolve the injunction, be made absolute, that said injunction be dissolved and set aside, and that the plaintiffs, *David Taylor & Co.*, do have and recover of *M. H. Laughter*, the intervenor, thirty dollars damages, and that the appellant pay costs in both courts.

ADELE FOWLER, Tutrix, *v.* THOS. DUVAL, JR.

Where land, once public, has become private property, the possessory action will protect the possession of him who holds as owner against the intrusions of all persons, whether claiming the property in virtue of title or not.

A perfect Spanish grant and survey made by order of the court, wherein the old lines are ascertained in conformity to the grant, and confirmed by the Act of Congress of 3d March, 1819, is valid and conclusive against a preëmption certificate and patent from the United States, as respects the lands embraced in the grant, although the portion of said land embraced in the patent may have been returned as vacant by an officer of the United States. In such case a survey made by officers of the United States are not conclusive evidence of the boundaries of the tract described in the Spanish grant, and courts are at liberty to receive other testimony in relation thereto, and if superior, to decide in favor of such evidence. The rule is different as to imperfect, and other titles emanating from the government of the United States. The approved surveys in such cases are generally, if not always, conclusive.

APPEAL from the District Court of East Baton Rouge, *Robertson*, J.

T. G. Morgan, for plaintiff. *Elam & Elam*, for defendant and appellant.

MERRICK, J. The plaintiffs sue to recover possession of a tract of land situated in the parish of East Baton Rouge, and alleged to be bounded on the east by lands formerly granted to *John G. Fledge*, on the north by lands formerly granted to *James* and *Benjamin Smith*, on the west by lands formerly belonging to *David Ross* and *F. Poussett*, and on the south by lands formerly vacant, containing about three hundred arpents.

Plaintiffs allege that they have possessed the tract of land for more than a year as owners.

They allege that the defendant has taken possession of about one hundred arpents of said land on the northern and western portions of the same, and that he is continually committing waste. They pray also for an injunction.

Defendant filed exceptions, also an answer containing a general denial, and the plea of prescription. The exceptions will hereafter be specially noticed.

On the trial the plaintiffs offered in evidence, to show the extent of their possession, a perfect Spanish grant, and a survey made by the order of the court, wherein the old lines were ascertained in conformity to the grant. The grant was embraced in list A, No. 176, of *J. O. Crosby's* report, and confirmed by the first section of the Act of Congress of the third of March, 1819, as a valid and complete title.

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The defendant, on his part, shows a survey made by the United States Deputy Surveyor, and approved, as appears by the map, which, instead of bounding plaintiff's tract on the north by the *James* and *Benjamin Smith* tract, and on the west by the *Ross* and *Poussett* tract, leaves a vacant space between the northern and western boundaries of the tract of land in controversy and the two tracts of land mentioned.

He further shows that he has settled upon the land so returned as vacant, and filed his claim for preëmption, and obtained a preëmption certificate from the Register of the Land Office at Greensburg.

The judgment of the lower court on the titles and parol evidence adduced was in favor of the plaintiffs, and the defendant appealed.

The points made by defendant in this court are the same as contained in his exceptions before referred to, and we give them in his own words, viz:

"First. The alleged right of ownership, on which the action is founded, if sustained by proof, disputes the dominion and sovereignty of the United States to the vacant and unappropriated lands, puts at issue their superior title, and claims the ulterior prerogative to force the United States to an action of title against those not in actual possession, before the public domain can be adjusted.

"Second. Adverse to the United States, there can be no possession or ownership, by a title dependent on a law of Congress for confirmation. And against those possessing and claiming as preëmptors lands returned as vacant by competent authority, the possessory action cannot be maintained; and without proof of a possession by title not dependent for confirmation on Congress, the possession of the preëmptor cannot be disturbed.

"Third. Neither the possession of one year, nor any number of years, can be evidence of ownership against the United States."

We will consider these grounds together.

The title offered in evidence by the plaintiff, to show the extent of his possession, was a perfect title from the Spanish government, and so recognized by the United States government, to the extent of the boundaries and limits designated in the grant. So far the title was as perfect as it would have been had the land been regularly surveyed and given to the original grantee by a special Act of Congress, and followed by a patent from the President of the United States. The land within the boundaries of the grant became private property, and subject to all the rules of law governing real estate in Louisiana. It became thenceforward a vested right, protected by the Constitution of the United States and the State of Louisiana.

It was no longer under the control of any department of the government of the United States, nor subject to be changed or altered in its location by the Surveyors or Deputy Surveyors of the United States, who are themselves only ministerial officers. It was not, therefore, in the power of the United States Surveyor to declare vacant any portion of the land conveyed by the original grant which had been recognized as valid by the United States government. The only question, therefore, presented to the lower court, was one of fact, and whilst the survey, made by the United States Surveyor, might be offered in evidence to show the boundaries of the grant, it was not conclusive, and the court was at liberty to consider other testimony tending to establish the original boundaries of the tract, and if superior, to decide in favor of such evidence. The rule is different in regard to imperfect and other titles eminating from the

government of the United States. The approved surveys in such cases are generally, if not always, conclusive.

We fail to perceive in what manner the view here taken disputes the dominion of the United States over the vacant and unappropriated lands. It leaves those lands exclusively under the control of the federal government, but simply asserts that when that government never had any title to the land in controversy, or when she has parted with the title she once had, the mistakes of her officers cannot make public property that which belongs to private persons. 17 L. R. 230; 5 Rob. 466.

Nor do we see any danger to the public interest by allowing to the owners of such property that great shield to title: the possessory action. Having its origin in the interdicts of the prætors, it has accompanied the petitory action in all countries where the civil law has prevailed as an indispensible complement. Certain it is, that as means of protecting title, it is not less important in Louisiana than elsewhere.

We see no more reason why the pretence that the party is claiming under the preëmption law of the United States should authorize the invasion of the annual possession of private property, than the pretence that such party holds under title from the real owner of the same.

Neither ought it to prevail in the possessory action, where the title to the tract of land in controversy is shown to be out of the government, and where title can be offered in evidence for the purpose of showing the extent of possession only.

It is unnecessary to determine whether the possession of one year of the lands of the United States can be set up against the government, or those claiming under it. That question does not arise in this case, and we only determine that where land has once become private, the possessory action will protect the possession of him who holds as owner against the intrusions of all persons, whether claiming the property in virtue of title or not.

On the merits, the judgment of the lower court seems to be sustained by the weight of evidence.

Judgment affirmed.

W. S. Wright & Co. *v.* Hogan & Tureaud et al.

A sale will not be set aside on the ground that it was made in fraud of creditors, by one in insolvent circumstances, where it was made openly, for a fair value, and with the knowledge of several of the creditors, although the sale was of the venders entire stock of goods.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Durant & Horner, for plaintiffs. *Roselius*, *Durell*, *Grivot* and *Breaux*, for appellants.

Voorhies, J. (Lea, J., dissenting—Merrick, C. J., took no part in this decision). This is a revocatory action. The plaintiffs allege that the commercial firm of *Hogan & Tureaud*, now in liquidation, are indebted to them on two promissory notes, one for the sum of $192 89, with 7 per cent. per annum interest from the 4th of March, 1853, and the other for the sum of $203 43, with like

interest from the 4th of January, 1854; that sometime in January, 1852, the plaintiffs, with many other creditors, agreed to grant an extension of time to said *Hogan & Tureaud*, then embarrassed in their business, and received in payment of their claim the notes sued upon; that *Jeremiah S. Hogan*, intrusted with all the assets, proceeded to liquidate the affairs of the partnership, and paid about fifty per cent. on account of their claim, which originally amounted to $608 91; that after the dissolution of the partnership, *Hogan* also carried on business in his own name, and had on hand at the time of his last payment to them, a large stock of hardware and other goods which had been left with him by the creditors and his retiring partner, that he might sell and convert the same into money and pay the creditors of *Hogan & Tureaud* their instalments as they matured; that prior to the maturity of the third instalment *Hogan* sold out all the stock in trade remaining in the store to *Samuel Lock*, into whose employ he shortly afterwards entered as clerk or salesman; that said *Hogan & Tureaud* have neither voluntarily surrendered their property to their creditors nor have they been proceeded against for a surrender under the provisions of the Act of the 28th of March, 1840; that at the time of said sale *Lock* was a heavy creditor of said firm, then utterly insolvent; that in making said sale the intention of *Hogan* was to withdraw and screen said goods from their pursuit and the pursuit of the other creditors of *Hogan & Tureaud*; and that *Lock*, cognizant of all these facts, made the purchase with the fraudulent design of procuring an unjust preference over the other creditors and securing his own claim against *Hogan & Tureaud*. They, therefore, pray that the firm of *Hogan & Tureaud* be condemned to pay them the amount of said promissory notes, interest and cost of protest; that the said sale from *Hogan* to *Samuel Lock* be decreed to be null and void; that the property thus sold be decreed to be subject to their execution, *and the said Jeremiah S. Hogan be decreed guilty of fraud, and dealt with in manner and form as provided by law*; that defendants be condemned, *in solido*, for costs, and pray for all further general and equitable relief.

The answer of *Samuel Lock* contains a general denial, and an admission that he did, in the winter of 1853, purchase of *J. S. Hogan*, his co-defendant, a quantity of hardware, which said purchase he alleges to have been made legally and for a good and lawful consideration, and without any fraud or shadow of fraud, as falsely alleged.

In his answer, *Hogan* also pleaded a general denial, except the sale to *Lock*, which he admitted to have been made in good faith; that said plaintiffs were aware of the sale being made, and have acted through malice in making false and unfounded charges to their personal knowledge, and done for the purpose of injuring, if possible, his reputation in the community.

Upon the pleadings and evidence adduced the case was submitted to a jury, who returned a verdict in favor of the plaintiffs for the amount of their claim against the firm of *Hogan & Tureaud*, declaring the sale from *Hogan* to *Lock* to be null and void, and the property sold subject to their execution, and *Jeremiah S. Hogan* guilty of fraud, etc. From a judgment thereon rendered by the court below against the defendant, whereby *Jeremiah S. Hogan* was also condemned to two years imprisonment in the parish jail, said *Hogan* and *Samuel Lock* have taken the present appeal.

The alleged agreement between *Hogan & Tureaud* and their creditors is in the following words:

We, the undersigned creditors of *Hogan & Tureaud*, agree to grant them the following extension, viz: in all of the month of March, 1852, 25 per cent.; in all of the month of January, 1853, 25 per cent.; in all of the month of March, 1853, 25 per cent.; and finally, 25 per cent. in all of the month of January, 1854, with interest at the rate of 7 per cent. per annum; this not binding on any unless every creditor comes into the above arrangement.

This instrument appears to have been executed in January, 1852. Shortly afterwards *Tureaud* retired from the firm and *Hogan* continued to carry on the business in his own name and on his own account, purchasing goods from time to time to keep up his assortment, and to liquidate the business of the partnership. In June following, an inventory of the goods of the firm was taken, and amounted to the sum of $14,434 11, at cost price, exclusive of $4963 15 for ploughs held on consignment for sale. When *Hogan & Tureaud* established their firm they owned no capital. *Mr. Thibaut* aided them by endorsing their notes—so did *Mr. Tureaud*, of St. James. The notes thus endorsed by *Thibaut*, and discounted by the banks, at the time of their suspension amounted to between $5000 and $7000, and were to be paid in full, according to the understanding of the parties. Independently of these notes, the liabilities of the firm amounted to about $30,912 70. The loss sustained by bad debts was about $10,000. It does not appear that any other assets belonged to the firm than those set forth in the above inventory at that date.

As evidence of fraud on the part of both *Hogan* and *Lock*, it is argued by the plaintiff's counsel that *Lock* was a creditor of *Hogan & Tureaud* at the time of the respite for $2554 68; and, from the 1st of January, 1852, was familiar with their whole business relations; that he was compelled, under an execution, to pay *Twibill & Edwards*, as endorser, the note of *Hogan & Tureaud* for $775 93; that he was continually dealing with *Hogan*, selling him goods and taking his notes; that he finally took *Hogan* into his employ; that under his influence and advice, his notes, given in part payment of the sale to him, were given in payment to *Busby & Little* for a debt due by *Hogan* individually; and that some time after the suit of *Twibill & Edwards* had been brought against him, he consummated his bargain with *Hogan* by paying *McNeely* two of these notes.

We are of opinion that the charge of fraud is unsupported by the evidence. Finding himself unable to continue business any longer with a reduced stock, an impaired credit and a heavy annual expense for rent, salaries of clerks, &c., *Hogan* made known his condition to several of the creditors of *Hogan & Tureaud*, and his intention to sell out. Some of them advised, but none of them appear to have disapproved of his determination. His negotiation with *Lock* for the sale of the goods was openly spoken of previous to the date of the sale: *Lock* appears to have communicated his intention to make the purchase to some of the creditors, and his inducement for doing so. After the contract was concluded between the parties, it took four or five weeks to make the inventory of the stock, and this to the knowledge of several of the creditors who occasionally visited the store during that time. The inventory of the goods, at cost price, amounted to $7965 85, which appears to have been paid as follows, to wit: ten notes, each for $517 57, dated the 10th of March, 1853, drawn by *Lock* to his own order, and endorsed by him and payable at 12, 18, 24, 30 and 36 months; three notes given by *Hogan* for goods sold to him by *Lock* after the dissolution of the firm, amounting to $1295 90. And here it may be observed, as we infer from the evidence, that *Lock*, in common with the other creditors, *Vredenburg*,

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Folger, David, Wright and *Sturtevant*, sold goods to *Hogan* for the purpose of enabling him to carry on his business successfully; and, as all the others have been paid in full, we see no good reason why he should not also be paid. The other items completing the price, are satisfactorily accounted for. *Tureaud*, sworn on behalf of the plaintiffs, says, "I suppose *Hogan* sold out at cost; hardware is an article always worth first cost. I have bought at two and a half years credit; it is the usual way when parties sell out at cost." *Bacchus*, one of the creditors, testifies that "*Hogan's* stock was much broken; that a *discount* on the cost prices would be a *fair* price for it." *Lock*, it appears, intimated to some of the creditors, that he was induced to buy out *Hogan* in order to employ him as a salesman in his store to extend his business with the planters, with whom *Hogan* had a large acquaintance, and would draw him a good deal of custom, but did not want the goods if *Hogan* could make some other disposition of them. But it is said that *Lock* was a heavy creditor of *Hogan & Tureaud*, and made the purchase with the fraudulent design of procuring an unjust preference over the other creditors in the payment of his claim. This allegation appears to be unsupported by the evidence. It is true that *Lock*, as one of the parties to the agreement with *Hogan & Tureaud*, was put down for three different sums, namely: $775 93, $685 10 and $1093 45, evidenced by three promissory notes; but it appears that the two last mentioned notes were held by the Mechanics' & Traders' Bank. *Leonard Sturtevant*, one of the creditors, testifies "that one of the amounts due *Lock*, which he thinks was the second one, was paid in the Mechanics' Bank, thinks he assisted *Hogan* in taking it up, by lending him $129, or thereabouts. The note was taken up because *Vredenburg, one of the directors* of the bank, and one of the plaintiffs against the same defendants, said it was impossible for *Hogan & Tureaud* to resume till it was taken up, &c." The certificate of *G. Cruzat*, commissioner, shows that the following notes were paid in the Mechanics' & Traders' Bank on the 28th of January, 1852: "*Hogan & Tureaud's* note, order of *Lock*, due 19th January, 1852, $1093 65; *Hogan & Tureaud's* note, order of *Samuel Lock*, due 28th of January, 1852, $685." We think it is not unreasonable to infer that both these notes were taken up by *Hogan*; at all events, it does not appear that *Lock* ever took up either of them. In relation to the note of $775 93, it is shown that *Lock* had transferred the same to *Twibill & Edwards*, who have received from *Hogan* the two first instalments on account thereof. On the 15th of July, 1853, *Twibill & Edwards* recovered a judgment against *Lock*, as endorser, for the remaining instalments due on this note. Thus it is evident that *Lock* was not a creditor of the firm of *Hogan & Tureaud* at the date of the sale, as alleged by the plaintiffs. Whether the notes given as the consideration of the sale were misapplied by *Hogan* or not is a matter in our opinion which cannot affect in any manner the validity of the sale. But was there any such misapplication? We think we are fully authorized, by the evidence, to answer this question in the negative. Although no inventory was taken when the respite was granted, yet we think there is sufficient evidence in the record to enable us to arrive at an approximate invoice value of the goods then on hand. The inventory at the time of the sale, as we have seen, amounted to $7965 85. Deducting therefrom $781 69, the amount paid *Robb* by *Lock* for goods on account of *Joshua Scholefield & Son*, then lying in the Customhouse and included in the purchase, there remained then in the store $7184 16. The stock had then been reduced by sales from June, 1852, to February, 1853, to $7184 16. Supposing *Hogan* to have

made corresponding sales during five months, from the date of the respite to that of the inventory of June, 1852, he would have sold goods invoiced approximating to the sum of $5191 85. Adding this to the inventory of June, 1852, would amount to $19,625 96, as the invoice value of *Hogan & Tureaud's* stock at the date of the respite.

Under the agreement it is evident that the creditors acquired no other privilege or lien on the stock of *Hogan & Tureaud*, their debtors, than that which the law had already conferred upon them. After the dissolution of the partnership, we think it may be fairly inferred from the testimony of *Tureaud*, that his partner *Hogan* was fully invested, if not with the ownership, at least with the authority to sell the stock under the circumstances disclosed by the record; at all events, he carried on the business in his own name and for his own account. It was not only known but approved by the creditors, who continued to deal with him on terms of credit. It is shown that during the time he thus continued in business, he purchased goods, to keep up his assortment, to the amount of $11,000 and paid for them; that he received consignments of ploughs, carts, wagons, &c., for sale on commission; and that the money arising from this sale of his goods and such consignments was applied indiscriminately to the payment of all his liabilities. It is shown that he has paid on account of the debts due by the firm $16,345 72, exclusive of $1778 65, the amount paid the Mechanics' & Traders' Bank, and the indorsement of *Thibaut* and *Tureaud*, amounting to upwards of $10,000. We think the evidence shows conclusively that he has fairly accounted for his liability to the creditors resulting from the management of the assets of the firm of *Hogan & Tureaud*. But it is said that he has misapplied the notes of *Lock* given as the price of the goods sold. It is in proof that he was largely indebted to *Busby, Little & Co.* for consignments, and gave in part payment thereof six of the *Lock* notes; he also gave two others in payment of the claim of *B. E. Exly*, a wheelwright and wagon-maker, and the remaining two appear to have been transferred to *Julia D. Dean*. Upon the whole, after a careful perusal of all the evidence which is voluminous but not contradictory, we are of opinion it is insufficient to sustain the charge of fraud against *Hogan* under the statute of 1840. *Lock* was clearly not a creditor of the firm of *Hogan & Tureaud* at the date of the sale, as charged in the plaintiffs' petition; he had ceased to be so for more than a year before in relation to the two notes which he had endorsed to the Mechanics' & Traders' Bank; and as to the third, endorsed to *Twibill & Edwards*, which he was compelled to pay since the date of the sale, it appears that the two last instalments thereon are still due him. The allowance of his claim in part payment of the price, as it placed him upon the same footing with the other individual creditors of *Hogan*, should not, in our opinion, affect the validity of the sale.

It is therefore ordered, adjudged and decreed, that the judgment of the court below, so far as it decrees the defendants *Jeremiah S. Hogan, Joseph P. Tureaud* and *Léon Séré* to pay, *in solido*, to the plaintiffs, three hundred and ninety-six dollars and thirty-two cents., with interest on one hundred and ninety-two dollars and eighty cents., from the 4th of March, 1853, at the rate of seven per cent. per annum, and like interest on two hundred and three dollars and forty-three cents., from the 4th of January, 1854, till paid, be affirmed with costs; and that in every other respect said judgment be avoided and reversed, the said plaintiffs to pay the costs of appeal, and so far as relate to said *Samuel Lock* also those of the court below.

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LEA, J., dissenting I think a sale made by an insolvent debtor of his entire stock in trade, on terms of credit, to a creditor who is fully aware of his insolvency, ought not to be protected, especially where the creditor takes the goods in part payment of his own claim. I am not satisfied, from the evidence, that the plaintiffs are estopped by having consented to the sale.

JACOB MUSSINA *v.* W. ALLING et als.

An action for the revindication of immovables is a real action, and an action to compel a conveyance of lands falls within this category.

The State courts of Louisiana have no jurisdiction to compel a conveyance of lands situated in Texas—and, *by the Court:* When the plaintiff entered into a Texas partnership in Texas land claims, he impliedly submitted himself to the Texas laws and tribunals. His attempt to bring these titles before the courts of Louisiana for adjudication, either directly or indirectly, is not to be favored, as it is not necessary for the due enforcement of our own laws, nor for the suppression of fraud within our borders. Aside from matters confided to the Federal Government by its Constitution, the relation of the States of this Union, *inter se*, is that of foreign States in close amity. Each is sovereign in its proper domain. If we would secure respect for our own sovereignty, we should pay respect to the sovereignty of others.

Plaintiff claims to have been a joint owner with two of the defendants of certain lands in Texas. He charged a combination of his co-defendants to defraud him of his interest in those lands, and brought this suit for damages resulting therefrom. But *held* that, so far as the record disclosed, there was a title paramount to that under which plaintiff claimed. *Held, also*, that there was no proof that he was entitled to damages.

THIS case was tried by a jury before the Fourth District Court of New Orleans, *Reynolds*, J. *Wolfe & Singleton*, *Roselius* and *Duncan*, for plaintiff. *H. D. Ogden*, *R. Hunt* and *Bonford*, for defendants and appellants.

SPOFFORD, J. This suit was instituted in the Fourth District Court of New Orleans, on the 1st of November, 1851.

The plaintiff, *Jacob Mussina*, describes himself as a resident of Louisiana, and the four defendants, *Stillman*, *Belden*, *Basse* and *Hord*, as citizens of Texas; the other defendant, *Alling*, being a citizen of Louisiana.

The leading allegations of the petition are the following:

That the plaintiff, together with two of the defendants, *Stillman* and *Belden*, on the 9th of December, 1848, entered into a written contract, by which they agreed to hold jointly certain land titles intended to cover the town called Brownsville, situated on the Rio Grande, in the State of Texas, the interest of the parties to be in the following proportions: *Stillman* one-half, *Belden* one-fourth, and *Mussina* one-fourth; that the defendant *Alling*, (who was the partner of *Belden*, in the firm of *Belden & Co.*, trading at Brownsville,) was secretly interested with *Belden* in this contract of the 9th of December, 1848, or shortly afterwards became so; that *Stillwell*, *Belden*, and the petitioner, (constituting the Brownsville Town Company,) employed the defendants, *Basse & Hord*, as attorneys at law in relation to their land speculations aforesaid, and that *Basse & Hord* continued to act in that capacity, as well as in the capacity of agents for the company, up to the —— day of December, 1849, when *Stillman*, *Belden*, *Basse* and *Hord*, aided and abetted by *Alling*, combined and entered into a conspiracy to defraud the plaintiff out of his just rights, under the agreement of the 9th of December, 1848, and to slander him and his titles

to the property embraced in the agreement, with a view of crippling his resources, &c.

That, on the 14th December, 1849, *Stillman* and *Belden* sold out to *Basse & Hord*, all their own interest, *as well as that of the petitioner*, under the said agreement, for the pretended price of $15,000; that, owing to the fiduciary relations between the parties, it was not competent for *Stillman* and *Belden* to sell, nor for *Basse & Hord* to buy, so as to defeat the rights of the plaintiff; but, as he deems it for his advantage to adopt this purchase, he does so, and claims to be the beneficiary thereof and the rightful owner of the whole property thus purchased by *Basse & Hord*, subject to the obligations by them contracted in the several deeds now of record.

That the property included in the partnership agreement, at the time of the said sale, was worth $300,000, and that *Basse* and *Hord*, and *Stillman* and *Belden* before them, had made large sales and realized $136,000, which they had fraudulently appropriated and refused to account for.

That the defendant, *Alling*, had aided and abetted *Basse & Hord* in effecting sales under their said purchase, slandered the petitioner's title, and warranted the titles of *Basse & Hord*.

That the value of the Brownsville property had been impaired by the fraudulent sale to *Basse & Hord*.

That *Basse & Hord* were insolvent, and wholly irresponsible for the amount of property thus thrown into their hands.

That *Alling* and *Belden*, on the 5th of January, 1851, for the price of one dollar, accepted a title from *Basse & Hord*, to a valuable piece of property, included in the agreement of the 9th of December, 1848, and now have possession of the same, with a view to defraud the plaintiff.

That *Stillman* also accepted their title to another valuable piece of the same property, for one dollar, with the same fraudulent intent.

That all the defendants had conspired to secrete certain maps of the Brownsville property, which were originally intrusted by the Company to *Basse & Hord*, as attorneys.

That the petitioner being somewhat embarrassed, as was confidentially known by *Stillman*, *Basse* and *Hord*, and having purchased an interest in some lands in Texas, about Point Isabel, for which he was unable to pay, consulted with the defendant *Hord*, under whose advice a deed of trust was drawn up, upon his interest in the Brownsville property, to secure his vendors for the price of the Point Isabel property, in the sum of $28,750. *Hord* being the trustee and advising the beneficiaries, who also were his clients, on the 20th of October, 1849, when the deed was made, that *Mussina's* interest in Brownsville was a sufficient security for that amount.

That there was pending in the United States District Court at Galveston, Texas, a suit entitled *Cavazos et al.* v. *Stillman et al.*, in which the title of *Stillman*, *Belden* and *Mussina*, was contested, and an adverse title set up; that *Basse & Hord* were employed, among other counsel, for *Stillman*, *Belden* and *Mussina*, in that case, and had neglected to take the testimony proper to sustain the defense; that *Hord* had been made a witness in the cause, and had testified, that since the institution of the suit, he had purchased the entire interest of *Stillman* and *Belden*, two of the defendants, and was also interested in favor of the establishment of the old title which he was called to

prove up; that this double employment in favor of the complainants and defendants was a betrayal of professional trust and a fraud upon the parties; that *Basse & Hord* had made a collusive agreement with the complainants, *Cavazos and wife*, by which the subject-matter of the suit had been compromised on an agreement to divide the property, which was in fraud of the petitioner's right; that *Alling*, *Belden* and *Stillman*, further conspiring with *Basse & Hord*, on the 26th of February, 1851, caused an amended answer to be filed for *Stillman* and *Belden*, in the said Chancery suit, denying that the plaintiff *Mussina* had any title in the town site of Brownsville, and averring that *Stillman* owned three-fourths, and *Belden* one-fourth of the whole.

That *Simon Mussina* was the plaintiff's agent in all the Brownsville matters, and had full knowledge of all the frauds practised by the defendants.

Upon these allegations the plaintiff, in his original petition, asked that *Alling* and *Belden* be condemned to make him a title of the property they bought of *Basse & Hord*, for the price of one dollar, and to account for the revenues, and in default thereof to pay him $12,000; that *Alling*, *Stillman*, *Basse & Hord*, be condemned to convey to him, by good and sufficient title, all the property included in the contract of 9th December, 1848, and acquired by subsequent purchase under the said contract, as well as all the property acquired by either of the said parties in fraud of the petitioner's rights, and that in default of so doing, they be condemned, *in solido*, to pay him $300,000 *in the way of damages;* there was also a prayer for general relief.

Alling was cited in New Orleans, the place of his domicil.

Belden, *Basse* and *Hord*, casually found in New Orleans, were cited there.

Stillman has not been cited, nor has he made an appearance in the cause.

All the parties who were brought into court, excepted to the jurisdiction *in limine litis*.

They averred that the demand on its face was in the nature of a petitory action, for lands lying in the State of Texas, where all but one of the defendant's reside; that the action is therefore local, and cannot be maintained in the State Courts of Louisiana.

This plea being overruled, the parties answered, still protesting against the jurisdiction, and reserving all their rights under the exceptions filed.

Nearly a year after the institution of his suit, the plaintiff presented a supplemental petition, asking the court to take it as an amendment and addition to the prayer of his original petition, and that, besides the relief already sought, it should be decreed that *Stillman* make the plaintiff a title to the property he bought of *Basse & Hord* for one dollar, and to account for the revenues, and further that all the defendants be condemned, *in solido*, to pay him $75,000 *in damages* for the wrongs, injuries, &c., growing out of the fraudulent combination and conspiracy of the said defendant, against him, as set forth in the original petition.

The supplemental petition was not put at issue by default or answer.

One *Antonio Longorie*, a citizen of Mexico, intervened in the suit, praying leave to join the plaintiffs in seeking to compel the defendants to make a conveyance of the real estate described in the petition, and in procuring a recognition of the title of *Jacob Mussina*, on the alleged ground that *Mussina* had conveyed the said property to him in trust for the vendors of the *Point Isabel* property, upon which the sum of $25,750 was said to be still due by the plaintiff. *Longorie*, as trustee, further prayed judgment for the said sum of

$28,750, and that the land described in the plaintiff's petition be sold to satisfy said claim by privilege and preference, &c.

This petition in intervention was served upon the plaintiff's attorney and upon the defendant *Alling* only, but does not appear to have been put at issue.

At the plaintiff's instance the cause was tried by a jury.

The trial appears to have occupied about ten days, the evidence being voluminous and complicated. The records of several suits in the courts of Texas, touching various titles and claims to the lands in question, form a portion of the evidence.

The jury rendered a verdict in the following form:

We, the jury, find that the defendants shall convey unto *Jacob Mussina*, the plaintiff, by good and sufficient title, all the rights of property acquired by *Basse & Hord*, under the transfer of conveyances of the 14th December, 1849, and 31st January, 1850, within ninety days from the date hereof, and that *Elisha Basse*, *R. H. Hord*, *S. A. Belden* and *W. Alling*, pay to the plaintiff the sum of $25,000 damages. We, the jury, further find that *S. A. Belden* and *W. Alling* convey to *J. Mussina* the property purchased by them from *Basse & Hord* on the 5th January, 1851, and, on the said defendants complying with the above, the said plaintiff shall refund the said amounts advanced by defendants for the purchase of the property, and in default of the defendants making the above conveyances within ninety days, we, the jury, find in favor of the plaintiff, *J. Mussina*, for the sum of $214,000, in lieu of the title to the property."

A judgment was rendered pursuant to this verdict, and the District Judge having overruled the motion for a new trial, offered by the defendants, the latter appealed.

In this court the plaintiff has joined in the appeal, averring that there is error in the judgment to his prejudice, and that upon finding the issues of fact in favor of the appellee, he is entitled upon the proofs and pleadings to a judgment *in solido* against the defendants, for the amount claimed in the petition, and supplemental petition, to wit: $375,000. Wherefore, he prays that the judgment of the court below be so amended as to give him an absolute judgment for $375,000, and without prejudice to any equitable lien he may have upon the lands in controversy, and that the judgment so amended be affirmed with costs."

The first question to be discussed is the question of jurisdiction.

So far as the action may be styled a real action, we think that the State Courts of Louisiana have no jurisdiction over it. An action for the revendication of immovables is a real action. C. P. 4. And an action to compel a conveyance of lands, falls within this category.

It is true the English Court of Chancery, in the exercise of its peculiar power over the consciences of parties, served with its *subpœna*, has indirectly assumed a jurisdiction touching real property situated abroad. But even there, it is believed that the cases generally will be found limited to a widely different state of facts from that which is presented by the record before us, to wit: that the parties defendant reside within the jurisdiction, that the land to be affected by the decree is under the dominion of the crown, and that, without the interposition of Chancery, there must be a failure of justice.

The courts of the United States which have been invested with chancery

jurisdiction have borrowed their doctrine and their practice from English precedents.

The case of *Massie* v. *Watts*, 6 Cranch, 157, relied upon by the plaintiff was a case from the United States Circuit Court of Kentucky against a defendant resident there; the land incidentally affected was situated in Ohio, but the question concerned the location of certain titles emanating from the Government of the United States; and the case was within the peculiar province of equity, not remediable at law.

These circumstances would hardly make the case of *Massie* v. *Watts* a precedent to support the jurisdiction of the Fourth District Court of New Orleans in the present controversy concerning land titles in Texas, even if that court had been endowed by the Legislature with chancery powers.

But the people of Louisiana have always resisted the encroachments of foreign modes of procedure, and especially the peculiar doctrines and forms of chancery.

After the Act of Congress of the 26th May, 1824, it was reluctantly admitted that the federal courts sitting in Louisiana had equity powers technically so called, and the question divided the Supreme Court of the United States. *Livingston* v. *Story*, 9 Peters, 652.

We find no warrant in our law and no justification in principle or necessity, for importing into our simple system of remedies one of the most subtle doctrines by which the chancellors of England extended their jurisdiction and aggrandized their power, a doctrine which, if carried into effect here without the limitations already alluded to, might occupy the courts of New Orleans with investigation of land titles all round the world.

True, our State courts may be said to have, both common law and equity jurisdiction in this sense, that they are generally competent to afford such relief, to parties and in cases properly before them, as may be demanded in a judicial proceeding, either at law or in chancery, in those States which recognize the English division of remedies. But it does not follow that all of the prerogatives claimed by courts of common law and courts of chancery, and all their artificial rules and peculiar dogmas should be usurped by the courts of Louisiana.

The case of *McDowel* v. *Reed*, 3 Ann. 391, has been cited as an authority in point. We do not find it so. That case was long held under advisement, and the decree was a very guarded one; in the decree we are to look for the character of the precedent.

The cause was remanded to ascertain if the garnishee, resident in New Orleans, had money in his hands, the proceeds of certain lands and slaves in Mississippi, which, by a contract made in New Orleans, had been conveyed to him in trust, with power to sell for the benefit of certain preferred creditors of the grantor, who was the defendant in execution, and to the prejudice of the complainant who resorted to the garnishee process. The court only intimated by its judgment, that if the garnishee had money in his hands, the proceeds of this arrangement made in Louisiana between citizens of Louisiana, in violation or in fraud of her laws, he should not be protected by his own reprobated contract from paying it over to the seizing creditor.

No other case has been cited from our reports to show that it was competent for the District Court to decree that the defendants should make the plaintiff a title to lands in the State of Texas.

The plaintiff, however, who succeeded in the court below in procuring a judgment for the land, almost in the words of the prayer of his petition, has chosen in this court to complain of that portion of the judgment, to drop the demand for a conveyance, and to ask an absolute judgment for $375,000 in damages.

When we consider that the gravamen of the complaint is the divestiture of title to lands in another State and their depreciation, by means of a conspiracy concocted there between persons resident there, it might well be doubted whether the incidental and subsidiary prayer for damages, which is now for the first time made the principal and indeed the only prayer, changed the legal aspect of the question of jurisdiction presented by the exceptions taken and overruled *in limine*. It has been said by high authority that if a court has no jurisdiction of a principal question it has none of its consequences and incidents. Per Kent C. J. in the *matter of Ferguson*, 9 John. 239. See also as to local actions for land, and damages to real estate. Vattel's Law of Nations, B. II, Ch. VIII, § 103, Story's Conf. Laws, § 543 et seq. *Rogers* v. *Woodbury*, 15 Pick. 156. *Livingston* v. *Jefferson*, 1 Brosch. 203. *Howard* v. *Ingersoll*, 23d Ala., 673.

But we do not find it necessary to decide the case wholly upon this ground. For, assuming (according to the oral argument pressed upon us at bar on behalf of the plaintiff) that where two things are prayed for, one within and the other without the sphere of its jurisdiction, the court must listen to the former prayer, and assuming also that we have a right to hear and determine the case upon the simple demand for damages, as if the action were transitory, still, we are compelled to say, after a diligent examination of the entire record, that the plaintiff has not furnished the means of a conjectural approach towards justice between the parties at present, by any judgment for damages whatever.

It may be that the plaintiff has suffered much, it may be that he has suffered not at all.

But, in controversies growing out of joint speculations in real estate, it is not upon wild conjecture that courts of justice should undertake to assess a specific amount of damages.

Such is the volume of the record and such the multiplicity of points both of fact and laws litigated between the parties, that we can only indicate a few of the numerous obstacles which render it impossible to do justice here and now, and which impose upon these litigants the necessity of postponing their controversy about damages, until the main question of title in its complicated bearings shall have been disposed of in the forum and by the law of the place *rei sitæ*.

The plaintiff in asking for damages assumes that the Brownsville Company absolutely owned the town of Brownsville; whereas they only owned certain pretensions of doubtful validity under which they took possession.

The revolutions of seventy years had covered the town site with various conflicting claims flowing from the various governments under whose empire the territory along the eastern bank of Rio Grande had successively passed.

One of these pretended titles emanated from the city of Matamoros on the opposite side of the river. Most of the lands in question were once a part of the *ejidos*, or town commons, granted to that city by the Congress of the State of Tamaulipas. The ayuntamiento of Matamoros parcelled out this portion of

their municipal domain in *labors*, or small farms, to tenants from amongst their own citizens. These farmers thus acquired an inferior and mongrel sort of title, somewhat analogous to that conferred on the lessee by the emphyteutical lease of the civil law. The direct dominion remained either in the city of Matamoros or in the sovereign; the useful dominion passed to the occupant of the *labor* subject however to various burdens and conditions. These *labor* titles formed one class of claims which attracted the attention of speculators covetous of acquiring a speedy fortune, many of whom anticipated that Brownsville would become a thriving city, when the American army left that neigborhood, after the successful termination of the late war with Mexico.

But some thought that such claims would not be respected by the courts, and contended that the superior title of the city of Matamoros vested in the State of Texas, by the event of war, as that State had declared in 1836, when she was a Republic, that her jurisdiction extended westward to the Rio Grande, and now that boundary was acknowledged. The partisans of this theory supposed that these lands, having *de jure* constituted a part of the public domain of Texas ever since the legislative declaration of 1836, and *de facto* since the military occupation in 1846, had for some time been subject to entry under Texas scrip and head-right certificates, some of which had been thus located by one *David Snively* since the occupation of the country by the United States troops.

In 1848, the defendant *Stillman*, a man of wealth, residing there, made investments in both classes of claims with the view of building up a town. He bought *labors* from *Zamora* and the two *Velas*, and scrip located by *Snively* to the amount of 4,676 acres, and employed surveyors who proceeded to lay out the town in lots.

Simon Mussina, the plaintiff's brother, and editor of a newspaper in Brownsville, having heard of *Stillman's* operations and intentions, proposed a partnership with him in speculating in Brownsville titles. As an inducement he held out the fact that he could control some more *labors*, in which he had been offered an interest by the farmers for the aid he might give them in forwarding their pretensions; he also professed some skill in Mexican titles. The negotiation of *Simon Mussina* with *Stillman* resulted in the wrrtten agreement of the 9th December, 1848, which is the main foundation of the plaintiff's case as presented in his petition. For some reason which does not very clearly appear, *Simon* put the name of his brother *Jacob* into the partnership, acting himself as his agent, the plaintiff never having been upon the Rio Grande.

The contract purports to be made between *Stillman*, *Belden* and *Jacob Mussina*, and binds them to hold jointly all *labors* of land which they or either of them had purchased or might thereafter purchase within what is termed the *ejidos* of Matamoros on the left bank of the Rio Grande, embracing the town of Brownsville, as also all locations and rights under Texas certificates or land scrip situated within the aforesaid *ejidos;* they also agreed that, *after all liabilities should be settled* the *profits* resulting from the sale of lands should be divided according to their respective shares in the partnership (to wit: *Stillman* $\frac{1}{2}$, *Belden* $\frac{1}{4}$ and *Mussina* $\frac{1}{4}$) all losses and expenses to be divided in the same ratio.

The company thus constituted sold some lots, chiefly on a credit, giving bonds for title, or actual titles, with the warranty of the company; and for some time lots were in demand, *Basse & Hord* acting as the agents of the company in making sales.

But the lots owed their value, not to the intrinsic worth of titles derived from Mexican *labor* tenants, or from Texas scrip locations, but mainly to the warranty of *Stillman* and *Belden* who were residents of the country and in good credit.

It is amply proved that *Jacob Mussina* of New Orleans was insolvent, and it would seem that his brother and agent, who testifies that he was equally interested with him in all his operations upon the Rio Grande, was not in much better condition.

It appears that the warranty of *Mussina*, an insolvent absentee, added nothing to the value of the lots.

Directly after the company commenced operations, their claims under the *labor* settlements and scrip locations were assailed by an ancient title descending from the Spanish crown.

On the 12th January, 1849, or less than five weeks after the partnership contract was signed, *Cavajos and wife* and various other persons representing themselves as the heirs of the original grantee *Don Jose Salvador de la Garza*, asserted their title dating back to the year 1781, by instituting a suit for the lands in question against *Stillman*, *Belden et als.*, in the United States District Court for the District of Texas.

At this time *Mussina* was unquestionably indebted to the company for his share of the expenses, and it is not surprising that his partners, encountering a law-suit at the outset, should have demanded a contribution from him. He appears to have gained time, and induced them to postpone their demand, by a proposal of his agent *Simon*, who, on the 12th January, 1849, addressed a letter to *Stillman* inclosing some Texas land certificates, which he estimated at $1,540 and which he requested *Stillman* to hold "as collateral for advances made in the purchase of Brownsville."

The plaintiff avers in his petition, that he entered into the agreement of 9th December, 1848, in good faith, and has fully discharged all the duties and obligations that devolved upon him under it: he assumed the affirmative of that issue; but the letter above referred to, as well as the testimony of his agent called by the defendant to testify against his interest, show that he did not contribute his quota to the joint expenses of a hazardous enterprize. The same testimony indicates that he contended for a point which would have wrought injustice towards his partners, viz: that the sale of lots should go on under the warranty of the company (which as we have stated derived its value from the names of *Stillman* and *Belden*) and that the proceeds should be divided among the partners before the titles were finally tested at law.

As the collaterals were afterwards returned to the plaintiff and he has not to this day paid a contribution, the judgment for $375,000 which he seeks would be a clear gain, with no valuable consideration other than the time spared by *Simon Mussina* from his editorial duties in attendance upon the courts and correspondence about the titles.

So embarrassed was *Simon Mussina* in October 1849, that he availed himself of his agency for his brother to mortgage his interest in Brownsville, to some of his own creditors by a deed of trust.

In the following December *Stillman* and *Belden* sold out to the defendants, *Basse & Hord*, who were agents of the town company. This sale of the 14th Dec., 1849, does not purport to convey to *Basse & Hord* the interest of *Mussina*. But a dispute had arisen as to what that interest was under the circum-

stances then existing. *Stillman* and *Belden* insisted that he had forfeited all rights under the contract by failing to contribute to the expenses or to the responsibility of the partnership. He contended that he was not bound to contribute, and that the profits of the speculation would pay his share of the expenses incurred. It would appear that just before the sale of the 14th December, *Simon Mussina* had some difference with *Basse & Hord* about another matter, to wit: the advice they had given their clients, *Simon Mussina's* creditors, relative to the registry of the deed of trust, just mentioned, upon the *Mussina* interest in Brownsville, executed on the 24th October, 1849, in which *Hord* was appointed trustee. The result was that another trustee was substituted to *Hord*, on the 15th December, 1849.

The purchase by *Basse & Hord*, two days afterwards, of the interest of *Stillman* and *Belden* would seem to have aggravated the dissensions which had grown out of *Mussina's* alleged failure to contribute to the expenses of the company.

On the 28th January, 1850, the scrip deposited as collateral for advances was returned to *Simon Mussina*, and *Stillman* and *Belden* gave public notice that all business connection between them and *Jacob Mussina* had ceased on account of his failure to comply with his engagements.

On the 30th January, *Simon Mussina* having come to an open quarrel with *Basse & Hord* also, wrote a formal notice for the press in the following words: "All authority vested by me in *Elisha Basse* and *Robert H. Hord*, of the firm of *Basse & Hord*, to act as my agents or attorneys in the affairs of the Brownsville Town Company, as also all other matters and things whatever, has been revoked. (Signed) *Jacob Mussina*, p. p. *Simon Mussina*."

The next day, Jan. 31st, 1850, *Stillman* and *Belden* executed the recognitive act to *Basse & Hord*, in which, for the first time, they appear to have warranted the latter against the claim of *Mussina*.

Six weeks afterwards, *Jacob Mussina* filed a bill of complaint in the United States District Court for the District of Texas, against *Stillman*, *Belden*, *Basse*, *Hord*, and one *George Lyon*, setting forth many of the allegations of the petition in this case, but averring the property sold by *Stillman* and *Belden* to *Basse & Hord* to be worth more than $50,000, and the moneys collected for the sale of lots to be about $20,000 in cash and about $10,000 in notes; certain interrogatories were propounded to the defendants, and, besides the prayer for a discovery, the following specific relief was asked: that all the pretended purchases of *Basse & Hord* from *Stillman* and *Belden* might be adjudged and decreed to have been made by *Basse & Hord* as the trustees of the complainant, and that, as his trustees, they should account and surrender to him all lands, notes, moneys, credits, bonds and obligations, together with all maps, plats, surveys and title papers received from *Stillman* and *Belden*, and that the petitioner be subrogated to the place and stead of *Basse & Hord*, in respect to the property, etc., received by them under the conveyances of the 14th December, 1849, and 31st January, 1850, upon compliance on his part with the terms conceded by *Stillman* and *Belden* to *Basse & Hord*; there was a further prayer that the defendants be compelled to account to the petitioner for all sales of lots and other receipts.

This bill was met by a demurrer, but, so far as the record informs us, it is still pending in the United States Court for the district of Texas.

In the court below, *Belden* pleaded the pendency of this suit by way of exception, and the same plea is set up in the answer of *Basse & Hord*.

The amendment asked for by the appellee in this court, as stated in his brief, reduces the case to a question of damages; it is said that the land is no longer in controversy here.

But the land is in controversy in Texas between the same parties, *Alling* alone excepted. How can we guage the damages, until we know what the Texas tribunal will do with the plaintiff's suit for the land there? A judgment in his favor simply for damages here will not bar the claim for specific relief pending there. And if his legal position be correct, that by reason of their former employment as agents and attorneys of the company, the purchase by *Basse & Hord* of the three-fourths interest of *Stillman* and *Belden* enured to his benefit, (a point which it is for the Texas tribunal, already possessed of that controversy, to determine,) and if his allegations about the value of the company's claims be also correct, he will turn out to be a gainer by the alleged frauds practiced by his former partners and the partnership attorneys, and we should not give him an additional reward in damages.

And as to the proceeds of lots sold, the present petition is not so framed as to call for a liquidation of the partnership. The plaintiff's bill in equity, pending in Texas, has called the defendants to account for these matters, and there, at the domicil of the partnership, it is proper they should be adjusted. If there were any evidence before us (which there is not) to show the amounts received, they are still liable to be refunded to the vendees and warrantees of the company, should their titles not prevail, and, by the terms of the partnership, nothing is to be distributed till all liabilities shall have been settled.

The depreciation in the value of lots which is complained of, is also an incidental question. The evidence shows that this was owing rather to commercial depression, a diminished population, and the clouds of adverse titles that thickened over the company's claims, than to the quarrel between the partners and the denial of *Mussina's* interest. Besides, if the plaintiff is not yet entitled to the lots or their value, he is not entitled to damages for their depreciation.

We now return to the *Cavazos* suit, in which the *De la Garza* title was asserted against the defendants, *Stillman* and *Belden*, to which suit *Jacob Mussina* voluntarily made himself a party, and which resulted in a decree recognizing that title as paramount.

The inconsistent positions taken by the plaintiff with regard to this decree have contributed to our embarrassment in the case.

He first contends that the decree is void for want of jurisdiction, and then claims in argument a large amount of additional damages, not charged in any of his pleadings, because, as he avers, that decree defrauds him of the Point Isabel tract of land bought in the name of *Simon Mussina*.

It is difficult to see how a decree, void for lack of jurisdiction, can have destroyed a title not in contestation in the suit.

From *Mussina*, who volunteered an appearance, the denial of jurisdiction, *ratione personæ*, cannot be heard. And it is plain that the court had jurisdiction of the subject-matter of the suit. If other parties should have been made, it does not follow that the decree is void as between the parties that were made. Can the plaintiff claim damages for this decree, which he has not sought to set aside by any of the direct modes known to the practice of the Texas or the United States tribunals?

We do not pretend to say that the decree was right. But *Mussina*, present in court by his separate counsel, as well as by his agent, contested the case,

with full knowledge of all the material facts which he now sets up collaterally in avoidance of the decree.

Basse & Hord never appeared as his attorneys in that case. They appeared only as the attorneys of *Stillman* and *Belden*, and of some of the *De la Garza* heirs who were made plaintiffs without authority, and who retired from that position. If *Basse & Hord* were ever the attorneys of *Jacob Mussina*, individually, of which we do not find satisfactory proof, they were, as we have seen, publicly discharged on the 30th January, 1850,—more than a year before the *Cavazos* suit was tried. More than a year before the trial *Mussina* knew that they had bought out *Stillman* and *Belden* and that the latter subsequently warranted them against his interest in the Brownsville titles. He thus dealt with them on the *Cavazos* trial at arm's length, and he had no longer a right to rely upon them to look after his interest in that suit. On the record his interest was denied by his former partners. On the other hand he instructed his special attorneys, before the termination of the suit, to take such steps in the further proceedings as would establish his title to the whole site of Brownsville. *Simon Mussina*, the plaintiff's agent, was present and made an affidavit on the trial. He is alleged to have been cognizant of all the frauds practised by the defendants, to have been skilled in Mexican titles, and to have devoted much time and labor to travelling and attending to law suits for the plaintiff.

Now, the plaintiff's petition in the present cause was filed after the trial but before the rendition of the decree in the *Cavazos* suit. He seemed to have anticipated that the decree must go against his interests, for he makes it matter of special complaint in the petition, that the procurement of the testimony to prove and maintain the title of the defendants in the *Cavazos* suit was intrusted mainly to *R. H. Hord*, and that he neglected to take at Brownsville and elsewhere the necessary depositions to prove up and maintain the rights of the defence, and especially the adverse possession of the defendant and their grantors.

If there was any neglect, the plaintiff must charge it upon his agent and counsel and not upon his adversaries.

But it is said that the decree was procured upon the testimony of *Hord*, an interested party. This does not appear, for the other evidence is not before us nor are any reasons for the judgment given. Were the fact so, still *Mussina* had the power to object, and did object to the competency of the witness, who, on his *voir dire*, openly avowed his interest in both the contending titles. *Mussina* was not deceived on the trial. If the judge ruled incorrectly in admitting *Hord* to testify, or gave undue weight to his testimony, those are matters for revision upon appeal, but they do not authorize us to override the decree as a mere nullity.

Again, it is said that because *Basse & Hord* were the agents and attorneys of the Brownsville Town Company, their purchase of the *Cavazos* title must be held to enure to the benefit of *Mussina*, and so he must be the beneficiary of the fraudulent decree.

It does not appear that *Basse & Hord* contracted for the purchase of the *Cavazos* claim until some time after the 30th January, 1850, when the plaintiff discharged them from all employment on his behalf.

It is a question, for the courts of Texas to determine, whether the plaintiff has acquired the *Cavazos* title by reason of the previous relations of *Basse & Hord* towards the Town Company, and their subsequent purchase from the heirs of *De la Garza*.

Again, we are asked to treat the old *De la Garza* grants as stale and fraudulent, although it was sustained by the *Cavazos* decree, to which the plaintiff was a party. If the judgment were out of the way we have not the information which would enable us to take such a responsibility. This grant always excited the serious apprehensions of the company, and it would seem that the plaintiff, or his agent, had even bought an interest under another portion of the same grant in August, 1849. The *Cavazos* claim was one of the obstacles to the success of the company, rendering the direct warranty of *Stillman* and *Belden* necessary to the sale of lots.

But it was not the only trouble encountered by the holders of the *labor* claims and scrip locations.

The State of Texas ignored their pretensions, and assumed to have succeeded to the paramount title of Matamoras and of Mexico on the 19th December, 1836, when she declared her boundry on the west to be the Rio Grande. She assumed, moreover, that the *ejidos* thus acquired, finally confirmed to her by the result of war, had not fallen into the general mass of her vacant lands, and that none of her laws had subjected them to be entered by scrip or head right certificates.

Accordingly, on the 24th January, 1850, by an Act of the Legislature incorporating the city of Brownsville, she donated the *ejidos*, in controversy, to the city itself in trust for certain public charities enumerated in the charter. This formidable claim must have been discussed for some weeks before it matured into a legislative grant, and it is but reasonable to suppose that the prospect of encountering it was one of the inducements of *Stillman* and *Belden* to make the sale of the 14th December, 1849.

It is true the Act incorporating Brownsville was subsequently repealed. But thereupon the District Attorney filed an information in the proper court to provide for the conservation and execution of the trusts; and the court, holding that the repeal of the city charter did not operate a revocation of the charities, and adopting the equitable doctrine that trusts shall never fail for want of a trustee, ordered and decreed that two new trustees be appointed to carry out the benevolent purposes of the Legislature in the administration and sale of the property. This decision is not technically binding on the adverse claimants, as *Simon Mussina* testifies, because the proceedings were, in form, *ex parte*. But, in reality, *Basse & Hord* were heard as *amici curiæ* in opposition to the motion of the District Attorney, as the holders of two anterior titles. Their pretensions, both under the Town Company and the *De la Garza* grant, are discussed at length in the learned opinion of the District Judge before whom the information was tried, and were there pronounced inferior to the title conveyed by Texas to the charitable uses aforesaid.

The testimony of *Simon Mussina* also points to another adverse claim, as likely to be asserted by the city of Matamoras, perhaps on the ground that her municipal possessions on this side of the Rio Grande could no more be divested by the events of war than those of any private owner.

The only property the company ever had, being thus beset by actual and impending litigation, the plaintiff would be fortunate, if by resorting to an action of damages in another State, he could exchange his conditional one-fourth interest in the Snively scrip locations and Mexican *labor* pretensions, for any absolute judgment for the value of the whole of Brownsville. He would thus escape, what were otherwise inevitable, the ordeal of a Texas war of titles, and the contingency of eviction.

But, to give him the judgment he seeks, we must assume that, by the laws of Texas, the fraudulent attempt charged upon his adversaries to deprive him of his one-fourth interest in the partnership, has so far redounded to his advantage, as to invest him with his partners' three-fourths, and not only so, but to make all the defendants his warrantors, that the partnership claims to the Brownsville town site, bought as an experiment and menaced on every side by hostile titles, some of which have been already successfully asserted in the Texas courts, were, nevertheless, perfect and indefeasible. We must pronounce the De la Garza grant to be stale and fraudulent; the Texas donation to the Brownsville charities to be an empty pretence, and the idea of an undivested interest still remaining in the city of Matamoras, to be preposterous. *Non nostrûm tantus componeri litis.* The courts of Texas must, in the first instance, settle these disputed titles to lands within their jurisdiction, and the demand for damages, if it could ever properly be entertained in the courts of Louisiana, is at least premature in the present stage of the business, and this for causes quite independent of the alleged frauds of the respondents.

If the charge of defeating the plaintiff's interest in the partnership of December 9th, 1848, by a fraudulent conspiracy were true, the intrinsic damages would be the amount he invested in the partnership; but he invested nothing. The resulting damages would be the amount of profits of which he has been deprived. But the profits would be nothing and the losses great and sure, if either of the rival titles should prove paramount to those purchased by the company. That such is likely to be the case, may reasonably be inferred, not only from the records in evidence, but from the fact that *Basse & Hord*, notwithstanding the brilliant acquisitions of which it is said they have robbed the plaintiff, are proven by his witnesses to be as insolvent as before.

So much upon the hypothesis that the plaintiff's interest in the town titles has been destroyed by the machinations of the defendants. We would not be understood to intimate that that interest can have been so destroyed. The plaintiff's title, such as it is, has been of record in the proper office of the county of Cameron, where the land lies, ever since the 18th of May, 1849, and we see no obstacles to the vindication of his rights in the courts of the locality. Indeed, his only adequate and complete remedy is there. We are not permitted to entertain a doubt of the ability or disposition of the courts of a sister State, to mete out justice to those who seek it in the right way.

When the plaintiff entered into a Texas partnership in Texas land claims, he impliedly submitted himself to the Texas laws and tribunals. His attempt to bring those titles before the courts of Louisiana for adjudication, either directly or indirectly, is not to be favored, as it is not necessary for the due enforcement of our own laws, nor for the suppression of fraud within our borders. Aside from matters confided to the Federal Government by its Constitution, the relation of the States of this Union *inter se* is that of foreign States in close amity. Each is sovereign in its proper domain. If we would secure respect for our own sovereignty, we should respect the sovereignty of others.

In so far as the residence of the defendant *Alling*, exempts him from the operation of some of the principles herein announced, it may be added, that the same difficulties which are at present in the way of even an approximative estimate of damages as against the principal offenders, apply to him, who is charged as an aider and abettor.

We also deem it proper to say, that the evidence which tends to show that he is liable *in solido* for the acts of his co-defendants in Texas, appears to us to be slight and inconclusive.

It is therefore ordered and decreed, that the judgment of the District Court be avoided and reversed, and that the plaintiff's demands be dismissed, as in case of non-suit. It is further ordered and decreed, that the plaintiff pay costs in both courts.

MERRICK, C. J. I concur in the judgment in this case, on the ground that there is in the record no sufficient evidence on which to base a decree in favor of the plaintiff.

The uncertainty which rests upon the titles, in regard to which the judgment of this court is sought, is so great, that in my opinion, it precludes, for the present at least, any safe estimate of damages. The judgment of nonsuit, therefore, receives my concurrence.

BUCHANAN, J. (concurring). The plaintiff's case was presented to the court below, upon an alternative prayer for the conveyance of the title to land, or for damages.

Before this court, the former alternative is abandoned, and the prayer for damages alone remains.

This claim for damages reposes essentially and indispensably upon an assumption that plaintiff, on the 9th December, 1848, and subsequently, was owner of an undivided fourth of certain lands situated in Cameron County, Texas, by titles derived from the State of Texas, and from the city of Matamoras.

These titles have been the subject of contestation in a suit in equity in the District Court of the United States, for the District of Texas, having Circuit Court powers; and by final decree of that court, rendered in January 1852, have been declared null and of no effect.

The plaintiff was a party defendant to that suit, having filed his appearance and answer on the 9th July, 1849, and was specially named in the decree.

He instituted the present action on the 1st November, 1851, pending the suit in equity in the Federal Court in Texas, and his petition alleges the pendency of said suit, and certain alleged fraudulent and collusive proceedings of some of the defendants (who were engaged in the suit in equity, either as defendants or solicitors,) touching the defence of that suit, as grounds for damages.

To sum up briefly. In November, 1851, whilst a suit in the nature of what we would call a petitory action for land, instituted by third persons, claiming under an adverse title, was pending against the present plaintiff as well as the present defendants, in a court of competent jurisdiction, in the State (Texas) where the land is situated, the present plaintiff cited his co-defendants in the said petitory action, before a Louisiana tribunal, and demands that the title be here settled in his favor, in the absence of those parties who were plaintiffs in the petitory action, and who might be (and as the result of that action has shown, are,) the true owners of the land. This is a change of venue which I think inadmissible. The action of the Federal Court, in Texas, could not thus be forestalled by that of the Louisiana tribunals.

I do not lose sight of the argument of one of the learned Counsel of plaintiff, that the concession of the fact that plaintiff has lost the land by the judgment of the United States Court, in Texas, does not exclude a claim for

damages against a party by whose frauds that judgment may have been brought about. But upon this point I observe, first, that there was no judgment in Texas when this suit was instituted, and, therefore, the cause of action supposed had not yet arisen. And, secondly, an inspection of the record of the Texas suit, shows that the plaintiffs, in that suit, claimed under a grant from the Spanish Crown, in 1781, and that *Mussina*, *Belden* and *Stillman*, claimed under titles from the city of Matamoras, dated 1834 to 1844, and under titles from the State of Texas, dated in 1847 and 1848. The judgment of the United States Court, in Texas, declares the Spanish grant to be the older and superior title; and annuls, by particular reference, so far as they conflict, with the Spanish grant, each and every title held by *Mussina*, *Belden* and *Stillman*. There is no allegation either in the equity suit in Texas nor in the present suit, that the Spanish title was a fraudulent one; and no matter how negligent, or even how fraudulent may have been the conduct of plaintiff's partners, or of the other defendants in the management of the Texas law suit, or of the other transactions connected with their joint speculations in lands, in and around Brownsville, it is manifest that plaintiff's eviction from those lands was *damnum absque injuriâ*, unless upon the hypothesis that the Espiritu Santo grant was an inferior title to that held by *Mussina* and his partners. Upon that point, the judgment of the court, in Texas, has concluded the plaintiff. At all events, the question is not re-examinable in this court.

R. N. Ogden & Leovy, for a re-hearing:

Having but recently been employed to assist the counsel of the plaintiff in his application for a rehearing, we feel great diffidence in attempting to impugn an opinion so elaborate as that pronounced in this case.

The first question treated by the court is that of jurisdiction, and to that we first respectfully invite a reëxamination. After a condensed statement of what the court considered "the leading allegations of the petition," the opinion states that "all the parties who were brought into court, excepted to the jurisdiction *in limine litis*. They averred that the demand on its face, was in the nature of a petitory action for lands lying in the State of Texas, where all but one of the defendants reside; that the action is therefore local, and cannot be maintained in the State courts of Louisiana." The validity of this plea must depend upon the nature of the demand contained in the petition.

The opinion says, that so far as the action "may be styled a real action, we think that the State courts of Louisiana have no jurisdiction on it. An action for the revendication of immovables is a real action, (C. P. 4,) and an action to compel a conveyance of lands falls within this category."

It must be in reference to this demand, to these allegations, and to the plea interposed against them *in limine litis*, that these observations of the court are to be applied. They cannot be applied to any suggestions contained in the answer to the merits filed after this plea was overruled. If this plea had been sustained, the petition would have been dismissed, and none of the matters contained in the answer to the merits, would have found their way to the attention of this court. Acting on an appeal from a decision so rendered, your attention would have been confined to the petition and the plea. In this manner only, we most respectfully suggest, is this question now to be investigated, without reference either to allegations of the answer, or proofs in the cause. How far the defendants are at liberty to set up any questions of disputed title, and thus embarrass the true issues in this cause; and how far such defence is supported by the proofs, are questions for future consideration in connection with the merits, but they are manifestly foreign to the present inquiry, which must rest for its solution on a sound application of precedents and principles to the original issue presented by the petition and the plea.

Can this be properly "styled a real action," or "an action for the revendication of immovables," in the language of the opinion; or as the defendants express it in their plea, "a petitory action for lands."

We respectfully think not.

In such actions the primary object is always the recovery of the thing. In this the primary object is redess for an injury, and the relief sought is in damages, unless the defendant chooses to accept the alternative presented to him, of surrendering the thing fraudulently withheld. Over such an action, there can be no doubt of the jurisdiction of our courts. That the power of our courts to do justice in such cases, is not restrained by the consideration that their decree may affect lands situated beyond their jurisdiction, is well settled by decisions of this court. In *McDowell et als.* v. *Read et als.* it was held that

"Where a court is called upon to enforce a right, it may avail itself of its jurisdiction over the person, to do justice relative to a subject-matter beyond its jurisdiction, though lands be affected by the decree." 3 Ann. 391. See *Copely* v. *Berry et als.* 12 Rob. 80.

Is not this case precisely the case supposed by Chief Justice Marshall, in the case of *Massie* v. *Watts*, 6 Cranch, 148, "where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff." In such case, this great Judge said, "the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

This case is so directly in point, that we must pray to be excused for expressing some surprise at its not having been regarded by this Honorable Court as of controling authority.

The view taken of it in the opinion, is expressed as follows:

"The case of *Massie* v. *Watts*, 6 Cranch, 157, relied upon by the plaintiff, was a case from the United States Circut Court of Kentucky, against a defendant residing there; the land incidentally effected was situated in Ohio, but the question concerned the location of certain titles emanating from the government of the United States, and the case was within the peculiar province of equity, and not remediable at law."

From this, we think, it must be inferred that, in the opinion of this court, one of the material grounds on which the jurisdiction was sustained, was, that "the question concerned the location of certain titles emanating from the government of the United States," and that in such a case, by reason of the subject-matter of the suit, the courts of the United States would have jurisdiction, without regard to the situation of the land. If such a ground of jurisdiction existed, it was conclusive, and superceded the necessity of referring to any other. It would hardly have escaped the luminous mind of Chief Justice Marshall, or the notice of his associates.

Yet, we find no allusion to it, as an element in the question of jurisdiction. On the contrary, the decision rests upon the general principles of equity jurisprudence, and not upon any special authority of the Federal Judiciary. After stating the case, and citing minutely the leading English precedents, it concludes in these words: "Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court, may be effected by the decree."

Nottingham said, in the case of *Anglasse* v. *Muschamp*, 1 Vernon, page 75, "the defendant residing in England, having fraudulently obtained a rent charge on lands lying in Ireland, a bill was brought in England to set it aside.

"To an objection made to the jurisdiction of the court, the Chancellor replied, 'this is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of the court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must agree *in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you that you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so wholly elude the jurisdiction of this court.' The Chancellor, in that case, sustained his jurisdiction on principle, and on the authority of *Archer* v. *Preston*, in which case a

contract made respecting lands in Ireland, the title to which depended on an act of settlement, was enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to England. On a rehearing before Lord Keeper North, this decree was affirmed.

"In the case of the *Earl of Kildare* v. *Sir Maurice Eustace* and *Fitzgerland*, 1 Vernon, 419, it was determined, that if the trustee live in England, the Chancellor may enforce the trust, although the lands lie in Ireland.

"In the case of *Toller* v. *Coteret*, 2 Vernon, 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the court, the person of the mortgagee being within it.

"Subsequent to these decisions was the case of *Penn* v. *Lord Baltimore*, 1 Vernon, 449, in which the specific performance of a contract for lands lying in North America was decreed in England.

"Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that in a case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery, is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

"The inquiry, therefore, will be, whether this be an unmixed question of title, or a case of fraud, trust or contract."

The question of jurisdiction might be safely rested here; but its importance induces us to call the attention of the court to a few additional authorities on the point.

"The principles thus laid down apply with the same force, where the equitable obligation in question has its origin in the contract of the defendant, as when it originated in a wrongful disregard on his part of the antecedent equity of the complainant. It is, therefore, well settled, that a contract for the sale of land will be specially enforced against a defendant within the jurisdiction of the court, although the land itself may be without it. The law was so held in the cases of *Fairley* v. *Shippen*, Wythe's Ch. Cases, and *Guerrant* v. *Fowler*, 1 Hen. & Mumford, 4, before the decision in *Massie & Watts*, and since then in *Shattuck* v. *Cassidy*, 3 Edwards, 152, and seems to be now too well settled for controversy. In *Ward* v. *Arredondo*, Hopkins, 213, the doctrine that rights growing out of contract are not tied down to any special locality, was applied under circumstances somewhat peculiar, and where the parties to the contract were beyond the reach of the court, as well as the property, to which the contract related. The defendants, who reside at Havana, had agreed to sell land to the complainants, who were residents of New York, and had actually sent a conveyance of the property, which was returned for some informality in its execution. The mistake was corrected, and the deed placed in the hands of defendants' agent in New York, but with directions not to deliver it to the complainant, unless on the payment of a sum of money in addition to that stipulated for in the original contract. Under these circumstances, the court sustained a bill for an injunction to prevent the agent from returning the deed to the defendants, and to compel him to deliver it to the plaintiffs in execution of the contract."

The decisions above cited were fully sustained in the recent case of *De Klyn* v. *Watkins*, 3 Sandford, 185, where it was held, that when land which had been obtained by fraud from the complainant, was sold to a subsequent purchaser with notice of the fraud, the purchase would be set aside, and a reconveyance directed, although the land lay beyond the jurisdiction of the court.

"The general principle, that the performance of equitable obligations will be enforced, without regard to the situation of the property, to which they relate, was applied in the case of *Mitchell* v. *Bunch*, 2 Paige, 606, by deciding that equity would compel the discovery of assets fraudulently concealed and withheld by a debtor, and their application to the payment of his debts, although consisting of lands in another State." White & Tudor's Leading Cases in Equity, p. 324, *et seq.*

"Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the complainant claims an equitable title, within the jurisdiction of the court; or to execute such a conveyance or transfer thereof, as will be suffi-

cient to vest the legal title, as well as the possession of the property, according to the *lex loci rei sitæ*." Ibid, p. 325.

"Although the question, how far the courts of our country are authorized to proceed against foreigners temporarily within their jurisdiction, in relation to contracts made in another country, has been frequently raised, it appears now to be well settled, both in this State and in England, that they have jurisdiction to enforce the performance of such contracts, where the party proceeded against is within the jurisdiction of the court. And it makes no difference whether the defendant is actually domiciled here, or is temporarily within the jurisdiction at the time of the service of the process to appear and answer the plaintiff's demand. *Sicard* v. *Whale*, 11 John. R. 194, *Peck* v. *Hozier & Mulock*, 14 id. 346; *Smith* v. *Spinola*, 2 id. 198; *Imley* v. *Ellessen*, 2 East's Reports, 453. Neither is this practice of entertaining suits against, or between foreigners, of recent origin, or confined to the courts of this country and of England. By referring to the digest, it will be found that the courts of Rome not only took cognizance of suits between foreigners, but that a Judge was specially authorized to discharge that duty. White & Tudor's Leading Cases in Equity, p. 326.

"In general, the fact that the property is not within the jurisdiction constitutes no bar to a proceediug in a court of equity, if the person is within the jurisdiction, for a court of equity acts upon the person, or, to use the appropriate phrase, *æquitas agit in personam*." Story Eq. Pl. §489.

The opinion says: "It is true the English Court of Chancery, in the exercise of its peculiar power over the consciences of parties served with its subpœna, has indirectly assumed a jurisdiction touching real property situated abroad; but, even then, it is believed that the cases generally will be found limited to a widely different state of facts from that which is presented by the record before us, to wit: that the parties defendant reside within the jurisdiction; that the land to be affected by the decree is under the domion of the crown; and that, without the interposition of Chancery, there must be a failure of justice.

"The courts of the United States which have been invested with Chancery jurisdiction have borrowed their doctrine and their practice from English precedents."

We have shown that neither in England nor in the United States does the jurisdiction of a Court of Chancery depend upon the residence of the defendant. In the case of *Massie* v. *Watts*, the language is: "the jurisdiction of a Court of Chancery is sustainable whenever the person be found."

In *Archer* v. *Preston*, "a contract respecting lands in Ireland was enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to Enguland. In several English and American cases we have cited from White and Tudor, vol. 2, part 2, p. 326, it was held to make "no difference whether the defendant is actually domiciled here, or is temporarily within the jurisdiction at the time of the service of the process to appear and answer the plaintiff's demand. In this respect, then, there is certainly no difference between those cases, in which the English and American courts have taken jurisdiction, and the case before the court. As to the second ground of difference, "that the land to be affected by the decree is under the dominion of the crown," which, in another part of this opinion, is applied to the States of this Union, as being, except in their federal relations, "foreign States in close amity," each sovereign, and bound to respect the sovereignty of each, we respectfully suggest that in no English or American decision which we have been able to find, is the question placed upon that ground. In those quoted, it is put upon the jurisdiction of the court, and not upon the power of the sovereign. In the case of *Massie* v. *Watts*, it was admitted that if the case involved "a naked question of title, the jurisdiction of the Circuit Court of Kentucky would not be sustained," and yet the lands lay within the dominion of the general government. In the English cases, the land was situated beyond the jurisdiction of the court, but clearly within the dominions of the crown, and yet the jurisdiction was supported on the general power of the court to act upon the person, without the slightest allusion to the situation of the lands as within the dominions of the crown. As to the third ground of difference, "that without the interposition of Chancery there must be a failure of justice," we respectfully think it constitutes no difference, because our courts are courts of equity as well as courts of law.

But the leading opinion, after commenting upon the decision of the Supreme Court of the United States, which we have quoted, proceeds to say: "These circumstances would hardly make the case of *Massie* v. *Watts*, a precedent to support the jurisdiction of the Fourth District Court of New Orleans, in the present controversy concerning land titles in Texas, even if that court had been endowed by the Legislature with chancery powers. But the people of Louisiana have always resisted the encreachments of foreign modes of procedure, and especially the peculiar doctrine and forms of chancery.

"After the Act of Congress of the 26th May, 1824, it was reluctantly admitted that the federal courts sitting in Louisiana had equity powers, technically so called, and the question divided the Supreme Court of the United States. *Livingston* v. *Story*, 9 Peters, 652.

"We find no warrant in our law, and no justification in principle or necessity, for imparting in our simple system of remedies one of the most subtle doctrines by which the Chancellors of England extended their jurisdiction and aggrandized their powers; a doctrine which, if carried into effect here, without the limitations already alluded to, might occupy the courts of New Orleans with the investigation of land titles all round the world.

"True our State courts may be said to have both common law and equity jurisdiction in this sense, that they are generally competent to afford such relief to parties, and in cases properly before them, as may be demanded in a judicial proceeding, either at law or in chancery, in those States which recognize the English division of remedies. But it does not follow that all the prerogatives claimed by courts of common law and courts of chancery, and all their artificial rules and peculiar dogmas, should be usurped by the courts of Louisiana."

We respectfully suggest that this passage contains errors, which have unconsciously influenced the conclusions of the opinion. The true question presented is not one of practice but of jurisdiction; not by what rules and modes of procedure our courts shall act, but whether they have the powner to act at all; not whether the "artificial rules and peculiar dogmas" of an English Court of Chancery should be "imported into our simple system of remedies," but whether our courts possess equity jurisdiction, and are competent to administer relief under our simple system of petition and answer.

The case of *Massie* v. *Watts*, we respectfully suggest, was authority to show what is a proper case for equitable relief, and so far as its facts are analogous to those of this case, it was a precedent. Supposing this to be such a case, and that the Fourth District Court was competent to afford equitable relief, we respectfully ask whether the authority of that case, and the English and American decisions we have cited, should not be considered safe guides in leading you to the conclusion that its jurisdiction over the person, arising from the nature of the case, was not restrained by the locality of the lands which might be affected by its decree.

That our courts possess full and complete equitable powers cannot be questioned. See Hennen's Digest, p. 466.

Although it may be that "the people of Louisiana have always resisted the encroachments of foreign modes of procedure, and especially the peculiar doctrines and forms of chancery," yet we are not aware that they have ever contended that our courts were not invested with full powers to enable them to do justice. The lawyers of Louisiana have always maintained that our courts were fully competent to afford equitable relief in all cases. Case of *Livingston* v. *Story*, 9 Peters, 652.

Assuming, then, that the court below had full jurisdiction, and was authorized by our laws to administer the relief sought, we proceed to other portions of the opinion, connected with the merits, which we respectfully suggest may require revision, the inquiry is, how far the plaintiff's case, as stated in his petition, is supported. At the threshold of this inquiry, it must be borne in mind that the case is not presented to this court as an original one, but as an appeal from the verdict of a jury sanctioned by the court of the first instance, that the case was one of damages for fraud, breach of trust, violation of contract, conflicting proof, one, therefore, peculiarly of the province of the jury, and in which this honorable court has been heretofore in the habit of attaching great weight to their verdict, the doctrine of this court, as collected from numerous decisions, is thus stated in Hennen's Digest, vol. 1, page 94:

"When the evidence is contradictory, the verdict of the jury upon questions of fraud and simulation, the assessment of damages, the credibility of witnesses, and other matters of fact peculiarly within its province, will not be disturbed unless manifestly erroneous."

We respectfully ask if there is not error in the views taken of the relative position of the parties, which have had a material influence on the decision. The opinion says, the plaintiff and defendants, *Stillman* and *Belden* entered into an agreement on the 9th of December, 1848, "to hold jointly certain land titles intended to cover the town called Brownsville, etc."

It further says: "The plaintiff, in asking for damages, assumes that the Brownsville Company absolutely owned the town of Brownsville, whereas they only owned certain pretensions of doubtful validity, under which they took possession."

We contend that the defendants stood in such relation to the plaintiff by their original agreements, and by their repeated recognition of his rights, and of the completeness of the title, and they cannot be permitted to set up, as a defence to this suit, any questions of disputed title, or to embarrass this case with any inquiry into title.

The contract of the 9th December, (to be found at p. 127 of the record, and on p. 2 of the original brief,) and the acknowledgments and recognitions of title, to which we shall now beg leave to refer your honors, as found in both record and original brief, prove, we most respectfully think, that the parties agreed to hold, not mere "land titles," but *lands;* not mere titles, "intended to cover the town called Brownsville," but the land itself on which the town then stood. Not "mere pretensions of doubtful validity under which they took possession," but the land itself, of which they had the peaceable, open, notorious and quiet possession, under titles perfect in all respects, derived from persons who had similar possessions, during a period sufficient to cover all defects by the ægis of prescription. And we further contend, that the fiduciary relations in which defendants stood towards the plaintiff forbade such a defence to this action.

We respectfully consider that it is clearly established that *Basse & Hord* acted throughout as the attorneys-at-law and as the agents both of the Brownsville Company and its individual members, in all matters connected with these lands, and as the attorneys-at-law of *Jacob Mussina* individually, in relation to certain other lands.

And we submit to the court, whether the defendants can be permitted to set up, as a defence to this suit, the condition of the titles to these lands, and lead the court into an investigation of those titles; whether in so doing they do not lead us away from the true issues in the cause; and whether such a defence can lay in their mouth.

It would be admitted that a defaulting teller of a bank, who had absconded with the funds of the bank, and invested them in the purchase of lands, in his own name, in the island of Cuba, could not be permitted, if found here and brought personally into one of our courts, at the civil suit of the bank, claiming damages for his acts of embezzlement, and offering to take from him a conveyance of the land bought with their funds, in lieu of damages, to set up as a defence that the titles to these lands were defective and imperfect, and lead the court into an investigation of their validity. Suppose a lawyer or agent, charged by one of our citizens with the defence of his title to real estate in San Francisco, and put into possession of his title deeds and means of defence, should betray his trust and acquire a title in himself to such real estate, and hold it adversely to his client, could he, when made personally amenable to the jurisdiction of one of our courts, in a suit like the present, be permitted to plead in defence that the titles were defective and the lands in litigation? The same principles which exclude such defence in those cases, ought, we conceive, to exclude it in the case stated in the petition, and supported as it is shown in proof.

If, however, we are to be led, in this case, into an investigation of the character and validity of these titles, we think they will be found, on a closer examination, to be of higher dignity and perfection than they are represented to be in this opinion. It says:

"The *Ayuntamiento* of Matamoras parceled out this portion of their municipal domain in *labors*, or small farms, to tenants from amongst their own citizens; these farmers acquired an inferior and mongrel sort of title, somewhat

analogous to that conferred on the lessee by the emphyteutical lease of the civil law."

Respectfully contending that the rights conferred by these labor titles were more extensivs than those "cenferred on the lessee by the emphyteutical lease of the civil law," let us for a moment examine them on the supposition of their analogy.

The emphyteusis is described by *Mackeldey*, as the real right by which a person is entitled to enjoy another's estate as if it were his own, on condition of cultivating and improving it, and paying, at certain periods, a certain tax or rent therefor. That although the emphyteuta does not become the owner of the thing, yet he has nearly all the rights of an owner. That he has the full right of enjoyment, consequently the right of possessing the thing and of reaping all the fruits thereof; that he has the right of disposing of the thing itself, by sale, on giving notice to the *dominus* or owner, who must, within two months from such notice, exercise or waive his right of preëmption.

"The grant of an emphyteusis," he says, "is usually founded on a contract. As this contract confers upon the emphyteuta a sort of ownership, it was regarded by many Roman jurists in the light of a contract of sale; but, as on the other hand, it requires the payment of a yearly rent, others regarded it as a contract of hiring. This controversy among the Roman jurists, respecting the nature of the emphyteutical contract, was settled by the Emperor Zeno, who decided that it was neither one nor the other, but an independent consensual contract."

It originated in the custom of the Romans to divide conquered lands among the citizens and soldiers, subject to the superior ownership of the State, and bound to the payment of a rent to the *ærarium* (treasury,) and "it being difficult to find a willing tenant for lands lying waste and uncultivated, or one who would be inclined to expend the necessary labor and capital to bring under cultivation land in which he had no permanent right, and to pay rent for it without some prospect of an adequate return, to obviate this difficulty and to promote agriculture, the rights of the tenants of waste lands were extended as far as possible, so as to give him a sort of ownership." "This expedient had great effect in encouraging persons to undertake to reduce such lands to cultivation; and afterwards municipal and ecclesiastical corporations also let out lands belonging to them, in a manner similar to emphyteusis."

The title of the emphyteuta descended at his death to his heirs, unless he had disposed of it by will.

Viewed, then, in the light of such a title, so nearly approaching to complete ownership, and only subject to be defeated by the non-performance of conditions subsequent, what did it become when the performance of those conditions were rendered impossible by a change of sovereignty effected by conquest and treaty.

He was so far owner, that he could alienate *inter vivos* or *mortis causa*, could mortgage the land or burthen it with servitudes without the consent of the *dominus*. As a means of enforcing his rights, he had the action *rei vindicatio utilis* against every possessor, including even the proprietor himself. Besides paying the rent and improving the property, he had to bear all the public burdens and taxes imposed upon it. Although he was bound to pay the rent (*canon*) agreed upon at the time specified, and without any previous demand, yet "he did not forfeit his right *ipso jure* by a non-performance of his duties, but only through an action brought by the proprietor."

From what is shown in this record, this labor title seems to be an absolute grant in fee, liable, however, to be defeated on the non-performance of certain conditions subsequent. The grantee became owner. In many instances he had taken possession of and improved the land before obtaining the grant, and the grant was then made, ratifying his possession and confirming his title as owner. The principal if not the sole condition was, it is believed, the payment of a rent almost nominal. See Doc. Fa., Rec. 303; Doc. Q., Rec. 112.

The lands embraced in these titles were held by the grantees, as their own property, and were mortgaged, sold, seized for debt, transmitted by devise and by descent during a great number of years, and no claim of forfeiture or defeasance was ever made during the existence of the former sovereign. The defendants themselves, we show, treated them as absolute titles, supporting their averments by their oaths.

In the case of *Soulard et als.* v. *the United States*, C. J. Marshall said:

"In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regards the stipulation as the avowal of a principle, which would have been held equally sacred, though it had not been inserted in the contract.

"The term 'property' as applied to land, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory as well as those which are executed. In this respect, the relations of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." 4 Peters, 511.

"Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and the rigorous execution of them is a species of *summus jus*, and in many cases hardly reconcileable with conscience. If the condition subsequent be possible at the time of making it, and becomes impossible to be complied with, either by the act of God, or of the law, or of the grantor; or if it be impossible at the time of making it, or against law, the estate of the grantee, being once vested, is not thereby divested, but becomes absolute." 4th Kent, 130.

In the *United States* v. *Arredondo et als.* 6 Peters, 745, the Supreme Court says:

"It is an acknowledged rule of law, that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single."

The condition was, that the grantees should establish on the lands two hundred Spanish families. The court says in that case:

"We are not prepared to say that the condition of settling two hundred Spanish families in an American territory has been, or is, possible; the condition was not unreasonable or unjust at the time it was imposed. Its performance would have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance after its cession to the United States would be demanding the '*summum jus*' indeed, and enforcing a forfeiture on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves at all events justified, if not compelled to declare, that the performance of this condition had become impossible by the act of the grantors—the transfer of the territory, the change of government, manners, habits, customs laws, religion, and all the social and political relations of society and of life."

These lands had been severed from the public domain and from the *ejidos*, or commons, and granted by metes and bonds—were so held as property, built upon, improved and cultivated under titles of ownership. Could they, consistently with the principles contained in these cases, and invariably acted upon by the courts of this country, be considered, after the change of government, in any other light than as complete and absolute titles, the duties to the new sovereign in the shape of taxes and other impositions affecting all lands, taking the place of the rent and other impositions of the former sovereign?

Such, then, was the title under which the plaintiff and his associates held their lands, and entered upon their enterprize. That they attempted to fortify it by a purchase of scrip detracted nothing from the value of the title on which they relied, and is a matter of small consequence, which, however, will receive in its proper place a passing remark. The leading opinion says: "Such is the volume of the record, and such the multiplicity of points, both of facts and laws litigated between the parties, that we can only indicate a few of the numerous obstacles which render it impossible to do justice here, and now, and which impose upon these litigants the necessity of postponing their controversy about damages, until the main question of title, in its complicated bearings, shall have been disposed of in forum, and by the law of the place *rei sitæ*."

These "numerous obstacles" are described as "clouds of adverse titles that thickened over the company's claims."

These "adverse titles" are enumerated, and we beg leave to call your honors' attention to them in the order in which they are mentioned in this opinion.

According to the principles settled in the cases above cited, it is clear that the State of Texas did not acquire by "the event of the war" any title to these lands, which were then owned by individuals, subject only, as in the case of *Arredondo*,

to certain conditions subsequent; and consequently, the purchase by *Stillman* of the Snively scrip locations, was at most only a work of abundant caution to avoid litigation or annoyance. But, however, that may be, it does not present, in this case, any conflict of title, inasmuch, as both the labor titles and the scrip titles were united in the hands of the company. The next adverse title mentioned is the De la Garza grant, which the opinion describes as follows: "Directly after the company commenced operations, these claims under the labor settlement and scrip locations, were assailed by an ancient title, descending from the Spanish crown.

"On the 12th January, 1849, or less than five weeks after the partnership contract was sighed, *Cavazos* and *wife*, and various other persons, representing themselves as the heirs of the original grantee, *Don José De la Garza*, asserted their title, dating back to the year 1781, by instituting a suit for the lands in question, against *Stillman*, *Belden*, *et als.*, in the United States District Court of the district of Texas.

"This suit resulted in a final decree, recognizing the De la Garza grant as paramount."

Neither this claim, nor its final recognition as paramount, can, we respectfully contend, form any obstacle to justice in this cause. The *Cavazos* suit, and the final decree rendered in it, are charged in the petition as being a part of the complicated machinery of fraud and conspiracy, by which the plaintiff has been wronged and injured, and it does not now stand in legal contemplation as a conflicting claim against us, because, as is charged and proved, it has been brought in during the pendency of the suit, and before the decree by our agents and trustees, who now claim to be in possession of the property embraced in that decree. What rights these agents and trustees acquired adversly to the plaintiff in this suit, by their arrangements with the complainant in the *Cavazos* suit depends upon their relations and obligations under a contract, and are examinable in this court; but as a question of disputed title, in which others than the defendants have any interest adverse to the plaintiff, it is forever set at rest by the acts of the defendants themselves.

The next in the enumeration of these adverse titles is described as follows, in the leading opinion, after speaking of the De la Garza claim, and its establishment by a final decree of a competent Texas tribunal:

"But it," the De la Garza claim, "was not the only trouble encountered by the holders of the labor claims and scrip locations. The State of Texas ignored their pretensions, and assumed to have succeeded to the paramount title of Matamoras and of Mexico, on the 19th of December, 1836, when she declared her boundary on the west to be the Rio Grande. She assumed, moreover, that the *ejidos* thus acquired finally confirmed to her, by the result of war, had not fallen into the general mass of the vacant lands, and that none of the laws had subjected them to be entered by scrip, or head-right certificates."

"Accordingly, on the 24th January, 1850, by an Act of the Legislature, incorporating the city of Brownsville, she donated the *ejidos*, in controversy, to the city itself, in trust for certain public charities enumerated in the charter. This formidable claim must have been discussed for some weeks before it matured into a legislative grant; and it is but reasonable to suppose that the prospect of encountering it was one of the inducements of *Stillman* and *Belden* to make the sale of the 14th December, 1849."

"It is true, the Act incorporating Brownsville was subsequently repealed. But thereupon the District Attorney filed an information in the proper court to provide for the conservation and execution of the trusts; and the court holding that the repeal of the city charter did not operate a revocation of the charities, and adopting the equitable doctrine that trusts shall never fail for want of a trustee, ordered and decreed that two new trustees be appointed to carry out the benevolent purposes of the Legislature, in the administration and sale of the property."

"The decision is not technically binding on the adverse claimants, as *Simon Mussina* testifies, because the proceedings were, in form *ex parte*. But in reality, *Basse & Hord* were heard as *amici curiæ*, in opposition to the motion of the District Attorney, as the holders of two anterior titles. Their pretensions, both under the Town Company and the De la Garza grant, are discussed at length in the learned opinion of the District Judge before whom the information was tried, and were there pronounced inferior to the title conveyed by Texas to the charitable uses aforesaid."

This adverse title can present no serious obstacle, as we respectfully maintain, for several reasons:

First—It is directly at variance with the other claim of the State of Texas first mentioned in this opinion, "that these lands, having *de jure* constituted a part of the public domain of Texas ever since the legislative declaration of 1836, and *de facto* since the military occupation of 1846, had, for some time, been subject to entry under Texas scrip and head-right certificates."

Second—The answer we have given to the first claim, equally applies to this second claim of the State of Texas, to wit: That the lands were private property, and protected by the principles recognized by our courts.

Third—That the attempted donation of the *ejidos*, or commons, to the city of Brownsville, contained in the charter, or act of incorporation, fell to the ground with the repeal of that act.

Fourth—That the *ex parte* decree, here spoken of, was reversed by the Supreme Court of Texas. See *Basse* v. *Fountleroy*, 11 Tex. Reps.

Fifth—That there is no one before this court setting up any such title, nor is it set forth in any of the answers in this suit.

Sixth—As the defendant's counsel, in his brief, page 27, tells us: "The State of Texas formally recognized the De la Garza grant, and relinquished by an Act of the Legislature, approved February 10, 1852, all its right, title and interest in the lands covered by it, to the original grantee, his heirs and assigns."

There remains but one more of the series of adverse titles enumerated in the opinion, and it is thus described:

"The testimony of *Simon Mussina* also points to another adverse claim as likely to be asserted by the city of Matamoras, perhaps on the ground that her municipal possessions on this side of the Rio Grande could no more be divided by the event of war than those of a private owner."

The only testimony of *Simon Mussina* on this subject is in the following words: "Being asked what was the nature of the claim of the city of Matamoras? says: 'The city pretended that it owned the property in fee, and had only leased it to those who had established the labors.'"

This testimony does not "point to" the grounds on which this claim of the city of Matamoras rested. It speaks of it merely as a pretension, and the pretension is evidently unsupported by a shadow of reason. The opinion says: "Perhaps on the ground that her municipal possessions on this side of the Rio Grande could no more be divested by the event of war than those of any private owner." But the protection thrown around private property by the conquering nation was never extended to belligerents; and the "municipal possessions" of the city of Matamoras could hardly be respected, when the rights of the sovereignty, of which she was herself a creature, had been annihilated.

But the defendants themselves furnish a complete answer to this and to all these pretended titles, so far as they affect the present controversy. Their counsel says, page 27 of his brief, that "the decision in the *Cavazos* case itself, by a court of competent jurisdiction, affirms not only the original validity of the title but determines that the rights of the claimants had not been destroyed by the change of government, forfeiture, or adverse possession, etc."

While we deny the validity of this De la Garza title, and claim the benefit of the defendant's sworn denunciation of it as "stale and fraudulent," and insist that this decree was the result of a fraudulent and collusive conspiracy to injure us, the defendants must be forever estopped by this admission from themselves setting up against us any of the pretended titles which they thus say have been finally set aside in their favor by the decree of a competent tribunal.

We cannot help thinking that this review of the case must disperse these clouds of adverse titles, and that your honors must see that the only one remaining at all deserving of your consideration is the De la Garza grant, now quietly held by our opponents in this cause, who attempt to obstruct your jurisdiction, and to postpone an examination of the plaintiff's claim of damages on the ground of conflict and uncertainty in regard to the title.

If we have succeeded in this, we hope to have removed the difficulties which seem to press upon the minds of the Chief Justice and of Mr. Justice Buchanan in their very guarded concurrence in the decree.

His Honor the Chief Justice says: "I concur in the judgment in this case, on the general ground that there is in the record no sufficient evidence on which to base a decree in favor of the plaintiff. The uncertainty which rests upon the title in regard to which the judgment of this court is sought is so great that, in

MUSSINA v. ALLING.

my opinion, it precludes, for the present at least, any safe estimate of damages. The judgment of non-suit, therefore, receives my concurrence."

Now it appears that there is no uncertainty as to the title; or, at least, none that the defendants can set up as an obstacle to the plaintiff's claim for damages; and that the only question is whether the title now held by *Basse & Hord*, by virtue of the Texas decree, is in their hands a good defence against this claim for damages.

It is true, as stated by Mr. Justice Buchanan, that there was "no judgment in Texas when this suit was instituted." But plaintiff had alleged in this suit the "fraudulent and collusive proceedings of the defendants touching the defence of that suit;" and, as stated in the leading opinion, had declared in his petition in this suit his anticipation "that the decree must go against his interest," in consequence of those fraudulent and collusive proceedings. The terms in which this charge is made, and this anticipation expressed, are as strong and explicit as language affords.

Although there may be no express allegation in so many words, "either in the equity suit in texas or in this suit, that the title was a fraudulent one," yet we respectfully submit to your honors that such a charge is substantially contained in both, and we have shown that in the answer of *Belden* and others in this suit, the *Cavazos* title was expressly declared to be "stale and fraudulent," and the charge was made under oath.

Lastly, in regard to the foregoing views of Mr. Justice Buchanan, "that the judgment of the court in Texas has concluded the plaintiff," and that "at all events, the question is not reëxaminable in this court," we respectfully conceive that, in this case, your honors are not called upon to override that decree, or to touch it in any respect. So far as the present controversy is concerned, the plaintiff, without admitting its validity or authority, and reserving the right to dispute both on all proper occasions, may well contend that its existence opposes no legal obstacle to his rights or claims in this suit.

It does not deprive this court of the right to determine, under the facts and circumstances of this case, who are the real beneficiaries of that decree, or, as Mr. Justice Buchanan has expressed it, "does not exclude a claim for damages against a party by whose frauds that judgment may have been brought about."

Besides, it is also true that the judgment in the *Cavazos* suit was rendered before the trial of this suit, and the fact was pleaded by the defendant *Alling*, and by him introduced into the cause as evidence, and therefore became a proper element for consideration in this suit. It was proved on the trial, not only without opposition but by the action of the defendants themselves, that the "anticipated" wrong and injury growing out of the fraudulent combinations of the defendants had been actually consummated.

These views seem to us to obviate the objection of the learned Judge that plaintiff is attempting a change of venue, and calling upon this court to settle questions of title to lands which are now pending and at issue "in a court of competent jurisdiction in the State (Texas) where the land is situated," and this, too, "in the absence of those parties who were plaintiffs in the petitory action (in Texas), and who might be, and, as the result of that action has shown, are the true owners of the land."

The plaintiff asks of this honorable court neither decision nor inquiry respecting the rights of the plaintiffs in that Texas suit, nor respecting the validity of the Texas decree. He has not sought to introduce here any litigation as to disputed titles. It has been introduced by his adversaries against his strenuous opposition. He contends that it is not germain to this cause. He opposes its introduction as a defence to his claim of damages, and he asks of this court only to settle the questions of right and justice between the present defendants and himself.

A. N. Ogden & Stansbury also filed an elaborate argument for a re-hearing.

Re-hearing refused.

Succession of George Foulkes.

To authorise a tutor to purchase property for the benefit of the minors under his charge, he must obtain the advice of a family meeting *before the purchase*. And where he bids in property without such advice, the executrix, who caused the property to be sold, is not bound to wait till the tutor convene a family meeting, to approve of his purchase, but on failure of the tutor to comply with his bid, she may at once put up the property again for sale. C. C. 2589.

A purchaser who holds an unliquidated demand, secured by a tacit mortgage on property sold at probate sale, has no right to withhold the price of his bid and delay the adjudication until his claims can be liquidated by a court.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Durant & Hornor, for *Howes*, opponent and appellant. *Benjamin, Micou & Finney*, for *Johanna Foulkes*. *St. Paul & Bouny*, for *Dr. Puissan*, appellees.

Buchanan, J. The mover in this rule* represents, as tutor, certain minors, who are creditors, with general mortgage, for a large amount of the estate of *George Foulkes*. At a probate sale of the property belonging to said estate, the mover in the rule bid off certain immovable property in the name of his wards, and it is now objected that he was not authorized by the Judge, on the advice of a family meeting, to make said purchase. In the case of *Davis* v. *Leaumont*, 5 Rob. 286, it was held sufficient in law that the family meeting ratified the purchase after it was made. Again, in *McCarty* v. *Steam Cotton Press Company*, 5 La. 21, Judge Porter, as the organ of the court, used this language: "But it is said that the approbation of the Judge of probates followed, and it should have preceded, the sale. The law does not specify at what time it is to be given, and we think that when the alienation takes place by auction, where the price cannot be known before the object is stricken off, the approbation of the Judge can alone be usefully and legally given after the sale." See also 2 An. 729: 4 An. 85; C. C. 1788.

The terms of the probate sale were one-third cash and the balance at one and two years' credit, for notes bearing mortgage and interest from date. The amount of the tutor's bid was $5000, and the administratrix of *George Foulkes* required of the tutor, by notice in writing, and through a Notary Public, a compliance with the terms of sale, by giving the cash and notes. Upon his failure to comply, the formalities required in case of a *folle enchère*, by Art. 2589 of the Code were followed, and the property was offered for sale a second time, and adjudicated to *Dr. Puissan* for $3250. The validity of the second sale necessarily depends upon the obligation of the tutor of *John Foulkes'* minor children, to give cash and notes to the amount of the bid made for their account. But it

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* On motion of *Durant & Hornor*, attorneys for *Robert Howes*, tutor of the minor children of *John Foulkes*, and on showing to the court that, on or about the 29th March, 1854, he bought, as tutor, at public sale, under an order of court, made by *Beard & May*, Auctioneers, a certain tract of land, belonging to the succession of *George Foulkes*, situated in this parish, right bank of the Mississippi river, about four miles below the city, measuring two arpents front on the Mississippi by forty arpents deep, for the price of five thousand dollars; and on further showing that he is a creditor of this succession, in the sum of six thousand and fifty-six dollars, with interest from 8th December, 1855, and legal mortgage from 20th December, 1848; and that he desires to retain the price of the property in part, and satisfaction of the aforesaid judgment.

It is, therefore, now ordered by the court, that *Johanna Foulkes*, administratrix of this succession, do show cause, on Saturday next, the 18th day of January, 1855, at 10 o'clock, A. M., why she should not perfect the said sale and transfer, by authentic act, to premovent the title to said property, and that *Dr. P. R. Puissan* be made a party to this rule.

SUCCESSION OF FOULKES.

is plain, he was under no such obligation. The minors whom he represented were creditors, with mortgage, of the estate of *George Foulkes*, who had been their tutor, and had died without rendering an account of tutorship. The amount of their claim against *George Foulkes'* estate was liquidated at the sum of $6056, by a judgment rendered after the probate sale; but the administratrix of *George Foulkes* had acknowledged, in an inventory made six months previous to that probate sale, that the estate of her deceased husband was indebted to the minors in a larger sum than the amount of their bid, to wit: in the sum of $5883 40. Now the law is well settled since the case of *Goodale* v. *Creditors*, 8 L. 302, that a mortgage creditor who purchases, at a judicial sale, property subject to his mortgage, may retain the price of adjudication in satisfaction of his claim, except so far as it exceeds the amount of his mortgage. The syndic or administrator can only require of him security to refund or meet such charge as may be afterwards legally ordered. In the present case, the administratrix was without right to require of the tutor of the minors *Foulkes* the whole amount of the bid, as she has done, and her subsequent acts gave no right to *Dr. Puissan* to the prejudice of those minors.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, that the cause be remanded, with instructions to convene a family meeting of the minor children of *John Foulkes*, in order to deliberate upon the propriety of ratifying the purchase made for the said minors by *Robert Howes*, their tutor, of a certain tract of land belonging to the succession of *George Foulkes*, at a public sale, on the 29th March, 1854, as shown by the proces verbal of *Joseph A. Beard*, auctioneer, on file in this case; that on such ratification being filed, this rule be made absolute, and the administration of *George Foulkes* be ordered to make a conveyance to the minor children of *John Foulkes*, represented by their tutor, *Robert Howes*, of the property mentioned in the rule, the firm to be credited upon the judgment obtained by said minors against the succession of *George Foulkes*, and that appellees pay costs of the rule in both courts.

SLIDELL, C. J., (with whom concurred SPOFFORD, J.,) dissenting. The tutor had no authority, by mere virtue of his office, to buy real estate for his wards. C. C. 348; see also *Davis* v. *Leaumont*, 5 Rob. 287; *Hall* v. *Woods*, 4 An. 85; *Carlin* v. *Germaine*, 6 La. 218.

The claim of the minors was, at the time of the attempted purchase, unliquidated and in litigation. After the adjudication, and his refusal to comply with the terms of sale, dictated by the creditors and ordered by the court, the tutor took even then no steps to have a judicial ratification of the purchase for the minors, upon advice of a family meeting, and judicial approval, nor to obtain an order of court, contradictorily with the administratrix or the numerous creditors of the succession, suspending the settlement for the price until the claim and alleged priority of the minors could be judicially ascertained. The tutor in so acting had no legal warrant. He had no right to put the estate and its creditors in such an uncertain and precarious position. Suppose the property had perished, while he was thus refusing to comply with the terms of the adjudication, and at the same time neglecting to obtain a judicial approval of his purchase; the minors could say, it has not perished for our account and at our risk—our tutor had no right to buy, and our claim against the estate exists intact.

I am, therefore, of opinion that, under such circumstances, the tutor obstinately persisting, during several months, in acting of his own head, and taking no steps to have a family meeting, or get an order of court contradictorily with the administratrix or the other creditors, authorizing the administratrix to suspend action; the administratrix fulfilled her duty in proceeding, after his long default, to a second crying and adjudication, and that *Puissan*, who bid in good faith, has a right to insist on his purchase. If the minors suffer a loss, it is the result of their tutor's mismanagement, for which they can look to him; but it would be a dangerous precedent to throw upon others the consequences of a tutor's lack of judgment and diligence. It was a matter for his sound and diligent discretion in the administration of his trust, to determine seasonably whether he would let the estate of the debtor be sold to others, and exercise the claim of his wards on the proceeds, or whether it would be desirable to buy for the minors. If his sound discretion suggested the latter course, then it was his duty to ask the advice of a family meeting and judicial authorization thereon, either before the adjudication or, at least, promptly afterwards. C. C. 348. He has done neither. He does not even suggest, in the present rule, a call for a family meeting, but claims a conveyance to himself, as tutor, and, by consequence, a rescission of the adjudication to *Pouissan*, a defendant in the rule, on the naked showing that he thought proper to bid for the minors, and that their tacit mortgage claim, then unliquidated and in litigation, has, since the adjudication to *Pouissan*, been ascertained by judgment. Upon the pleadings and evidence I am not prepared to say the learned Judged below erred in dismissing the rule.

Same Case on a Re-hearing.

Merrick, C. J. (Voorhies, J., and Buchanan, J., dissenting.) A majority of the court are of the opinion that, inasmuch as the tutor of the minor had not, previously to the sale, caused himself to be authorized to purchase by the advice of a family meeting, the administratrix of the succession was not bound to delay the proceedings until it should be ascertained whether a family meeting would ratify the unauthorized purchase made by him or not.

We are, further, of the opinion, that whatever may be the law as to purchases made at the sales of surrendered effects or property of successions by the mortgagee, who holds a special mortgage upon the immovable or slave which he buys, that the person who holds an unliquidated demand secured by a tacit mortgage has no right to withhold the price and delay the completion of the adjudication of property of a succession purchased by him at a probate sale, for the purpose of liquidating his claim against the succession by the judgment of a court, and in order to retain it out of the price. Nor are we prepared to say (neither is it important to decide the question) that the holder of such liquidated tacit mortgage would have the right to retain in his hands the proceeds of property bought by him at a probate sale, until there should be a classification of the mortgage and privilege claims against the succession.

We are, therefore, of the opinion that the administratrix in this case had the right, after complying with the formalities required by Article 2589 of the Civil

SUCCESSION OF POYDRAS.

Code, to reoffer the property for sale, and that the purchase made by *Dr. P. R. Puisson*, at the second sale, ought to be maintained.

It is, therefore, ordered, adjudged and decreed by the court that the judgment heretofore pronounced by this court in this case be set aside and annulled, and that the judgment of the lower court be affirmed, with costs.

MICHON et als. *v.* GRAVIER et als.

Where there is a discrepancy in the boundary lines, as shown by a public act on the one hand, and a plan attached to the act on the other, if the description be clear and unambiguous in the former, it will prevail.

On the 16th of September, 1820, M. & G. entered into an act of compromise, by which G. conveyed to M., with a warranty against his own act, all his right in a portion of the batture, in the faubourg St. Mary. By the terms of the act, the batture conveyed extended to the water's edge. On the 20th of September, 1820, G. made an act of donation to the city of New Orleans, by which the batture previously conveyed to M. was created *locus publicus*. Under the facts of the case, it was held, that for the purpose of the donation, G. was to be regarded as the *negotiorum gestor* of M., who was bound by the act granting the batture to the public. In 1851, the act of donation of September 20th, 1820, was, by agreement, rescinded. This action was brought by the heirs of M. against the heirs of G. to recover the proceeds of the batture sold by G. to M. in 1820, which proceeds were received by the heirs of G. under the Act of 1851, rescinding the donation of 1820. *Held:* the contract of 20th of September, 1820, so long as it endured, seemed to have been viewed by M. and by his heirs, as binding upon them; but when that donation was rescinded in 1851, and the *locus publicus* created by the contract of 1820 was again made the subject of private ownership, the warranty contained against their own acts in the conveyance of the 16th of September, 1820, unquestionably forbade the heirs of G. to put into their own pocket the proceeds of the land embraced in that conveyance to M.

The heirs of G. were bound to account for the proceeds of the batture conveyed to M. when called upon, but the right of action only accrued when the money was received, which, being less than two years before this suit was brought, the prescription of ten, twenty and thirty years could not avail.

The principles decided in *Roselius* v. *Delachaise*, 5 Ann., affirmed.

APPEAL from the Second District Court of New Orleans, *Lea*, J. *Griffon* and *St. Paul & Bouney*, for plaintiffs. *Denis* and *Roselius*, for defendants and appellants.

BUCHANAN, J. On the 16th of September, 1820, the ancestor of plaintiffs and the heirs of *Bertrand Gravier* made a compromise, by act before a notary public in New Orleans, of a lawsuit then pending in the United States Court, in the said city, wherein *Michon* was plaintiff, and the *Heirs of Gravier* defendants. The suit in question was a petitory action, claiming the batture extending to the river, opposite a lot having a front of sixty feet on Tchoupitoulas street, within the faubourg St. Mary.

By the compromise in question, it was agreed between the parties, that this batture should be divided by a line running from Tchoupitoulas street to the margin of the river, into two equal parts, of which one should belong to *Michon* and the other to the *Heirs of Gravier:* and each party conveyed to the other, with a warranty only against his own acts, the half of the batture to the water's edge. Annexed to the compromise, and referred to therein, was a plan upon which the division of the ground was figured by a line, which says the act of compromise, "vient aboutir à la Nouvelle Levée, et qui doit, dans l'intention des parties, être prolongée jusqu'à la ligne marginale du fleuve."

This compromise differs, in two important particulars, from those in the cases of *Jourdan*, of *Poydras*, and of *Tourné*, against the same defendants, lately decided by us. In all of those cases, the description of the property reciprocally conveyed, limited the property by the New Levee, or by New Levee street, on the side towards the river. In this, the terms of conveyance extend to the water's edge. The expression "jusqu'à la ligne marginale du fleuve," has no ambiguity; it conveys the whole alluvion or batture. The second point of distinction between this case, and those just mentioned, consists in this: that the compromise with *Michon* was made before the act of donation by the *Heirs of Gravier*, to the city corporation, of their rights in the batture outside of New Levee street; while the compromises with *Jourdan*, *Poydras* and *Tourné*, were made after that donation.

It is urged in argument by defendants' counsel, that the plan which is annexed to this contract of compromise, and upon which the lateral lines of the property mutually conveyed, are prolonged no further towards the river than the New Levee, ought to control the words of the contract; and the case of *Suary* v. *Duralde*, 1 L. R. 260, is cited. That was the case of a contract for building a house; and the plan, which was a part of the contract, was held to be properly used for the purpose of supplying defects in the specifications, upon an issue whether certain work figured in the plan, but not mentioned in the specifications, was extra work or not. It will be perceived that the plan, in that case, was not admitted to diminish or abrogate any stipulation of the contract, as is sought to be done here. We have copied the words of the contract, which refer to the fact of the line of division upon the plan terminating at the levee, and which add that the intention of the parties is, that the said line be prolonged to the margin of the river, in accordance with the description of the land conveyed, contained in the deed. The words of explanation are a part of the conventions of the parties, which cannot be disregarded.

The effect of the conveyance of *Gravier's Heirs* to *Michon*, of all their right in a portion of the batture, on the 16th of September, 1820, was to incapacitate them from donating the same rights to the city on the 20th of September, 1820, unless with the consent of *Michon*. Such donation came expressly within the warranty, "leurs faits et promesses," contained in the deed. We cannot, however, suppose that *Michon* was ignorant of that donation, which followed so immediately upon his own compromise with *Gravier's Heirs*. The clauses in the compromise by which *Michon* agreed to make the new levee, and to pay three hundred and ten dollars to the city treasury, imply a knowledge on his part, and a ratification of the arrangements pending between the *Heirs of Gravier* and the city, and which ripened a few days afterwards into the contract between those parties of the 20th of September, 1820. Indeed, the petition in this case alleges, that the contract of the 16th of September, 1820, was made in contemplation of that of the 20th of September. When, therefore, the *Heirs of Gravier* donated to the city the batture, which but a few days previously they had conveyed to *Michon*, they must be presumed to have done so, as agents, or *negotiorum gestores*, of *Michon*. The contract of September 20th, 1820, so long as it endured, seems to have been viewed by *Michon* and by his heirs, as binding upon them; but when that donation was rescinded in 1851, and the *locus publicus* created by the contract of 1820, was again made the subject of private ownership, the warranty against their own acts contained in the conveyance of the 16th of September, 1820, unquestion-

ably forbade the *Heirs of Gravier* to put into their own pockets, the proceeds of the land embraced in that conveyance to *Michon*. They were bound to account for those proceeds when called upon. The prescription of ten, twenty, and thirty years, invoked by defendants, cannot avail them. The right of action of plaintiffs, to claim of defendants money received by them for the account of plaintiffs, only accrued when the money was so received, which was less than two years before this suit was brought.

Defendants have set up in reconvention, a claim for $1000 counsel fees for defending a suit of *Parish et al.*, relative to the property of the batture of the faubourg St. Mary. This claim has been opposed on the authority of the decision in *Roselius* v. *Mrs. Delachaise*, 5th Ann. In the case quoted, *Mr. Roselius* claimed as having been employed by *Mrs. Delachaise*. But in the present case, we do not understand that there is any pretence that the learned counsel, who represented the *Heirs of Gravier*, in the defence of the suit of *Parish*, were retained by the present plaintiffs; and as the *Heirs of Gravier* had, undoubtedly, large interests of their own at stake in that suit, they must be supposed, in the absence of contrary proof, to have engaged counsel in reference to those interests.

We have not been able to perceive any error to defendants' disadvantage, in the calculation of the amount coming to plaintiffs, upon which the judgment of the District Court was based.

Judgment affirmed, with costs.

EUGENE ROCHEREAU et al. *v.* JEAN JONAU & WIFE et al.

Where the husband and wife by their marriage contract, executed in France, stipulated: 1st, That they adopted, as the law of their marriage, the dotal system, (*régime dotal*,) to the exclusion of that of the community, (*régime en communauté*,) and 2d, that the acquisitory (*acquets*) made during the marriage should be shared equally by the spouses, and should revert to the children of the marriage, each of the contracting parties, in default of such children, to have the free disposition of his or her moiety. It was held that this contract created under the French law a modified or limited community (*communauté conventionelle*) between the spouses—and that all acquisitions made after the marriage, except such as were made by inheritance or donation to one of the spouses, belonged to this community.

Held, consequently, that the husband and wife having removed to Louisiana after the marriage, immovable property acquired here in the name of the latter was not the separate property of the wife but formed a portion of the community, and the husband having become insolvent and having made a surrender of his property to his creditors, the title of the immovables so acquired, vested, by force of the surrender, in them.

Held, also, under this contract, the wife could not acquire a separate estate in her own name until the community was dissolved by the decree of a competent tribunal, unless the acquisition was made by a re-investment of her paraphernal capital.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Magne*, *Latour* and *H. D. Ogden*, for plaintiffs and appellants. *Dufour*, *Castera* and *Charvet*, for defendants.

MERRICK, C. J. The principal question in this case arises out of a marriage contract entered into in France, by *Jean Jonau* and wife on the eave of their marriage.

It contains among others the two clauses following, viz:

"Article 1er. Les futures ont declaré vouloir être mariés sous le régime dotal à l'exclusion de celui de la communauté."

"Art. 5. * * * * * * * *

Ils s'associent en outre aux acquets qu'ils feront, lesquels seront reversibles aux enfants qui seront provenus du présent mariage, et à défaut d'enfants chacun des futurs disposera de sa moitié ainsi qu'il avisera."

The wife having purchased in her own name a small tract of land and dwelling house, previous to the surrender of her husband, we are called upon to decide whether it shall be held by the wife or administered by the syndic for the benefit of the creditors of the community and insolvent.

If we give the same effect to the marriage contract which would be given to it in France, where it was executed, it will not sustain the pretensions of *Mrs. Jean Jonau* and it will not, therefore, be necessary to decide whether a marriage contract, executed in a foreign country, circumscribing or setting aside altogether the community of acquets and gains would be carried into effect here, where it affected the rights of third parties.

The two stipulations in the marriage contract, in France, had this effect only. It prevented the movables of the spouses, possessed at the time of their marriage or subsequently acquired by inheritance or donation, from falling into the community, as they otherwise would by the French law, and it gave the husband the exclusive control over the dotal effects during the marriage, the wife the control of her extra dotal estate with the obligation to carry the the annual revenues thereof into the limited community, and made that community to consist of all acquisitions after the marriage, except by inheritance or donation to one of the spouses, and left the respective rights of the husband and wife, in regard to this limited community, in other particulars, as in the case of the community established by law. C. N.. 1581, 1498 and 1499, Troplong du Mariage, vol. 3., Nos. 1852, 1854 and 1891.

We think it must follow, that the property purchased by the wife in her own name, before the surrender of her husband, which has not been shown to be the re-investment of her paraphernal effects, belonged to this limited community, of which the husband was the head and master; and that by the surrender it passed to his creditors. Indeed, it is difficult to perceive in what manner the wife can acquire a separate estate in her own name, otherwise than by the re-investment of her paraphernal capital, until this community is dissolved by a decree of a competent tribunal.

On the other point, we see no error in the judgment of the District Court in refusing to remove *Paul Juge, jr.*, from his office of syndic. He may well have supposed that *Mrs. Jonau* could acquire separate property, and the prompt manner in which the sale was rescinded, satisfied the Judge of the lower court that he was acting in good faith, and we cannot say that the Judge erred in his conclusion in this particular.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, that the plaintiffs' demand against *Paul Juge, jr., & Co.* be dismissed, and that said defendants recover their costs, and that the tract of land in the parish of Plaquemines, in said State, on the left bank of the river Mississippi, about forty miles below the city of New Orleans, having a front of about two and one-fourth arpents on the river by a depth of forty arpents, and being the tract of land acquired by act under private signature

ROCHEREAU v. JONAU

from *Dr. Pierre Lafon*, in the name of said *Mrs. Jean Jonau*, on the 7th day of December, 1853, be hereby declared to belong to the effects surrendered by Jean *Jonau* to his creditors, and the said *Paul Juge, jr.*, syndic, is hereby ordered to administer the same for the benefit of the creditors of said *Jean Jonau*, and it is further ordered that there be judgment against the residue of the plaintiffs' demand against said *Paul Juge, jr.*, and that the defendants and appellees, Jean *Jonau*, *Jeanne Jonau* and *Paul Juge, jr.*, individually, pay the costs of both courts, reserving to the said *Mrs. Jeanne Jonau* any right she may have to claim of said syndic the re-imbursement of any paraphernal or dotal funds or effects paid at any time on account of said tract of land, as well as the like effects alienated or appropriated by her husband to his own or the use of the community before his surrender.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

MONROE.

JULY, 1856.

PRESENT:

HON. E. T. MERRICK, *Chief Justice.*

HON. A. M. BUCHANAN,
HON. H. M. SPOFFORD,
HON. J. N. LEA, } *Associate Justices.*

R. BRYAN *v.* S. P. DAY.

A person who is a mere nominal party to the suit, is a competent witness.
Wherever a nominal party to a suit is liable for costs in his individual capacity, he is incompetent as a witness, although he may demand nothing for himself, but joins the plaintiff in a prayer for a judgment in his (plaintiff's) favor. MERRICK, C. J.
C. C. 2260.

APPEAL from the District Court of the parish of Bienville, *Drew*, J.

Stubbs and *Morrison*, for plaintiff. *Egan & Jones*, for defendant and appellant.

BUCHANAN, J. (SPOFFORD, J., recused himself, having been of counsel.) The plaintiff was security of one *Bowers*, upon a bond given under an order of a Court of Chancery in the State of Georgia, on the 8th of February, 1837, conditioned, that said *Bowers* should produce a slave, *Harriet*, and all her increase which should be in life, at a certain time specified. The time having arrived, and *Bowers* having neglected to produce the slave *Harriet* and her increase, according to the condition of his bond, suit was brought against *Bryan*, the present plaintiff, to recover the penalty of the bond. Judgment was entered up against him upon confession; and by the same judgment, the plaintiffs in the suit relinquished, renounced and assigned to the defendant, (the present plaintiff,) all their right to, and interest in, the slave *Harriet* and her increase.

The present suit is brought to recover a slave named *Emily*, which slave is alleged to be one of the children of *Harriet*.

The questions of subrogation, both legal and conventional, which have been elaborately argued by counsel on both sides, may be left out of view. The

BRYAN v. DAY.

judgment in the case of *Rutland et als.* v. *Bryan*—a judgment pronounced in the presence and upon the consent of both parties to that suit—is the title of *Bryan* to the slave *Emily*, whose identy with the child of *Harriet* of that name, we consider to be sufficiently established. The title of the *Rutlands*, which vests in him by the terms of that judgment, must prevail, unless prescription has run against it. The defendant pleads the prescription of five years.

The defendant's title is a receipt from *William G. Beard*, dated 9th August, 1843, for one hundred and fifty dollars, as price of a mulatto child named *Emily*, four years of age, sold and delivered to *Mrs. Leah Ann Day*.

Admitting this document to be an act translative of property, prescription was suspended during the minority of the children and heirs of *Reddin Rutland*, who were none of them of age, at the date of *Beard's* sale to defendant, and one of them, *Calvin Rutland*, was not of age until after the institution of this suit. This is supposing the heirs of *Rutland* could have maintained an action for the possession of the slave *Emily*, from the time defendant first came into possession of her. But in truth they had no such right of action under their father's will, until *Rufus K. Rutland* attained the age of majority, which was in October, 1850. Up to that time, the usufruct of their mother, *Rutland's* widow, lasted. And prescription does not begin to run until a right of action has accrued. *Gueno* v. *Soumastre*, 1 Ann. 44.

Accordingly, we find *Rutland's* children only sued *Bryan* on his bond in March, 1851. In December, 1851, judgment was rendered in that suit, as above stated, conveying the title of *Rutland's* heirs to *Bryan*, who instituted the pesent action in February, 1852.

There is a bill of exceptions to the reception of the testimony of *Reddin Rutland*, and of *Mrs. Mary Howell*, who were examined as witnesses for plaintiff. The ground of objection stated in the bill is, that those witnesses were parties plaintiff to this suit, as well as warrantors of the plaintiff, *Bryan*.

In regard to *Mrs. Howell*, the objection is obviously without any foundation. Her name does not occur, either in the petition in this case, or in the suit against *Bryan*. As to *Reddin Rutland*, he is a merely nominal party, for the purpose of giving his sanction, to the claim of plaintiff. The petition states that *Reddin Rutland* and others, "joins this petitioner for the purpose of aiding and assisting him, if possible, to recover said slave *Emily*, and to have the benefit of all the right, title, interest and claim, which they request he may have given him, as fully as if they were plaintiffs themselves." The prayer or conclusion of the petition is exclusively in the name of *Reddick Bryan*. No relief or judgment of any kind is asked in the name of *Reddin Rutland* or his co-heirs. It is plain, therefore, that he is but a nominal party, and is therefore competent to testify. *Reynolds* v. *Rowley*, 2 Ann. 890. Neither is this witness a warrantor of plaintiff's title. He merely conveys to him what title he himself had. The consideration passing from *Bryan* to *Rutland*, for such conveyance, was not the price of a sale, which would have implied a warranty in law; but the acquittance of a debt of *Bryan*, as security of *Bowers*, due to *Rutland*.

Judgment affirmed, with costs.

MERRICK, C. J. I think that wherever the nominal party to a suit is liable for costs in his individual capacity, he is incompetent as a witness, although he may demand nothing for himself, but join the plaintiff with a prayer for a

Judgment in his, the plaintiff's favor. The Civil Code says, the witness must not be interested, neither directly or indirectly in the cause. C. C. 2260. This, it is evident, is a different case from that where the plaintiff or defendant sues or is sued in a representative capacity. Thus, in the case of an administrator, it is the succession, and not the individual, which is the party to the suit, and there is no reason why the individual who fills the office of administrator, should not be a witness, if he is not otherwise interested in the event of the suit.

In other respects, I concur with the reasoning of Mr. Justice Buchanan, the the organ of the court.

HALL & EMSWILER *v* THE CORPORATION OF BASTROP.

The Act of March 14th, 1852, p. 82, concerning the licensing of drinking houses, does not confer the power of seizing property, by summary process, to secure the payment of a license when granted. If a person has obtained such a license, without paying for it, the remedy to enforce payment, is by ordinary action.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J. *Newton & Hull*, for plaintiffs. *Parsons*, for defendants and appellants.

SCOFFORD, J. The plaintiffs enjoined the Tax Collector of the town of Bastrop from seizing and selling their property, under a claim of $500, alleged to be due as a license for keeping a retail grocery within the corporate limits.

The injunction was perpetuated by the District Judge, and the corporation has appealed.

If it were conceded that, under the Act of March 14th, 1852, p. 83, concerning the licensing of drinking houses, the corporate authorities of any town have the power to impose the payment of any sum they choose, as a condition precedent to the granting of a license, after a majority of voters have determined by ballot to license such houses, upon which point we express no opinion; still the grant of such a power could not carry with it the power of seizing property by summary process, to secure the payment of a license when granted. Nor do we find that the Act incorporating the town of Bastrop, or any amendment thereto, authorizes a claim for license money to be enforced by a seizure without suit or judgment.

If the plaintiffs have this license, and have not paid for it, the remedy of defendants (so far as we are advised) is by ordinary action; if, on the other hand, the plaintiffs were selling spirituous liquor, without a license, the laws relative to crimes and offences afforded an ample remedy.

Judgment affirmed.

Thomas N. Barham *v.* A. Livingston.—Tatum & Barham v. A. Livingston.—Consolidated Cases.

The appellee is entitled to three judicial days in which to move a dismissal of the appeal, unless he waives that right by some action on his part. Filing an answer to the merits, without tendering a motion to dismiss, would import such a waiver, but the act of the court, *ex propria motu*, setting down the cause for trial, could not deprive the party of a legal right.

The Clerk's certificate, which states that the record contains a full transcript of all the documents filed, all the proceedings had, and all the evidence adduced on the trial, *as on file and of record in his office*, is insufficient.

It is imperative on this court to grant to the appellant who claims it an order to postpone the trial, that the Clerk may have an opportunity to amend his certificate, if he can truthfully do so.

THE record in this case is missing. The Reporter is unable to give the name of the Judge by whom the case was tried, and the names of the lawyers who appeared in it.

Spofford, J. The appellee has moved to dismiss this appeal, because the transcript is not certified by the Clerk in legal form.

The appellant objects to the motion being considered, on the ground that it was filed too late.

The record was filed in this court on the 16th July, and the motion to dismiss on the 18th July.

The 16th July was the first judicial day of the term, and on that day all causes then on file were set down for trial on the next day, without any application from parties to fix them. It does not appear whether the present record was on file at the time the order of court was made, or was filed later in the day.

However this may be, the appellee was entitled to three judicial days in which to move a dismissal of the appeal, unless he waived that right by some action on his part. Filing an answer to the merits, or going to trial on the merits, without tendering a motion to dismiss, would import such a waiver. But the act of the court, *ex propria motu*, setting down the cause for trial, could not deprive the party of a legal right. See *Gwin* v. *Clack*, 12 L. 460.

The motion must then be considered.

The Clerk's certificate states that the record contains a full, true and complete transcript of all the documents filed, all the proceedings had, and all the evidence adduced on the trial *as on file and of record* in his office.

Non constat from this certificate that there were not proceedings had and evidence adduced on the trial which were not on file and of record in the office at the date of the Clerk's certificate.

Similar certificates have been held bad in numerous instances. *Carpenter* v. *Reynolds*, 3 An. 592; 6 L. 166, 303; *Vacien's Widow* v. *Hiers of Payne*, 13 L. 538. In the latter case, the court ordered the cause to be postponed, under the Article 898 of the Code of Practice, that the Clerk might have an opportunity to amend his certificate, if he could truthfully do so. The Act of 20th March, 1839, makes it imperative upon us to grant such an indulgence to the appellant, who claims it. The privilege is insisted upon in this case.

It is, therefore, ordered, that the trial of the cause be postponed, and that the appellant have leave to perfect the record, if it can be done, until the next term of this court.

The State v. Moses A. Grice et al.

A simple appearance is not sufficient to entitle a party to relief from a judgment forfeiting his recognisance. There must be an effective appearance—an appearance that finally disposes of the case.

If it is ever allowable for the accused to procure relief from such a judgment, it must at least be a case where he has done all in his power to procure a trial without effect.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J.

Stubbs, District Attorney, for plaintiff. *Caldwell* and *Todd & Richardson*, for defendant and appellant.

Slidell, J. This appeal is taken from a judgment forfeiting a recognizance, or rather from a judgment refusing to set aside the forfeiture at the same term it was decreed.

The ground upon which the appellants contend the judgment should be set aside is, that the accused appeared at the same term of the court at which the bond was forfeited, and demanded a trial, which was refused by the court, because the jury had been discharged for the term. The argument is, that the discharge of the jury was the act of the court, and that it cannot prejudice him; that he did all in his power to comply with the law, and was deprived of an opportunity of a trial not by his own laches, wherefore the forfeiture should be set aside.

The statute declares that "the judgment so rendered may, at any time during the same term of the court, be set aside upon the appearance, trial and acquittal, or upon the appearance, trial, conviction and punishment of the defendant or party accused."

A simple appearance is not sufficient, it must be an effective appearance—an appearance that finally disposes of the case. If it is ever allowable for the accused to procure relief from a judgment forfeiting his bond without such an effective appearance, it must, at least be a case where he has done all in his power to procure a trial without effect. But in this case there was a manifest evasion of a trial. During the term the case was postponed time after time at the request of the prisoner, and he was informed that a trial at the term would be insisted on. After the bond was forfeited, the accused was in the town where court was holden, but he made no appearance whilst the jury and District Attorney were in attendance. He availed himself of a short absence of the District Attorney, and of the order of the Judge discharging the jury for the term, to go in and demand a trial, which he knew could not then be awarded him. Persons indicted for crime, who give bonds to appear at court, bind themselves not to depart thence without leave; they are to attend upon the court, not the court upon them. The demand of this party and his surety, that the juries of the country should be kept idle about the court house, after the jury business is finished, until all the other business of the court is completed, to see whether it shall suit their pleasure to submit to a trial, is too extravagant to be seriously considered.

Judgment affirmed.

Elder *v.* Rogers et als.

No special order to answer is necessary when the interrogatories are annexed to the petition, and the garnishees are duly cited.

The Act of 20th March, 1839, p. 168, assimilates parties cited under its provisions to garnishees, and makes them liable in the same manner. The garnishee must answer within the usual delay, and in case of his refusal or neglect to do so, it shall be considered as a confession of his having property in his hands belonging to the debtor sufficient to satisfy the demand. C. P. 262, 263.

It is in the sound discretion of the District Judges to rescind their interlocutory orders.

An order, rendered on an *ex parte* motion, that interrogatories be taken as confessed, is not a definitive judgment, and no formal motion for a new trial is necessary in order to have it set aside.

APPEAL from the District Court of the parish of Jackson, *Richardson*, J. *McGuire & Ray*, for plaintiffs and appellants. *Ludeling*, for defendant.

Spofford, J. The plaintiff, having a judg nent against one *Rogers*, instituted proceedings, and cited *Bond* and *Turner*, as garnishees, under the Act of 20th March, 1839, p. 166. There was a judgment, from which the plaintiff has appealed. He complains that the District Judge erroneously set aside an order that the interrogatories propounded to the garnishees be taken *pro confessis*, allowing the garnishees to file their answers, and rendered a qualified instead of an absolute judgment against them.

The garnishees have moved to dismiss the appeal, because the original judgment debtor was not made a party. We do not perceive that he is interested in the controversy, and he is not a necessary party.

The garnishees have also joined in the appeal, and prayed for an amendment of the judgment in their favor.

It is true that no special order to answer is necessary when the interrogatories are annexed to the petition and the garnishees are duly cited. *Parmly* v. *Brusley*, 13 L. 354. The Act of 20th March, 1839, p. 168, assimilates parties cited under its provisions to garnishees, in attachment suits, and makes them liable in the same manner. The garnishee must answer within the usual delay, and if he refuse or neglect to answer interrogatories in the delay of the law, such refusal or neglect shall be considered as a confession of his having property in his hands belonging to the debtor sufficient to satisfy the demand. C. P. 262, 263.

And it has been held that no judgment by default, or even rule to show cause, is necessary to precede the final judgment, of which such neglect or refusal imports the confession. *Sturgess* v. *Kendall*, 2 An. 566; *Landry* v. *Dickson*, 7 An. 241.

But in this case there was no final judgment rendered before the garnishees tendered their answers. There was merely an interlocutory order that the interrogatories be taken as confessed. This order was rendered on an *ex parte* motion on the morning of the second day of the term. On the same day the garnishees tendered a motion to rescind the order to take the interrogatories *pro confessis*, accompanied by their affidavits of surprise, and explanatory of the circumstances which led to the apparent neglect. The next morning the Judge permitted the motion and affidavits to be filed, rescinded his previous order, and allowed the garnishees to put in their answers to the plaintiff's interrogatories; the plaintiff took his bill of exceptions.

It is in the sound discretion of the District Judges to rescind their interlocutory orders. The order in this case was not a definitive judgment, as contended by the appellant, and therefore no formal motion for a new trial was necessary.

Upon an examination of the affidavits, we do not find that the Judge abused his discretion in rescinding the order. A strong equitable case for relief was made out, and the course of practice in the District Court might have justified the apparent delay of the defendants. They seem to have answered before the case was reached in its order upon the docket as it was set for trial.

We do not think the appellees can justly complain of the judgment. It seems to have been rendered in pursuance of the statutes of 20th March, 1839, § 13, p. 166, and the reservation therein will enable them to exercise all the equitable rights they now claim when the proceeds come to be distributed.

Judgment affirmed.

MERRICK, C. J. Without expressing an opinion upon the question, whether the debtor has or has not an interest in the amount of the judgment against the garnishee, I concur in the affirmance of the judgment on the merits for the reasons assigned.

THE STATE v. W. G. BUNGER.

Where a person states, when examined on his *voir dire*, that he has formed and expressed an opinion relating to the guilt or innocence of the prisoner, and that it might bias him in forming an opinion after having heard the testimony—that direct evidence only would change his opinion—that circumstantial evidence would not—he should be rejected as incompetent to act as a juror, although he should further state that the opinion he has formed is not so fixed that it could not be changed by the evidence which might be adduced on the trial—that he thought he could do justice between the State and the prisoner—and that the opinion he had formed would not influence his mind as a juror. As to the appointment of triors, when there is a challenge to a juror, although such a request is unusual in this State, it should be allowed on the request of the prisoner.

The power to grant a change of venue is confided to the District Courts exclusively, and the exercise of it is not subject to revision by the Supreme Court.

APPEAL from the District Court of the parish of Franklin, *Barry*, J. *Stubbs*, District Attorney, for the State. *Crawford*, for defendant and appellant.

SPOFFORD, J. The prisoner was convicted of murder, and sentenced to death.

Upon appeal to this court, he complains that the District Judge erred, to his prejudice, in refusing to set aside certain jurors challenged by him for cause.

Amongst others, one *Jesse M. Randolph* was called as a juror, who, when examined upon his *voir dire*, answered as follows:

"*Interrogatory.* Have you formed and expressed an opinion relating to the guilt or innocence of the accused?"

"*Answer.* I have formed and expressed an opinion."

"*Int.* Would what you have heard, and the opinion you have expressed, bias or prejudice your opinion as a juror, after hearing the evidence?"

"*Ans.* I think it might bias my opinion. I don't think it would prejudice me—not intentionally."

"*Int.* Could you decide this case from the evidence that may be given on the trial, without being influenced by what you have heard?"

"*Ans.* If the evidence should be positive and point-blank against what I have heard, I might change my opinion, but it would have to be positive and point-blank."

"*Int.* Would circumstantial evidence, different from what you have heard, change your opinion?"

"*Ans.* No. It would have to be positive. If positive evidence went against a part of what I have heard, it would change my mind so far as it went, and if it contradicted the whole of what I have heard, it would change my opinion about the case."

The bill of exceptions further recites that, in answer to questions propounded by the District Attorney, the juror said: "That the opinion he has formed is from what he has heard of the case; that the opinion he has formed, and what he has heard of the case, would not prejudice his mind as a juror; it might bias his mind unintentionally and imperceptibly on his part; believes that, after hearing the evidence, he could give the accused a fair and impartial trial, without his mind being influenced by what he heard, or the opinion he has expressed."

And in answer to the court, the juror says: "That he has formed and expressed an opinion in relation to the guilt or innocence of the accused from what he has heard; has heard a good deal said about the case; has heard the matter spoken of before the witnesses, but does not recollect to have heard the witnesses themselves speak of it; states that the opinion he has formed is not so fixed that it could not be changed by the evidence which may be adduced on the trial, should it be different from what he has heard; thinks he could do justice between the State and the accused; believes the opinion he has formed would not influence his mind as a juror."

Thereupon the court overruled the principal challenge of the prisoner to this juror, and decided that he was competent; to which ruling the prisoner excepted.

It is manifest that the Judge erred. The process of interrogation by which the juror was gradually led to contradict his first answers relative to the bias upon his mind, is not disclosed; but the questions put by the prisoner's counsel, which we have already quoted from the bill of exceptions, were fair, clear and pertinent. The answers were equally explicit, admitting a deliberately formed and expressed opinion on the part of the juror; an opinion which, it appears, was not formed and expressed upon vague rumor, but from hearing a great deal said about the case, and hearing it talked of in presence of the witnesses; an opinion so decided and absolute that it could not be changed by any circumstantial evidence whatever; an opinion that could be affected only by positive and point-blank testimony, contradicting the unsworn statements upon which it had been formed; an opinion which the juror felt to be so strong that he twice stated it might bias his mind.

We find no authority in the books, and have been referred to none by counsel for the State, which supports the ruling of the District Judge relative to the competency of the juror upon this subject. See Wharton's Crim. Law, p. 513; *State* v. *Brown*, 4 An. 505.

The verdict must, therefore, be set aside, and a new trial trial awarded.

We are of the opinion that a change of venue is a matter confided to the District Courts exclusively, and is not subject to revision by this court.

As to the appointment of triors, when there is a challenge to the juror, although such a request is unusual in this State, we think it should be allowed upon the request of the prisoner. It was the English practice, and our statute of 1805 adopted the common law of England as a guide in criminal procedure.

Such seems also to be the practice in other States of the Union. 1 Chit. Cr. Law, p. 549; Wharton's Cr. Law, p. 861.

In remanding the cause, we feel constrained to remark that the transcript betokens a degree of negligence which it is painful to see exhibited in so serious a matter.

There is no record of the empannelling of a grand jury, nor does it appear who composed the grand jury which preferred the bill of indictment. According to a bill of exceptions, the list of jurors served upon the prisoner seems to have included the grand jurors, who could not be permitted to pass upon his trial. And the jurors who did pass upon the trial, at intervals during its progress, had free admission to a grog-shop, where other persons were congregated.

Too great caution cannot be observed by the ministers of justice in conducting a capital trial according to settled rules of law and practice. It was said by the District Attorney that this is a case of peculiar attrocity. Of that we can form no opinion, for the law does not permit the facts of a criminal case to come under our cognizance, and when a party accused has not been convicted according to law, we are bound to presume his innocence. At the same time, we may say that when the accused is really guilty of a heinous crime, those officers who, through heedlessness, suffer errors to creep into the proceedings which enable him to escape, incur a momentous responsibility to the public.

It is ordered, that the judgment of the District Court be avoided and reversed, the verdict of the jury set aside, and the cause remanded for a new trial according to law.

ISABELLA A. FLUKER *v.* BOBO, Sheriff, et al.—J. C. COOPER *v.* DAVIS et al.

The Statute of 1855, relative to bonds of State and parish officers, so far as it relates to the enforcement of the rights created by the registry of the bond is purely remedial, and in no manner affects the previously existing rights, the enforcement of which it was intended to facilitate. It was intended to give to the registry of the bond, as to property sold after its registry, the same effect as that conferred on acts of sale by the clause of non-alienation.

The mortgage created by the act was intended to secure the bond. There is nothing in the legislation on the subject which justifies the inference that the bond was intended exclusively for the benefit of the State. It enured to the benefit of any person who had a claim against the Sheriff for malfeasance in office. And *By the Court:* the provisions of the Statute are applicable to "all public officers" who, under existing or prospective legislation, were "required to give a bond."

The Act of 1855 did not repeal the Acts of 1847 and 1848, so far as the provisions of those Acts were reënacted in the revisory legislation of 1855.

Sureties have an equitable interest in the payment of the principal demand, and a judgment creditor has a right to permit an execution to issue at their instance.

APPEAL from the District Court of the parish of Morehouse, *Richardson* J.

Todd & Brigham, for *Mrs. Fluker*. *Baker & Harris*, for *Cooper*. *McGuire & Ray*, for defendant.

FLUKER v. BOND.

LEA, J. In these cases, the plaintiffs have obtained injunction against the execution of a judgment in favor of *Benjamin Davis* against *Thomas N. Barham*, so far as the execution of said judgment is sought to be enforced by the seizure and sale, under execution, of property purchased by them of *Barham*.

The state of facts out of which this litigation arises is substantially as follows: *Barham*, who was elected Sheriff of the parish of Morehouse in November, 1849, gave his bond, as Sheriff, dated November 19th, 1849. At the date of the execution and approval of this bond, *Barham* was the owner of the property the seizure of which is the subject matter of contestation in these cases. On the 5th of December, 1851, *Barham* sold a part of this land to *James C. Cooper*, and on the 6th December, 1851, he sold the remaining portion to *B. F. Miller*, who subsequently transferred it to *D. J. Fluker*, whose representative is one of the plaintiffs herein. *Benjamin Davis*, the defendant in these injunction suits obtained judgment against *Barham* and his sureties, upon the official bond above referred to, for the sum of $3236 23, with interest thereon at the rate of 8 per cent. per annum, from the 1st day of October, 1843; *Davis'* right of action being based upon malfeasance in office, by *Barham*, which resulted in injury to him. Upon this judgment execution issued against *Thomas N. Barham*, in virtue of which the property which had been sold, as before stated, to *Fluker* and *Cooper* was seized.

The plaintiffs urge in support of the injunctions sued out by them the following grounds:

1st. That even if the mortgage claimed really existed upon the lands seized, they could not be proceeded against by a direct seizure, but that the plaintiff in execution should have resorted to an hypothecary action; and further, that the writ being directed solely against the property of *Barham*, the Sheriff was without authority to seize the property of the plaintiffs.

2d. That no such mortgage existed by virtue of any law of the State, and that the registry of a Sheriff's bond created a mortgage only in favor of the State and not in favor of private individuals.

3d. That the bond of *Barham* was a nullity because not executed according to law.

4th. That the lands in question were not the subject of a mortgage at the date of the registry of the bond, until the 29th June, 1854, as up to that period they were a part of the public domain of the United States, and before that period *Barham* had parted with whatever rights he might have asserted to the lands.

5th. That the mortgage expired with *Barham's* term of office.

6th. That the seizure was made at the instance, and by the direction of the sureties of *Barham*, and that by the terms of the judgment they were subrogated to the rights of the plaintiff therein, upon the payment of the judgment or a part of the same, which they have never done.

7th. That the seizure was for the full amount of the judgment which, including interest, exceeded $6000; whereas, the mortgage could have effect only for the amount of the bond, viz: $5000.

Lastly, it is urged that should the injunction be dissolved, the execution should be credited with $2500, the value of two slaves seized in execution of the original judgment against *Hall*, and the subject matters of an hypothecary action instituted by *Davis* against *W. T. Hall*.

On the first point we deem it sufficient to remark, that the mortgage is created by the registry of the bond, in accordance with the provisions of the Act of 1847, relative to the bonds of tax collectors and public officers. By the terms of this Act (section 4th), it was provided that when the Treasurer or Auditor of the State shall issue execution against the Sheriff, the officer under it may seize and sell according to law any land or slaves which may have belonged to the principal obligor at the date of the rigistry of the bond without regard to any subsequent transfer or change of title, and in whatever hands the same may be found. By the Act of 1855, relative to bonds of State and public officers, this summary remedy was extended to all cases in which execution shall issue. It is urged that this Act, having been passed since the registry of the bond, has no application to a bond enacted before its passage. The Statute is, in our opinion, so far as it relates to the enforcement of the rights created by the registry of the bond, purely remedial, and in no manner affects the previously existing right, the enforcement of which it was intended to facilitate. It was intended to give to the registry of the bond (as to property sold after its registry) the same effect as that conferred in acts of sale by the clause of non-alienation.

2d. The mortgage created by the act was intended to secure the bond. There is nothing in the legislation on the subject which justifies the inference that the bond was intended exclusively for the benefit of the State: by its provisions it is in terms applicable to "all public officers" who, under existing or prospective legislation, were "required to give bond." The Act of 1855 did not repeal the Acts of 1847 and 1848, so far as the provisions of those Acts were reënacted in the revisory legislation of 1855. See State on the relation of *Holmes* v. *Wiltz*, lately determined.

3d. The formalities required in the execution of the Sheriff's bond are directory, and were intended to furnish undoubted and accessible evidence of its execution; the ommission of such formalities does not destroy the validity of the bond nor any of the rights of parties dependant thereon.

4th. The plaintiffs cannot repudiate their own title as derived from *Barham*. If they have acquired nothing under the transfers from *Barham*, the land seized is still his property, and they are without interest in opposing the seizure. It appears that the relinquishment, from Congress, was made in favor of *Barham*.

The 5th ground is not seriously urged. If valid, it would render useless the most important provisions of the law.

6th. The plaintiff had a right to permit the execution to issue at the instance of the sureties. If the plaintiff, in execution, authorizes the proceeding, the defendants cannot complain of a resort to executory proceedings for the purpose of enforcing payment. The sureties have an equitable interest in the payment of the principal demand.

7th. The judgment appealed from has reduced the amount demandable upon the writ to that expressed on the face of the bond. The appellee has acquiesced in this reduction, and the appellant is without interest in disturbing it.

As respects the credits claimed, we find no evidence that any funds have been realized or could have been realized by the seizures of the two slaves referred to in the supplemental petition.

The defendants have ample legal remedies to secure the recognition of any actual payments made, or to be made, upon the principal debt sought to be enforced.

We find no error in the decree of the District Judge, subjecting the property last alienated by the judgment debtor to the satisfaction of the writ, before proceeding to the seizure and sale of that transferred by previous alienations. It is correctly urged, on behalf of *Cooper*, that the effect of the laws of 1855 and 1847 was merely to modify the general law so far as to dispense a party holding a general mortgage resulting from the registry of a Sheriff's bond from the necessity of instituting an hypothecary action. It is contended that Art. 715 of the Code of Practice does not apply in this case, we think it does; but in the absence of any statutory provision regulating the subject, such a mode of proceeding would result necessarily from the relations of the parties, and the equitable rights incident thereto. See *Patin* v. *Pregean*, 7th La., 301.

Judgment affirmed.

G. McELROY *v.* H. DEAN.—HEIRS OF HEMKEN, Intervenors.

Plaintiff sued defendant for rent. A third party, claiming to be the owner of the land, never having had possession, intervened, and claimed the rent and privilege on the crop. *Held*, that the privity of contract and lessor's privilege existed alone between the lessor and lessee. The intervenors' remedy was by petitory or possessory action, to be brought against the lessor when the tenant disclosed his name. C. P. 43.

The possession of lessee is that of his lessor. C. C. 3404.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J. *McGuire & Ray*, for plaintiff. *Ludeling*, for appellant.

MERRICK, C. J. This suit was instituted to recover of the defendants $300, the amount of rent due upon a lease, and interest, a writ of sequestration having issued, and the lessor's privilege being claimed upon the crop of cotton and corn, and the furniture. The heirs of *Hemken* intervened in the suit, setting up title, and claiming to be the owners of the land, and praying for $350, and interest, and also for a privilege on the cotton. There was judgment in favor of the plaintiffs against the defendant, and the intervention was dismissed.

There was no error in the judgment. The possession of the lessee is that of the lessor. C. C. 3404. The privity of contract and lessor's privilege existed alone between the lessor and lessee. A third party, claiming to be owner of the land, never having had possession, cannot claim as lessor. His remedy is by a petititory or possessory action, to be brought against the lessor when his name is disclosed by the tenant. C. P. 43. It is evident, therefore, that the intervenor cannot claim the same thing as the plaintiff, nor something connected with it, for his demand is that of the property in, or possession of the land, whilst the demand of the plaintiff arises solely from the contract of letting and hiring. The intervenor has no legal interest in the success of either party, and as the lease extended beyond the period of the intervenors' title, the court properly dismissed the intervention, notwithstanding the answer to the merits. C. P. 389, 390.

Judgment affirmed.

John Temple *v.* Marshall & James and Sheriff.

An appeal was filed on the 11th July, 1855, the court being then in session and the cause was continued on the 20th July, 1855. A motion made by the appellees, on the 16th July, 1856, to dismiss the appeal for irregularities in the transcript, namely, the want of an order of appeal, comes too late.

If the Sheriff has seized more property than could be considered reasonably necessary to satisfy the judgment, the proper course is not an injunction but an application to the District Judge to reduce the seizure. C. P., 652.

Where it appears that plaintiff, in injunction, was not only surety on a twelve months' bond, but co-debtor, *in solido*, with the principal in the judgment on which the execution had issued, and that the property had been sold, for which the twelve months' bond was given, and also that the bond was past due and unpaid—the defendants had the right to issue execution against him in his capacity of surety. C. P., 719, 720.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J. *McGuire & Ray*, for plaintiffs and appellants. *Hunter*, for defendant.

Buchanan, J. This appeal was filed in this court on the 11th July, 1855, the court being then in session. The cause was continued on the 20th July, 1855. On the 16th July, 1856, a motion was made by appellees to dismiss the appeal for irregularities in the transcript, namely: the want of an order of appeal. This motion comes too late. See *Murray* v. *Bacon*, 7th N. S. 271 ; 2 An., 138.

The next day after the filing of the motion to dismiss, the appellant applied, by petition, to the court for a writ of mandamus to the District Judge, commanding him to amend the minutes of a preceding term of his court, *nunc pro tunc*, so as to make it appear that an appeal had been in fact ordered.

We entertain great doubts about the propriety of granting a mandamus for the purpose demanded, but are relieved of the necessity of a decision upon this point by the conclusion to which we have come, as already expressed, upon the inadmissibility of the motion to dismiss.

We will, therefore, consider this case upon its merits, and as if the transcript were perfectly regular.

The plaintiff and appellant prayed for and obtained an injunction against a *fi. fa.* upon a twelve months' bond, in which he was surety, upon several grounds.

On motion of defendants, the District Court dissolved the injunction upon the face of the petition, with damages, and plaintiff has appealed.

There is no error in the judgment of the court below. If the Sheriff seized more property than could be reasonably considered necessary to satisfy the judgment, the proper course was not an injunction, but an application to the District Judge to reduce the seizure. C. P., 652, 653.

From the petition, it appears that plaintiff, in injunction, was not only surety upon a twelve months' bond, but co-debtor, *in solido*, with the principal, in the judgment upon which execution had issued, and the property been sold, for which said twelve months' bond was given. It also appears, from the petition, that the twelve months' bond was past due and unpaid.

In plaintiff's capacity of surety on this bond, the defendants had the right to issue execution against him. C. P., 719, 720.

And although the petition alleges that the principal in the twelve months' bond had enjoined the execution upon it issued against himself, upon grounds touching the validity, legality and amount of the judgment and bond; yet the

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plaintiff does not allege those objections to be true, nor does he even state what they are, save in the general terms above copied.

As to the plaintiff's co-debtor having bound himself towards plaintiff to pay all the debts of the late partnership of *Temple & Knox*, this is manifestly no ground for enjoining these defendants in executing their judgment against plaintiff.

The allegation of the petition that the *fi. fa.* issued prematurely, is inconsistent with other allegations of the petition.

The want of a mortgage recorded against *Knox* for the price of property bought by him at Sheriff's sale, and constituting the consideration of the twelve months' bond, does not discharge the surety on that bond. *Coons* v. *Graham*, 12th Robinson, 206.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

SEWELL T. TAYLOR *v.* JAMES HUEY 3D et al.

The defendant purchased the land in controversy, at a public sale provoked by him to enforce a mortgage, in his favor, resting on it. The plaintiff, claiming the land by a deed from the mortgagor, which was executed subsequent to the mortgage, but anterior to the public sale to defendant, yet not registered until afterwards, instituted a petitory action and sought to rescind the sale to defendant for various alleged defects and vices.

Held: That it is doubtful, under the facts of the case, whether plaintiff can inquire into the regularity or good faith of the proceedings under which defendant acquired title The mortgagor was the proper party to attack the order of seizure and sale by a direct action, and that conceding plaintiff could impeach defendants title, he had not laid a foundation for doing so in his petition, having alledged no tender to defendant of the mortgage debt which burdened the land, and which was only discharged by the sale, which he sought to treat as a nullity.

APPEAL from the District Court of the parish of Jackson, *Richardson*, J. *Garrett*, *Ludeling* and *Thompson*, for plaintiff and appellant. *McGuire & Ray*, for defendants.

SPOFFORD, J. Article 595 of the Code of Practice provides, that "if the appellant wishes to withdraw his appeal *before he has cited the appellee*, he may be allowed to do so, on motion to the lower court; and in such case, he may renew his appeal within the time herein above allowed."

It is admitted, that the appellee was not cited under the first order of appeal. And as the statement of facts is silent upon that point, we will presume that the appellant obtained leave from the lower court to withdraw his first appeal. In such case, he had a right to renew his appeal, and the motion to dismiss is overruled.

Upon the merits, we find this to be a petitory action for a tract of land, in which the plaintiff, anticipating the probable defence, attacks the title of the defendants, and seeks to rescind the same for various alleged defects and vices. The defendant *Huey*, pleaded a general denial.

Both parties claim under one *Fountain;* the plaintiff by a deed passed in New Orleans, on the 29th of August, 1846, but not recorded in the parish of Jackson until the 3d of May, 1847, and the defendant *Huey*, under a Sheriff's deed recorded in Jackson, on the 18th of February, 1847, when it seems he

was without any notice of the plaintiff's title. The basis of the Sheriff's deed to *Huey* was an adjudication made on the 2d of January, 1847, under an order of seizure and sale issued upon an act of mortgage which had been executed by *Fountain* to *Huey*, on the 9th of December, 1845, and duly recorded on the 2d of November, 1846. And the plaintiff alleges that the land when seized was in the possession of *Fountain*. The seizure took place on the 10th November, 1846.

Huey, then, has the first recorded title, and without notice of any conveyance to *Taylor*. He has a title, moreover, derived from the party in possession, under a sale made to satisfy a mortgage in his own favor, executed by the owner *Fountain*, before he had made any conveyance to any person.

It is doubtful, under the facts of this case, whether *Taylor* can inquire into the regularity or good faith of the proceeding under which *Huey* acquired his title. *Fountain* was the proper party to attack the order of seizure and sale by a direct action.

But conceding that *Taylor* could be heard to impeach the title of *Huey* thus acquired, he has not laid a foundation for doing so, by the allegations of his petition. He has made no tender to the defendant of the mortgage debt which burdened the land, and was only discharged by the sale he seeks to treat as a nullity.

It is unnecessary to notice other points in the case.

Judgment affirmed.

M. A. COPLEY *v.* JOHN LAWHEAD & CO.

A partnership formed for the purpose of running a steam-sawmill, and making and selling lumber, and of carrying on the lumber business generally, is a commercial partnership. C. C. 2796.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J.

Morrison, for plaintiff. *Parsons*, for defendants and appellants, *Newton & Hall*, for *Sharp & Shelton*.

STOCKDALE, J. The defendats have appealed from a judgment against them *in solido*, upon a promissory note signed in their partnership name.

The only question is, was the partnership a commercial one? The articles state that the partners associate themselves "for the purpose of running the steam-sawmill at Point Pleasant, and of making and selling lumber, and of carrying on the lumber business generally." The lumber business generally, includes the buying of timber as well as the selling of lumber. "Commercial partnerships are such as are formed (1) for the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture." C. C., 2796. See also *Succession of Hamblin*, 3 Rob. 130; *Hubbell* v. *Read*, 14 L. 244; *Nachtub* v. *Praque*, 6 An., 759.

It is, therefore, ordered that the judgment appealed from be affirmed with costs.

E. J. Jones and Rebecca Jones v. J. Moore.

Plaintiff brought suit upon a decree rendered by a Chancery Court in Arkansas, and upon a delivery bond executed by defendants to entitle them to retain possession of certain property seized under an execution issued upon the decree. He alleged, in his petition, "that said bond having been forfeited, acquired the force and effect of a judgment according to the laws of Arkansas; that the original judgment was satisfied and novated in this, that the bond was taken for the delivery of property as aforesaid, and forfeited as aforesaid, and therefore the said bond became a new judgment, having the effect as aforesaid; that both said judgments, the original and statutory judgments, have the effects of and are joint and several judgments, according to the laws of Arkansas." The defendant alleged, in his answer, that the bond set up by plaintiff was false and forged as to his signature.

Held: that the allegation of novation, with the qualification annexed, is not so absolute as to prevent the plaintiff from recovering on the original decree in chancery. If, therefore, the defendant did not execute the bond the original judgment was not extinguished: if he did execute the bond the plaintiff is entitled to recover on the forfeited bond.

APPEAL from the District Court of the parish of Union, *Richardson*, J.

Regenburg & Essick, for plaintiff:

But this case must be decided by the law applicable to it, whether that law is harsh or otherwise. What then is the law applicable to the issues presented by the answer? The Sheriff states on his return that *James Moore* signed the bond. It is also stated at the end of the bond, that it was signed, sealed and delivered in the presence of the Sheriff. Execution issued upon the bond against all the parties thereto.

The proceedings are, therefore, all regular and without any defects whatever. Now the first position we take is, that the Sheriff's return cannot be contradicted but must be conclusive against the defendant, and if the defendant did not sign the bond, his remedy is against the Sheriff for a false return. This in the doctrine of the common law, and is well established. The court will judiciously notice the fact, that the common law is the basis of the jurisprudence of the State of Arkansas; *Copley* v. *Sandford*, 2 A. 335. *King* v. *Sejour*, 4 A. 129.

Greenleaf says, that "The return of a Sheriff, also which is conclusively presumed to be true, between third persons, is taken, *prima facie*, as true even in his own favor; and the burden of proving it false, in an action against him for a false return, is devolved on the plaintiff, notwithstanding it is a negative allegation. In fine, it is presumed, until the contrary is proven, that every man obeys the mandates of the law, and performs all his official and social duties; Greenleaf on evidence, section 40. See also *Clark* v. *Lyman*, 10 Pick., 47. *Boyntorne* v. *Willard*, 10 Pick., 169.

"As between the parties to the process, or their privies, the return is usually conclusive, and not liable to collateral impeachment. This is a well established general rule, one necessary to secure the rights of the parties, and give validity and effect to the acts of ministerial officers, leaving the persons injured to their redress, by an action for a false return;" 4 Philips on evidence, 1087, and cases there cited. See also pages 1088, 1089 and 1090 of same book. We are not, however, left to decide solely by the principles of the common law, what effect the precedings in Arkansas would have in that State; but the question has been decided by the highest tribunal of that State, and as the court of that State has fully discussed the nature and effect of the delivery bond and the forfeiture thereof; and as it may be inconvenient or impossible for your honors to examine the reports of the Supreme Court of Arkansas, we will make a few extracts from the most important decisions of that court, which will clearly show the nature of the bond and the forfeiture thereof; and also of the new or statutory judgment which arises by operation of law from the forfeiture of the bond.

In the case of *Ruddell* v. *Magruder*, 6 Eng. Rep. 583, the court said "When the bond has been forfeited, it has, by operation of law, the force and effect of a judgment on which execution may issue, and the Sheriff's return to that effect is conclusive record evidence of the fact of such forfeiture, and cannot be

contradicted by parol evidence even at the return term. Thus the non-delivery of the property transforms the bond, by operation of law, into a statutory judgment, on which statutory judgment execution may issue against all the obligors in the bond. The execution does not issue upon the bond, but upon the statutory judgment; which, by operation of law, springs into being upon the forfeiture, and then exists in contemplation of law.

Also in the case of *Biscoe et al.*, v. *Sandefer et al.*, decided at the January term, 1854, and reported in 14 Ark. Rep., 584, 585, the court said, "This new judgment is considered as possessing the qualities, force, effect and dignity of a judgment obtained in the ordinary mode of proceeding according to the course of the common law, and in a court of competent jurisdiction *scire facias* may be issued to have execution upon it, (3 How. Miss., R.) and in another State it will be regarded as a judicial proceeding within the meaning of the Act of Congress of 1790. As a judicial proceeding it may challange full faith and credit, and can no more be impeached collaterally than any other judgment. The precise question came under review in the court of appeals of Kentucky, in the case of *Kelly* v. *Louk*, 7 B. Monroe, 223, and was fully discussed and ably considered. It was an action of debt brought on one of these statutory judgments from the State of Mississippi, and the court held that while the statutory judgment remained in force, unreversed or annulled, it was record evidence of right in the plaintiff, and could only be impeached by evidence of as high a grade as itself; and further, that *nul tiel record* was the only proper admissable defence to it in the court. In Kentucky a delivery bond is for the whole debt, and on forfeiture has the force and effect of a judgment on which execution issues as of course. 1 Morehead & Brown's Laws, Ky., 641. *Joyce* v. *Farquar*, 1. A. K. Marsh, 20, 21; *Chitty* v. *Gleim*, 3 Men., 425. And so as in Virginia a replevy bond is held to be an extinguishment of the previous judgment, and of all liens created by execution, because the bond when made has the force and effect of a judgment, and execution issues against all the obligors for the whole debt.

The present law came before this court in *Reardon, ex parte*, 4 Eng. 450, and was pronounced constitutional; subsequently in the case of *Ruddell* v. *Magruder*, 6 Eng. 579, that case was confirmed, and it was held, that the non-delivery of the property transformed the bond, by operation of law, into a statutory judgment, on which execution might issue against all the obligors for the debt, interest and cost remaining unpaid; that the forfeiture imparted to the bond the force and effect of a judgment; that the Sheriff's return of the forfeiture, was conclusive evidence of the fact, and could not be controverted by parol proof. Substantially the doctrine of the cases in Mississippi is adopted by this, and undoubted when the law is the same, the decisions of the courts should correspond, as far as justice, comity and reason will permit, and we think it would be impossible to establish any other doctrine, without leaving the debts exposed to grevious evils, without seriously impairing the harmony of the law, and without departing from the manifest intention of the Legislature."

See also *Miner* v. *Lancashne*, 4 How. Miss. 350; *Saunders* v. *McDowell*, ibid; *Wagner* v. *Baker*, ibid; *U. S. Bank* v. *Patton*, 5 How. Miss. Rep. 200; *McNutt* v. *Wilcox*, 3 How. Miss. Rep. 419; *Annis* v. *Smith*, 16 Peters' Rep. 304; *Brown* v. *Clark*, 4 How. U. S. Rep.

In the next place, admitting that the Sheriff's return can be impeached, then the *onus probandi* is on defendant, because:

1st. A sworn officer is presumed to have done his duty until the contrary be shown. *Gentile, admr.* v. *Paley*, 3 An. 148; see also Hennen's Digest, p. 479, sec. 44, and references.

2d. Judicial proceedings are presumed to be regular until the contrary is proved. *Hubbell* v. *Clannon*, 13 L. R. 495; *Despan et al.* v. *Swinuler*, 3 N. S. 705.

3d. The effect of a legal presumption is to relieve the party in whose favor it is from the necessity of making any proof. *Succession of Tilgham*, 7 Rob. 393.

4th. The plea of the defendant goes to charge the officer with a culpable neglect of duty, and it must be proved by him, although it involved a negative. 1 Greenleaf on Evidence, sec. 80; Phillips on Evidence, p. 195; *Morgan* v. *Mitchell*, 3 N. S. 576.

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5th. If the defendant denies his identity, he must prove that he is not the man. The proof furnished by the record is *prima facie* sufficient against him. *Whiting* v. *Ivy*, 3 An. 649.

Baker & Harris, for defendants and appellants:

The defendant will not contest the position assumed by the plaintiff in his petition, "that the original judgment (of *Elijah J. Jones and Rebecca, his wife*, v. *George W. Rutherford and James Moore, Administrators of Joel Wodel*) was satisfied and novated by the taking of the delivery bond, according to the laws of the State of Arkansas." The court below considered that this action was based on the forfeited delivery bond.

Let us then proceed to see what the proof was as to the signature to the bond. As before stated, all the proof offered is comprised in the transcript from the court in Arkansas. The action was on the bond. The defence was that the signature of the defendant was false and forged. The original bond was not offered. No effort was made to prove by witnesses that the defendant signed the bond. The whole reliance was the Sheriff's return on the execution and his approval of the bond. We submit that when the defendant denies his signature, on oath, it is incumbent on the plaintiff to prove it. This they failed, nay, did not attempt to do. They were not entitled to a judgment.

But the plaintiffs meet all objections by asserting that the return of the Sheriff on the bond is, by the laws of Arkansas, a judgment, and interpose the Constitutional provision "that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." Art. 4, sec. 1. And the latter clause of the Act of Congress of 26th May, 1790: "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in any court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

The general doctrine in relation to foreign judgments seems now to be, that they are *prima facie* evidence, but that they are impeachable. That when a forcing judgment is made the basis of an action, the court will inquire whether the foreign tribunal had jurisdiction of the subject matter of the parties, and whether the defendant had actual or constructive notice. Beyond this the court will not go, but hold the forcing judgment binding, subject to be avoided if founded in fraud or pronounced by a court not having competent jurisdiction over the cause.

Story's Commentatories; Conflict of Laws, pp. 499 to 615; 1 Kent, 261, and notes; United States Digest, vol. 5; Supplement, 230; 13 Johnson, 192, 205; 10 L. 18, 220, 381. We conclude, then, if in looking into the transcript from Arkansas, your honors should find that the court had jurisdiction of the subject matter, and that the defendant had actual or constructive notice, that the judgment of the court *a quo* is correct, and sustainable, both by authority of the general doctrine relative to foreign judgments, by the Constitution and Act of Congress, as well as our own Code of Practice, Arts. 752, 753.

But before proceeding to inspect this Arkansas record, let us inquire what is such a judgment as, by the general doctrine, is to be held *prima facie* evidence, and what, in contemplation of the Constitution and Act of Congress, are judicial proceedings. Judicial proceedings can only be carried on where there is a Judge—one clothed with judicial power. To illustrate: the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. Art. 3, sec. 1. By the Constitutions of the several States, the judicial power is vested in such courts as are enumerated in each respectively. By the Constitution of the State of Arkansas, Art. 6, sec. 1: "The judicial power of this State shall be vested in one Supreme Court, in Circuit Courts, in County Courts, and in Justices of the Peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in corporation courts, and when they deem it expedient, may establish Courts of Chancery." Digest of the Statutes, p. 59. To constitute a valid judgment there must be a Judge, a cause, a plaintiff and defendant.

Now, what does the plaintiff exhibit? A claim, as a judgment; a judicial proceeding. The execution issued on the original judgment of *Jones and wife* v. *Rutherford and Moore, Administrators of Wodel.* The return of the Sheriff reciting the seizure of the negroes *Daniel* and *Bill*, the property of

Rutherford; the giving by *Rutherford* the delivery bond; the advertisement of the slaves, the return of the execution before the sale day, and that this execution was not satisfied. The *venditioni exponas* directing the sale of the negroes previously seized; the Sheriff's return thereon; the delivery bond and *fi. fa.* and Sheriff's return thereon. Nowhere in the record is there to be found any judgment of any court against the parties to this delivery bond, it is not pretended that there ever was a judgment asked for and obtained thereon; but the plaintiffs contend, that by virtue of the statute of the State of Arkansas, p. 49, sec. 46, the Sheriff's return is a judgment, is a judicial proceeding which, by the Constitution and Act of Congress, is entitled to full faith and credit. These delivery bonds are of modern origin, and certainly the return made by the Sheriff on one of them, never entered into the contemplation of the framers of the Constitution or of Congress, when adopting the Art. 4, sec. 1, or enacting the Act of 26th May, 1790. The acts of officers are not judicial proceedings. It is evident that these acts are not considered in this light in Arkansas. The law of Arkansas gives to the party in favor of whom a delivery bond has been executed, various remedies. By sec. 38, a lien was effected on the property seized; by sec. 39, the right was given to seize the same property or any other of the defendant's subject to seizure, and sell it after five days notice; by sec. 40, if the condition of the bond be broken the defendant and his security shall be deemed to have notice of the facts, and the plaintiff, without further notice, may, on the return day of the execution or any subsequent day of the time, move the court for judgment on the bond against the defendant and his securities, or any of them, or the plaintiff may, at his option, bring an ordinary suit on the bond. We concede that a judgment thus rendered, would be a judicial proceeding. By section 41, it is further provided, that if no judgment had been entered on the bond, the plaintiff might have judgment after twenty days notice, without any formal pleading. Digest of the Statutes of Arkansas, p. 500, by English.

Now, suppose that instead of adopting any of the modes above provided, the plaintiff chooses, under sections 46 and 47, to issue execution against the parties to the bond, and that one of the parties named in the bond, his property being seized, should either enjoin or sue out a writ *coram nobis*, and allege that his signature was forged, on the hearing, what would be the course of procedure? We are to presume that the rule of evidence is universal, no one is held to the proof of the negative, it would be incumbent on the defendant in such case to prove the signature to the bond. With us the rule is fixed, that a man is bound to admit or deny his signature, having denied it on oath, and it being proved, he is barred every other defence. C. P. 324, 325, 326. It is just as it would be, if a delivery bond had been taken under our Act of 1842, p. 210, which provides that the defendant in execution, whose property had been seized, shall have the right to retain possession until the sale day, on condition that he execute his bond *in solido* in favor of the plaintiff, with good and sufficient sureties for the delivery of the property at the time of the sale, and upon a forfeiture of said bond, made to appear by the certificate of the officer, the bond shall have the effect of a twelve months' bond, and execution shall issue against all the parties to the bond.

If such execution was to issue, and property of one whose name appeared to the bond should be seized, and he were to enjoin, alleging that his signature to the bond was forged, would the court hesitate to perpetuate the injunction if, on trial, the party in whose favor the bond was taken, failed to prove the genuineness of the signature? We think clearly not. The case at bar is still stronger in favor of the defendant in this case, as the original bond was not produced, and was not within the State or in possession of a court or officer in this State, which could have been reached by an order of the court.

MERRICK, C. J. This action is brought by the plaintiff, upon a decree rendered in the Circuit Court in Chancery, for the county of Saline, of the State of Arkansas, for $974 38, and interest at six per cent. and costs, against one *Rutherford* and the defendant, and upon a "delivery bond" made on an execution issued upon said decree.

By the statutory law of Arkansas, the Sheriff or other officer charged with the service of any execution, is required to levy it upon personal property,

and the defendant is authorized to retain possession of the same until the day of sale, by giving bond in favor of the plaintiff, with sufficient security, to be approved by the officer, in double the value of said property, with a condition for the delivery of the property to the officer at the time and place of sale named in such condition; and with the further condition, that in case the property shall not be delivered according to said condition, the bond shall have the force and effect of a judgment on which an execution may issue against all the obligors. By the same statutes it is provided, that the forfeiture of the bond shall be shown by the return of the officer, endorsed on the execution. See Dig. of Statutes of Arkansas, pp. 500, 502, secs. 37, 46 and 47.

The plaintiff, in his petition, after alleging that said bond having been forfeited, acquired the force and affect of a judgment, according to said law of Arkansas, further averred, that the "original judgment was satisfied and novated in this; that the said bond was taken for the delivery of property as aforesaid, and forfeited as aforesaid, and therefore the said bond became a new judgment, having the affect as aforesaid; that both said judgments, the original and statutory judgments, have the effects of and are joint and several judgments, according to the laws of the State of Arkansas."

The defendant excepted to the plaintiff's petition, as containing inconstant demands. The exception being overruled, he filed an answer containing a general denial and an averment, that the bond set up in the plaintiff's petition was false and forged as to his signature, and he sustained his answer by his affidavit.

The principal question raised in this court, and the only one requiring our notice, arises from his denial of the signature to the bond. The defendant contends, that he is not bound to prove a negative, and that the burden of proof is upon the plaintiff to show, that the signature to the bond is genuine. The plaintiff, on the other hand, having rested his case on the record, which he offered in evidence, says, that under the Constitution of the United States and the Act of Congress of 1790, his statutory judgment is conclusive against the defendant, must have the same effect in Louisiana, that it has in Arkansas, where the original judgment was rendered, and the statutary judgment substituted in its place.

We do not deem it important to decide either of the questions here presented. The allegation of novation with the qualification annexed, is not so absolute as to prevent the plaintiff from recovering judgment upon the original decree in Chancery. If, therefore, the defendant did not execute the bond, the original judgment was not extinguished, and the plaintiff is entitled to recover on his original decree. If he did execute the bond, the plaintiff is entitled to recover on the forfeited bond, but the original judgment alone indicates how much of the bond may be executed as a judgment. The defendant, therefore, has no interest in establishing the bond, except for the mere purpose of defeating a legal demand by a technicality. See case of *Ruddell* v. *Magruder*, 6 English Rep. 583.

We are not prepared to say, that the judgment ought to be amended in favor of the plaintiff, for the small amount of costs claimed. And to the cost of the transcript, we see no reason why it may not be taxed among the costs under the judgment already rendered.

Judgment affirmed.

Estate of John and Martha Routon.

The validity of a judgment ordering a partition cannot be inquired into, on the trial of an opposition to an administrator's account, which is not based on the partition, and which does not embrace any of the property divided.

APPEAL from the District Court of the parish of Catahoula, *Barry*, J. *Taliaferro*, for the administrator. *Hendry*, for appellant.

Buchanan, J. *John* and *Martha Routon* died in 1850, leaving five children surviving, and grandchildren, issue of two children deceased. *Talbot A. Routon*, one of the children, qualified as administrator, and in the same year brought a suit for partition of the slaves belonging to the estate, upon which a judgment was rendered in December, 1850. In 1854, *Robert J. Plant*, guardian of *William H. Routon*, grandchild and one of the heirs of *John* and *Martha Routon* presented his petition, calling upon the administrator to file an account of his administration, which he has done. The account filed charges the administrator with moneys received, and credits him with moneys paid. The guardian of *William H. Routon* has opposed several items of the credit side of this account, but the principal ground of opposition relates to the slaves which had been partitioned under the judgment of court before mentioned.

Opponent alleges that the proceedings in partition were null, as regards the minor, for want of a compliance with legal formalities.

The judgment of the District Court sustained the opposition as to the items of credits objected to, but rejected it as to the slaves embraced in the partition, reserving to the minor heir the right to prosecute all rights and claims set up in the opposition in a direct action.

The opponent appeals, and relies for a reversal of the portion of the judgment, of which he complains, upon the case of *Paxton* v. *Cobb*, 2 La., 139, in which it was held to be a general rule in jurisprudence that wherever a man may sue, he can except, when the matter which he might have annulled in an action is presented as the basis of a demand against him. That authority does not justify the present attempt to impugn collaterally the judgment of partition. The present account, which is opposed, is not based upon the partition, neither does it include any of the property which was divided under the judgment of partition. That judgment, to which all the heirs were parties, and which has been executed, cannot be treated as a mere nullity. It can only be declared null by another judgment rendered in a suit instituted against all those parties. The parties necessary for declaring its nullity are not now before us.

Judgment affirmed, with costs.

J. P. ELAM, Tutor, et al., *v.* THE HEIRS OF A. S. BARR, deceased, et al.

The Code of Practice, in prescribing the conditions upon which an attachment may issue, requires an oath of the existence of the debt in a form to exclude the exceptions of payment, compensation, &c., and a compliance with its requirements is equivalent to an averment that the debt has not been so extinguished.

APPEAL from the District Court of the parish of Catahoula, *Barry*, J. *Mayo*, for plaintiffs and appellants. *Taliaferro*, for defendants.

MERRICK, C. J. The present is a suit against the sureties on a tutor's bond. It was commenced, as to a part of the defendants, by attachment. The attachment was dissolved, and the action dismissed, not only as to the absentees, but also as to those who had been cited, and the plaintiffs have appealed.

We think the judgment of the lower court ought to be affirmed as to the absent defendant. The plaintiffs have not sworn with sufficient certainty to the indebtedness of the defendants to entitle them to the harsh remedy of the attachment. The absentees are the heirs of *A. S. Barr*, deceased, who was one of the sureties of *Glenn*. *Glenn's* estate was administered by the Clerk of the court as a succession under five hundred dollars in value, and the plaintiffs allege that they have obtained judgment against the said Clerk as such administrator of *Glenn*. The indebtedness of the defendants is alleged in the affidavit in these words, (it being the substance of the allegations of the petition, which are also sworn to,) viz: "That they have obtained judgment against the legal representatives of *Samuel Glenn* for the sums set forth in the foregoing petition, as due them respectively, for which they verily believe the heirs of *A. S. Barr*, whose names are set forth in the foregoing petition, are liable."

The Code of Practice, in prescribing the conditions upon which an attachment may issue, requires something more than the *prima facie* allegations which suffice for the petition itself and a judgment thereon. It requires an oath of the existence of the debt in a form to exclude the exceptions of payment, compensation, &c., and a compliance with its requirement is equivalent to an averment that the debt has not been so extinguished—that it still exists. If we look to the averments of the petition, we find them in such form that we might, if they were substantiated by proof, render a judgment thereon; we might infer that the judgment was regularly obtained against *Glenn's* succession, and that, when produced against *Barr's* succession, it would be *prima facie* proof of the extent of the liability of the surety. But it is not positively sworn to that the heirs of the surety are liable for that amount. Notwithstanding the mere opinion of the plaintiffs, the absent defendant may not be bound to the extent of the judgment against the principal: they may be entitled to a division, or there may have been payments. The plaintiffs, before they can resort to an attachment, must assure themselves that the defendants are indebted to them, and they must state the amount of such indebtedness. The attachment was, therefore, properly dissolved.

But as it respects the exception, relied on by the parties cited, that the suit was prematurely brought, we are of the opinion that the plaintiffs have substantially complied with the requirements of the Act of 1842. It is evident that no further pursuit of the demand against the succession of the principal

debtor would be availing. The necessary steps, therefore, have been taken to enforce payment against the principal. We see no error in the reception of the parol proof to establish the insolvency of *Samuel Glenn's* succession.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment as to the said *Sarah Davis*, wife of *Moses Davis*, *Martha Hollis*, wife of *Henry Hollis*, *Lewis C. Barr*, and *Mary Hudson*, and *James G. Taliaferro*, be affirmed; that as to the other defendants, the judgment be avoided and reversed, and the exception overruled, and the cause remanded, to be proceeded in according to law, and that said last named defendants pay the costs of the appeal.

The Liverpool and London Fire and Life Insurance Company v. Ephraim C. Hunt.

A person having effected insurance with a company in its corporate capacity, and having received from it payments made under the supposed obligation growing out of that contract, will not be permitted to deny the corporate existence of said company, when sued by it for the restitution of the money thus paid.

APPEAL from the District Court of the parish of Caddo.

Winans, for plaintiff. *Landrum & Williamson*, for defendant and appellant.

Lea, J. The defendant in this case having effected an insurance with the plaintiff in its corporate capacity, and having received from said plaintiff $2000, in virtue of the supposed allegation growing out of the contract, cannot, in a suit brought against him for the restitution of the amount thus paid, be permitted to deny the corporate existence of the company with which he has dealt. So far as relates to the subject-matter in litigation, and the transaction out of which it arises, the defendant must be considered as concluded by his acts in the premises.

Upon the merits, we find nothing in the evidence which would justify us in disturbing the judgment appealed from. The Judge *a quo* appears to have made a liberal deduction upon the plaintiff's demand, as an indemnity for the actual loss sustained by the defendant. No greater sum could have been allowed under the evidence without violating the stipulations of the contract.

The plaintiff's counsel has asked, in his brief, for an amendment of the judgment by the rejection of the whole of the defendant's claim, as having been forfeited in accordance with the terms of the policy, by his exaggerated and fraudulent representation of the loss sustained by him.

We cannot inquire into the merits of this branch of the case, as the plaintiff has not joined in the appeal or filed any answer praying for an amendment of the judgment.

Judgment affirmed.

J. H. Lengsfield *v.* Thomas W. Jones.

When a person receives a shipment of cotton, and gives a bill of lading in the ordinary form, he becomes liable as a common carrier.

The fact that plaintiff inspected the boats before the shipment does not exempt the carrier from liability for a loss occasioned by the unseaworthiness of the vessel.

APPEAL from the District Court of the parish of Caddo, *Land*, J. *Williamson & Austin*, for plaintiff. *Jones* and *Beall*, for defendant and appellant.

Spofford, J. This is an action for damages alleged to have been done to fifty bales of cotton shipped by plaintiff on a certain flatboat, belonging to the defendant, for transportation from Shreveport to New Orleans.

The plaintiff, who sued for $2,146 92, had a verdict and judgment for $580. The defendant has appealed, and the plaintiff, in his answer, prays for an increase of the judgment to the amount claimed in his petition.

There has been some discussion upon the question whether the defendant, *Jones*, was a common carrier. There is no proof upon this point except the contract of the parties, which is evidenced, as to most of the cotton shipped, by bills of lading in the common form, by which the defendant acknowledged to have received the cotton in good condition, and undertook to deliver it at New Orleans in like good order, at a specified rate of freight, "the dangers of the navigation alone excepted."

It seems, also, that Red River, at the time of the shipment, was extremely low, and that steamboat navigation was suspended. It also appears that the defendant built several flatboats, upon which he undertook to transport the cotton, and that he took cotton for other parties than the plaintiff.

If he wished to exempt himself from the law of common carriers, he should have made a special contract to that effect, instead of giving bills of lading in the ordinary form. Moreover, his original answer to the petition would seem to imply an admission of his liability as a common carrier, for he there averred that the damage, if any, was occasioned "by the accidental and unavoidable sinking of the boat on which it was shipped."

A serious damage having been fully proven, the burden was on the defendant to show that it occurred through one of the excepted perils.

The proof, on the contrary is clear, that his flatboats were unseaworthy. The one upon which the plaintiff's cotton was shipped was so leaky as to require constant pumping from the commencement of the voyage. She was insufficiently manned, and during every night the water gained rapidly, so that the lower line of the cotton, (which belonged to the plaintiff,) was kept constantly standing in water, at various depths, during the tedious voyage from Shreveport to a bar above Grand Ecore, where the boat sunk. We are setisfied that the unseaworthiness of the flatboat was the real cause of much of the damage.

But it is urged that the plaintiff inspected the boats before he shipped the cotton, and therefore took the risk of their seaworthiness upon himself. The contract of the parties does not so read, and the plaintiff might well have run the risk even of a doubtful experiment, if he had confidence in the defendant's guaranty against everything but the perils of the river.

It is urged that the defendant has waived his claim to damages, because, after the flatboat sunk, and the plaintiff made his protest, he sent an agent down to the bar, who received the damaged cotton from the plaintiff, and paid him $100 salvage, without which he refused to deliver the cotton.

The defendant acknowledged by letter to the plaintiff his inability to fulfil his contract. He did not, as he had undertaken to do, deliver the property to the consignees in New Orleans, but, after sinking his boat, abandoned the voyage.

We do not perceive that the conduct of the plaintiff, in sending an agent to save what he could from the wreck, assented to as it was by the defendant, was an implied waiver of the action in damages, and it is not pretended that there was any express waiver.

As to the amount of damages done to the cotton, only the injury received up to the time the plaintiff's agent took it into possession should be considered. Upon that subject the evidence is somewhat conflicting. Under such circumstances we do not interfere with the verdict of a jury selected by the parties, except for flagrant error. We find no such error in the estimate made by the jury in this case.

Finally, it is contended that there was error in the judgment, which allows legal interest from the date of the verdict, when the verdict is silent as to interest. The error, if error it be, is too trifling to attract attention here, when it appears that no effort was made to procure an amendment below.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

J. EAGER *v.* GEORGE A. J. BROWN.

Where the notary having no knowledge of the residence of the drawer, made enquiry on the subject, of the acceptor's factor, (who was also factor of the drawer,) and received for answer, that the drawer lived at F., for which place he mailed notices of the day of the protest, addressed to the drawer; and, a few days after, having received other information in relation to the drawer's residence, dispatched another notice to the place designated. *Held:* That the notary used such reasonable diligence as to excuse the want of notice.

APPEAL from the District Court of the parish of Ouachita, *Richardson*, J. *McGuire & Ray*, for plaintiff. *Ludeling*, for defendant and appellant.

LEA, J. In this sase, the defendant seeks to escape liability upon a protested draft, of which he is the drawer, on the ground that he has been released by the *laches* of the holder in not giving him notice of non-payment.

The notary's deputy, whose testimony was properly received, testifies, that he had no knowledge of the residence of the defendant, that he made inquiries on the subject of the acceptors, who, it appears, were also the defendant's factors, and received for answer that the defendant resided at Farmersville, the seat of justice for the parish of Union, in Louisiana, for which place notices were mailed on the day of the protest, addressed to the defendant. Thus the notary appears to have made inquiries with reference to the residence of the drawer, from those who might be supposed most competent to give it, and from them he received unequivocal information, upon which he acted with

all proper dilligence and despatch. A few days afterwards, having received other information with reference to the drawer's residence, he dispatched another notice to the place designated. We think, under the circumstances of tne case, that assuming the notary to have been misled by the information obtained from the acceptors, such reasonable diligence was used as to excuse the want of notice. See *Ledoux* v. *Morgan*, 3d Ann. 545; also, Story on Bills, § 299.

This view of the case, makes it unnecessary to examine the other points presented in the briefs of counsel.

Judgment affirmed.

STATE *v.* JAMES EVANS.

Where no term of the court was held at Monroe, in October, 1855, though the record of an appeal was returnable at that term, it was held to be a sufficient compliance with the law to file the record at the subsequent term.

Where the accused is not called at the courthouse door to receive his sentence, nor his sureties called to produce his body, there is no forfeiture of the bond obligating him to appear and receive his sentence.

APPEAL from the District Court of the parish of Claiborne, *Drew*, J.

Stubbs, District Attorney, for plaintiff. *Scott*, for defendant and appellant.

MERRICK, C. J. This suit is prosecuted against the defendants, as principal sureties on a bond, requiring the defendant *Evans* to appear and receive his sentence under a conviction for shooting with an intent to murder.

There is, in the record, a motion to dismiss the appeal. We think it should be overruled. The court did not hold a term at Monroe, in October, 1855, the docket having been disposed of in July of that year; Act, 1855, p. 211., sec. 3. The appellants were not obliged to file the transcript at the time fixed for the October term. The filing on the first judicial day of the present term was in time. It may be fairly presumed that the parties against whom the judgment was rendered, and who gave the bond, were those who moved for the appeal.

On the merits we do not find that *Evans* was called at the courthouse door to receive his sentence, nor that his sureties were called to produce his body. It does not, therefore, appear that the bond has been forfeited; 3 An., 225.

The judgment of the lower court must be reversed, and the *State* left to renew proceedings, in a regular manner, upon the bond if it shall be deemed expedient.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court, as to the said *Mabry Mitchell* and *N. J. Scott*, be avoided and reversed, and judgment rendered in their favor as in case of a non-suit.

William W. Allen v. May & Kohn.

The answer of one of the defendants, who are commercial partners, is admissible against his co defendant.

Plaintiff died pending the suit in the District Court of Caddo, the administrator of his succession also died. There being no publication to fill his vacancy, the Clerk of the court, representing the succession, entered appearance, *ex officio*, in the Supreme Court—*Held:* that he could do so under the circumstances by the provisions of the Act of 1855, without proof of his appointment of administrator.

APPEAL from the District Court of the parish of Caddo, *Jones*, J.

Nutt, for *Kerby*, clerk. *Turnell & Hodge*, for defendant and appellant.

Buchanan, J. The parties file cross demands to a large amount against each other. The proof of many items on both sides is vague and unsatisfactory; but there are other items which are proved. The District Judge, in his reasons for judgment, has analysed the proof on each side, and given judgment for those items which are proved on either side, striking a balance of ten hundred and sixty-two dollars and ninety-three cents in favor of plaintiff. This judgment appears to us in accordance with the evidence. There is a bill of exceptions to the admission of the answers of one of the defendants, (commercial partners,) to interrogatories, as evidence against the other defendant.

There was no error in the admission of these answers. The contract of lease, in evidence, shows that the girl *Phœbe* was left by plaintiff in the possession of both defendants, as security for payment of his rent, with leave to defendants to sell her in default of payment of his rent, her proceeds to be applied to the payment of the arrears of rent due.

The plaintiff having died pending the suit in the District Court, it was revived in the name of his administrator, *John W. Morris*, against whom the appeal is taken. It having been suggested of record that *Mr. Morris*, plaintiff's administrator, is likewise dead, and the cause being continued from last term to make parties, the Clerk of the District Court of Caddo now enters an appearance, as *ex officio* administrator of the succession of *William W. Allen*, there being no application to fill the vacancy occasioned by the death of *Morris*. The appellant, by counsel, objects to the Clerk of the court representing appellee without proof of an appointment as administrator; but we think him entitled to assume that capacity, *ex officio*, under the circumstances, by the provisions of the Act of 1855, page 55, section 19.

It is, therefore, adjudged and decreed that the judgment of the District Court be affirmed, with costs.

Spofford, J., recused himself, having been of counsel.

Martin Tulley *v.* M. D. C. Alexander, Executrix.

The rule that the husband cannot be a witness for or against his wife, nor the wife for or against her husband, C. C., 2260, being founded on considerations of policy and morality, is believed to be without exception, and the fact that the spouses live apart does not change this rule of law.

APPEAL from the District Court of the parish of Caddo, *Drew*, J.

Hodge & Austin, for plaintiff and appellant. The record does not show who appeared for the defendant.

Spofford, J. The only question in this case arises upon a bill of exceptions taken to the ruling of the District Judge, relative to the competency of a witness.

The husband of *M. D. C. Alexander*, the defendant, was offered by the plaintiff as a witness, and rejected by the court upon the objection of the wife.

The rule in civil matters is, that the husband cannot be a witness for or against his wife, nor the wife for or against her husband, C. C., 2260. And the rule being founded upon considerations of policy and morality, is believed to be without exception. Here the wife was not a mere nominal party; as the principal legatee of the testator, she had a direct pecuniary interest in defeating the demand against his succession. *Beard* v. *Morancy*, 2 An., 347.

The fact that her husband and herself lived apart could not change the rule of law. The reason which induced the lawgiver to enact it still subsisted in all its force.

Judgment affirmed.

Eliza Sale *v.* Van Bibber, et al.

A deputy Clerk is without power to grant an injunction.

The Acts of 1831, p. 102, and 1838, p. 98, as to the damages to be awarded on the dissolution of an injunction, do not apply to the case where an injunction is dissolved restraining the proceedings of an execution during the pendency of an action to annul a will. They apply only to injunctions obtained in cases in which there are judgments in the proper sense of the word, and not *ex parte* orders made by the Judge of a probate court.

Such special damages, only as are alleged and proved, will be allowed on the dissolution of an injunction in a case of this kind.

APPEAL from the District Court of the parish of Caddo, *Land*, J.

Terrill & Hodge, for plaintiff. *Beall* and *Crain & Nutt*, for defendants.

Merrick, C. J. This action was brought to annul a will, and also to enjoin the proceedings of the executors during the pendency of the action of nullity.

The principal complaint made by the appellant in this case is, that the injunction was improperly issued, and that it ought to have been dissolved and damages decreed him for counsel fees as well as costs, instead of which he has been decreed to pay the costs.

The deputy Clerk was without the power to grant the injunction. *Gerald* v. *Gerald*, 5 An., 243; *Wungerter* v. *White*, ibid, 487.

The injunction having been issued by an incompetent person, and being a conservatory process, not necessarily connected with the main action, we think the same ought to have been dissolved, on the motion to dissolve, at the cost of the plaintiff. But the Acts of 1831, p. 102, and 1833, p. 93, as to the damages to be awarded on the dissolution of the injunction, do not apply to the case before us. They apply only to injunctions obtained in cases in which there are judgments in the proper sense of the word, and not *ex parte* orders made by the Judge of a probate court. 15 L. R., 191; 17 L. R., 182; 2 Rob., 180.

Had the defendant suffered damages by the wrongful serving out of the injunction, he should have alleged and proved such special damages. The law will not, in a case of this kind, imply damages at most beyond nominal damages.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be amended, so far as the same decrees the payment of the costs of the process of injunction issued in this case, to be paid by the defendant, and it is ordered that the plaintiff pay the costs of said injunction, and it is further ordered that the judgment of the lower court, so amended, be affirmed, and that the plaintiff and appellee pay the costs of the appeal.

S. D. PARKER et al. *v.* B. T. SCOGIN et al.

A judgment confessed by the president of the police jury, is *res adjudicata* against each individual tax payer.

In the absence of an appeal or action of nullity, no irregularity in the form of proceeding before the district court can be inquired into after the lapse of one year. When the police jury has been regularly cited or made its appearance, no inquiry can be entertained after the lapse of that period, as to whether the power to confess judgment was or was not formally conferred by sufficient authority.

The parish tax collector is the proper person to collect the tax levied to pay the subscription of stock of a railroad company.

APPEAL from the District Court of the parish of Caddo, *Land*, J. *Wright*, for plaintiffs and appellants. *Crain & Nutt*, for defendants.

MERRICK, C. J. The plaintiffs are sundry land holders and tax payers of the parish of Caddo. They have brought this action to restrain *B. T. Scogin* from collecting the tax to meet two instalments of the subscription of $100,000 of stock subscribed by the police jury of the parish of Caddo to the Vicksburg, Shreveport and Texas Railroad Company. Their action was sustained as to the second instalment.

We quote for a statement of the facts (preceding the subscription of stock) the following from the elaborate opinion of our brother of the District Court:

"The police jury of the parish of Caddo on the 19th day of October, A. D. 1852, passed an ordinance for the subscription of one hundred thousand dollars to the stock of the Vicksburg, Shreveport and Texas Railroad Company. This ordinance contained a statement of the number and amount of the shares proposed to be subscribed, to wit: four thousand shares at twenty-five dollars per share. It also levied a tax of two per cent. annually, for five years, on the landed estate of the parish, to pay the amount of the subscription of one hundred thousand dollars. The ordinance further provided that it should be submitted to the voters of the parish, on whose property the tax mentioned was proposed to be levied, for their approval and ratification, at an election to be

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held at the different precincts in the parish, for that purpose, on the first Monday in February, 1853. It further provided that said election should be held by the commissioners of general elections, and that the returns should be made to the clerk of the police jury within six days after the election. The ordinance also provided that on the same day of the election, or as soon as the returns should be made, that the clerk and president of the police jury, in the presence of all such persons as should choose to attend, should, at the court house, ascertain the state of the vote, and declare the same; and that if in the affirmative, then to declare the tax (ordinance) to have the force of law. The ordinance contained, besides, other provisions unnecessary to enumerate in this place.

The election did not take place on the first Monday in February, 1853, as directed by the ordinance, for the reason (stated in Col. Battle's testimony) that notice of the same had not been published for the length of time required by law.

The police jury afterwards, on the 7th day of February, 1853, by ordinance, directed the election to be held on the 14th of March, 1853, or on such other day as the president of the police jury should designate and appoint; and by virtue of this ordinance the election was advertised to be held on the 19th day of March, 1853, by order of the president of the police jury, but did not take place for the reason (stated by Col. Battle) that there was a misdescription in the advertisement of the name and style of the railroad company.

The election was again ordered by the president of the police jury, and advertised to take place on the 16th day of April, 1853, and was accordingly held on that day, having been preceded by a notice for thirty odd days, published in the Caddo Gazette, a newspaper published in the parish of Caddo.

And on the 19th day of April, 1853, the clerk and president of the police jury proceeded, in the presence of witnesses and other persons, to open the returns and to count the votes, when it appeared that two hundred and eleven votes had been cast in favor of the ordinance, and one hundred and fifty-four against it, leaving a majority in favor of the ordinance of fifty-seven votes.

And on the evening of the same day, (19th of April,) after the result of the election was officially known, or on the morning of the next day, the president of the police jury, William Terrell, subscribed to the stock of the Vicksburg, Shreveport and Texas Railroad Company, four thousand shares, at twenty-five dollars per share.

And on the 28th of May thereafter, the president of the police jury made official proclamation of the result of the election in the Caddo Gazette, and declared the said ordinance of the police jury of the 19th of October, 1852, to have the force and effect of law."

In November of the same year the police jury passed a resolution, wherein, after reciting that a majority of the legal voters had not accepted the resolution to subscribe the stock to the railroad company, they ordered a new election to be held to test this, as they called it, "momentous question." The Vicksburg, Shreveport and Texas Railroad Company instituted in the District Court for the parish of Caddo, in May, 1854, an action praying for judgment against the police jury of the parish, for the sum of one hundred thousand dollars, in five annual instalments, and interest, and inasmuch as the police jury had failed to assess and collect the tax, that the sheriff be ordered to assess and collect the tax on the real estate of the parish of Caddo, under the provisions of the Act of April 29, 1853.

This suit was commenced by citation. The police jury, however, having obtained a compromise by which a portion of the interest was remitted, and the terms for the payment of the instalments deferred, passed a resolution authorising their president to confess judgment, in conformity with the compromise. The confession of judgment was filed, and a judgment rendered thereon the 30th day of May, 1854, decreeing the payment of the one hundred thousand dollars, by instalments payable at the period, and bearing the interest agreed upon. It was further decreed that an assessment of taxes should be made and a collector appointed by the police jury to collect the taxes, and in the event of failure on the part of the police jury to make the appointment, a mandate should issue, charging the sheriff with the duty of assessing and collecting the tax.

The police jury took no appeal from the judgment thus rendered, and no action of nullity was brought to rescind it.

The judgment of the lower court having been adverse to the plaintiffs, as to one instalment, on their appeal they present to us for our consideration the following questions, viz:

"1st. Had *Mr. B. T. Scogin*, parish tax collector, authority to collect the railroad tax?

"2d. Is the judgment, confessed by the president of the police jury, *res judicata* against each individual tax payer?

"3d. Is the Act of 12th March, 1852, constitutional?

"4th. If the Act is constitutional, can less than a majority of the whole number of the voters, land holders of the parish, approve and ratify the ordinance and subscrip ions made under it?"

It is evident that an affirmative answer to the second question presented by the appellants, will render the discussion of the third and fourth unnecessary. We will, therefore, consider this question out of the order presented.

The nature of municipal corporations is such, that they, of necessity, represent all the citizens of the territory or district submitted to their jurisdiction by classes, as well as collectively. As it would be impossible to conduct a proceeding against each and every inhabitant of a parish, they are represented by their police jury. If the police jury can represent the inhabitants collectively, it can represent them by classes for the same reason. So the Legislature of the State not only represents the electors who have chosen the representatives composing the Legislature, but also all other classes composing the State, such as women, minors, naturalized citizens, denizens and aliens within its limits. So of a city. The municipal authorities, while they represent the whole body of the citizens within the limits of the city, represent the same by classes; they represent the merchants, the draymen, the laborers, the mechanics, the physicians, the lawyers and the laboring men of all classes. So the police jury represents the tax payers by classes; those who pay taxes upon land as well as those who pay taxes upon slaves, upon movables, upon capital, upon employments, or those who pay merely the poll tax. A judgment, therefore, against the police jury, as the representative of a single class, must be as obligatory upon that class as a like judgment would be against the police jury as the representative of the whole. The effect of such judgment is, in this respect, precisely as that rendered against the administrator of a succession. If the judgment against the administrator, binds not only the heir of full age, who is *sui juris*, but the married woman, the emancipated minor, the minor

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heir, whether with or without a tutor. The judgment of the District Court must, therefore, be held obligatory upon the plaintiffs. In the absence of an appeal or action of nullity, it is obvious that no irregularities in the form of the proceeding before the District Court can be inquired into after one year has elapsed from the rendition of the judgment. If the police jury was regularly cited, or made its appearance, no inquiry can now be entertained whether the power to confess judgment was or was not formally conferred by sufficient authority.

In the case of the *Vicksburg, Shreveport and Texas Railroad Company* v. *the Parish of Caddo*, decided by this court last year, it was held that the parish tax collector was the proper person to collect this tax. We discover no error in the conclusion of the lower court that *B. T. Scogin* had authority to collect the tax under the mandate issued to his predecessor in office.

Judgment affirmed.

SPOFFORD, J., declined taking a part in the decision of this case.

BUCHANAN, J. My views of the unconstitutionality of the law of March 12, 1852, providing for the subscription by parishes and municipal corporations to the stock of corporations undertaking works of internal improvement, as expressed in my dissenting opinion in the case of the *City of New Orleans* v. *Mrs. Grailhe*, 9th Annual Report, are still unchanged.

But I think the plea of unconstitutionality of the law which authorized the police jury of Caddo to levy the tax in question, like any other defence which might have been pleaded before judgment, is barred by the exception of *res judicata*, founded upon the judgment confessed by the parish of Caddo, in favor of the Vicksburg, Shreveport and Texas Railroad Company. The plaintiffs were parties to that suit, collectively with all the other landowners in the parish of Caddo, by their mandatories, the police jury of Caddo.

I concur in the decree pronounced by the Chief Justice.

JESSE C. WILLIAMS *v.* DOUGLAS & ROOKS.

In a possessory action, where plaintiff alleged himself to be the owner and possessor of the land in question—*held*, that the defendant having in answer to interrogatories propounded to him, admitted that he leased the land from the plaintiff, defendant was estopped to deny the allegation of ownership and possession.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J. *Newton*, for plaintiff and appellant. *Todd & Robertson*, for defendants.

SPOFFORD, J. It is needless to inquire whether a claim to what is styled an "improvement" on public lands will furnish a foundation for the possessory action in ordinary cases.

In this case, the plaintiff alleged himself to be the owner and possessor of the land in question, and the principal defendant is estopped to deny it; for, in an answer to interrogatories propounded to him, he admitted that he leased the land from the plaintiff.

He could not change the character of his own possession from that of lessee to that of owner.

The pretended sheriff's sale of the improvement right did not operate any change of possession. The sheriff does not appear to have made a valid seisure by taking possession himself, or to have put the pretended purchaser into possession; we need not mention other informalities in these anomalous proceedings.

The identity of the tract claimed is admitted by the pleadings.

Judgment affirmed.

STATE *v.* J. T. SMITH.

The statute against carrying concealed weapons does not contravene the second article of the amendments of the Constitution of the United States.

A partial concealment of the weapon, which does not leave it in full open view, is a violation of the statute.

APPEAL from the District Court of the parish of Claiborne, *Land*, J.

The record does not show who appeared for the State. *George*, for defendant and appellant.

MERRICK, C. J. The defendant was indicted and convicted of carrying concealed weapons. He takes the present appeal to reverse the charge of the judge to the jury. The language used in the charge, and excepted to, is "that carrying of a pistol in the pocket, under the clothes, although partially exposed, is the carrying of concealed weapons within the meaning of the statute."

The charge is objected to, "first, because it is a direct charge upon the facts of the case, and secondly, an evident misinterpretation of the statute."

The charge was not a charge upon the facts, although the facts proven before the jury may have been similar. The judge charges upon the facts when he expresses an opinion upon what has been proven to the jury, or when he assumes a given state of facts as proven, and not where he expresses, as in this case, his opinion of the law arising from a state of things which may, or may not, have been established before the jury, and upon the proof of which he abstains from intimating any opinion. On the other branch of the case, we are not satisfied that the charge of the judge mislead the jury as to the law of the case.

The statute against carrying concealed weapons does not contravene the second article of the amendments of the Constitution of the United States. The arms there spoken of are such as are borne by a people in war, or at least carried openly. The article explains itself. It is in these words: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke. There is, therefore, nothing in

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the Constitution of the United States which requires of us a rigorous construction of the statute in question.

The section of statute under which the indictment is framed, is in these words: "Be it further enacted, &c., That whoever shall carry a weapon or weapons concealed on or about his person, *such as pistols, bowie knife, dirk or other dangerous* weapon, shall be liable to a prosecution by indictment or presentment, and on conviction for the first offence shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, or imprisoned for one month; and for the second offence not less than five hundred nor more than one thousand dollars, or imprisonment in the parish prison at the discretion of the court, not exceeding three months, and that it shall be the duty of the judges of the district courts in this State to charge the grand jury especially as to this section."

The offence created by this statute is the carrying of the weapon, pistol, bowie knife or dirk, &c., *concealed* on or about the person. By the first section of the Act of 1813, a weapon of the kind designated was defined as concealed when, being carried by a person, it did not appear in full open view." Act 1813, p. 172, sec. 1.

A partial concealment of the weapon, which does not leave it in full open view, is a violation of the statute. The judge, in the single expression in his charge to the jury excepted to, does not fully explain himself, yet we think a fair construction of his language does not imply more than is here expressed. He says the carrying of a pistol (a weapon designated by the statute,) in the *pocket or under the clothes*, although partially exposed, is the carrying of a concealed weapon. We must understand the district judge as speaking of weapons as ordinarily worn, and where the partial exposure is the result of accident or want of capacity in the pocket to contain, or clothes fully to cover the weapon, and not to the extremely unusual case of the carrying of such weapon in full open view, and partially covered by the pocket or clothes. We cannot say, from the single expression of the charge excepted to, that such error has intervened on the trial of this case as to require us to reverse the judgment.

Judgment affirmed.

CURRY & PERSON *v.* C. A. C. HERLONG.

This was an action against the drawer of a draft. It was held that the notice of protest was insufficient to charge him.

Although the drawer may have no funds in the hands of the acceptor, yet, if upon taking up the bill he would be entitled to sue the drawee *or any other party on the bill*, as if he be an accommodation drawer for the drawee or *payee*, or any subsequent indorsee, then, and in every such case, he is entitled to strict notice of the dishonor.

APPEAL from the District Court of the parish of Jackson, *Richardson*, J.

McGuire & Ray, cited 12 R. 231, 3 A. 248, 3 N. S. 147, 18 L. 418, 7 Ann. 225.

Baker & Harrison and *Dufour & Thompson*, for defendants and appellants, cited Story on Bills, 351-2-3; 10 Peters, 572; 9 L. 124, 19 L. 370.

LEA, J. The plaintiffs in this case bring suit against the drawer of a draft protested for non-payment at maturity. The defendant pleads the want of proper notice of non-payment.

It is urged on behalf of the plaintiffs that the notice of protest was properly given, and, moreover, that the defendant was not entitled to any notice, not having had any funds in the hands of the drawee, or any such relations or previous transactions with the drawee, as to justify a reasonable expectation that the bill would be paid for his account. The draft is dated at Trenton, in this State. It is shown that the drawer has resided for several years within four miles of the town of Vernon, which is the postoffice nearest to his residence, and that he receives his letters and papers at that place. It is shown that the residence of the defendant is distant twenty-four or twenty-five miles from Trenton. The notice of protest was directed to the defendant at Trenton, and it does not appear that the notary made any inquiry or used any diligence whatever to ascertain the drawer's residence. It is urged that in consequence of the notary's death, it is impossible to show what steps he took to ascertain the drawer's residence, but the rule of law is that a want of notice discharges the drawer, unless it is shown that upon the exercise of due diligence the domicil of the drawer could not have been ascertained. Even had an inquiry been made of the acceptors, (which nothing in the evidence renders probable,) the notary could not have obtained from them such an unequivocal statement that the residence of the drawer was in Trenton, as to create a reasonable belief of its correctness.

One of the acceptors, who testified as a witness, deposes that he had no knowledge of the defendant's residence, except such as he derived from a letter written to him by the payee. A reference to this letter shows that the defendant did not reside in Trenton, and it does not state where he resided.

We think, therefore, that the notice of protest was insufficient to charge the drawer.

The next question to be determined is, whether the drawer was entitled to notice. The rule of law in reference to the right of the drawer of a bill to a notice of protest, so far as applicable to the case at bar, is, that although the drawer may have no funds in the hands of the acceptor, yet if, upon "taking up the bill, he would be entitled to sue the drawee *or any other party on the bill*, as if he be an accommodation drawer for the drawee *or payee*, or any subsequent indorsee, then, and in every such case, he is entitled to strict notice of the dishonor." See Story on Bills, §311, 312.

In this case it is shown by the evidence that the draft was drawn by the defendant for the accommodation of the payee, and was received by the holders, who are also the plaintiffs in this case, directly from the payee, and was applied to the liquidation in part of a large indebtedness due by him to them. Of this fact the holders had full notice through their agent, *Lane*, upon whose suggestion the payee obtained the draft. It was known, also, to the plaintiff's agent, that the payee expected to provide funds with which to meet the acceptance at maturity. Under these circumstances the defendant's case comes within the recognized exceptions to the general rule, which dispenses with notice of dishonor to a drawer who has no effects in the hands of the payee.

It is ordered that the judgment appealed from be reversed, and that there be judgment for the defendant with costs in both courts.

Heirs of B. De Bardelabon *v.* W. J. Averret et als.

A nuncupative will, under private signature, may be written by the testator himself, or by another, but when written by another person, it must be "from his (testator's) dictation," or he must have "caused it to be written," in substance and form, as he presents it, declaring it to contain his last will, *see dernières volontés*. C. C. 1574.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J. *Todd & Brigham* and *Parsons*, for plaintiffs. *Matthews & McFee*, for defendants and appellants.

Spofford, J. The heirs at law of *Shelby De Bardelabon*, deceased, sued the executor and executrix and universal legatee of his last will, made in the nuncupative form, under private signature, to annul the same, on the following allegations:

1st. That the testator was of unsound mind, and therefore incompetent to make a will.

2d. That the formalities prescribed by law were not pursued in the execution of the will.

3d. That it contained a substitution and a *fidei commissum* reprobated by law.

The defendants have appealed from a judgment declaring the said testament null and void.

The judgment is correct, upon the second ground urged by the plaintiffs, and it will be unnecessary to express an opinion upon the other points.

It cannot be pretended that this will was written from the dictation of the testator or in his presence. It was written by one of the witnesses, at the dictation of another witness, out of the testator's presence. And the evidence does not satisfy us that he ever declared to the witnesses, that the paper signed by him, after he awoke from a stupor, contained his last will. To sustain such a testament, would be to subvert the Article 1574 of the Civil Code. It is evident that the deceased did not "cause" the particular will in question to be written, in the sense of the Article just cited. Our law insists that testaments, in all their forms, shall be the utterance of the testator himself—the embodiment of his own thoughts and wishes. In the olographic form, the end is attained by requiring him to write the whole "with his own hand;" in the mystic form, he is to declare before a notary and seven witnesses, that the paper he presents for their authentication, contains his testament "written by himself or by another, *by his direction*;" the nuncupative will, by public act, must be "dictated by the testator and written by the notary as dictated;" and, if under private signature, it may be written by himself, or another; but, when written by another person, it must be "from his dictation," or he must have "caused it to be written," in substance and in form, as he presents it, declaring it to contain his last will, "*ses dernières volontés*."

Judgment affirmed.

L. D. Brewer, Executor, et al. *v.* George Cook.

Complaint of the non-joinder of other parties defendant and the mis-joinder of plaintiffs, can not be made when the case stands at issue on the merits.

It did not appear that defendant had any establishment or agent in the parish of West Feliciana, at the time suit was brought, and it did appear that he had a house and home in Catahoula, to the jurisdiction of the court of which parish he had excepted—*Held:* Even if he resided alternately in the two parishes, he might have been sued in either.

The nature and extent of the service of counsel may be proved by parol.

APPEAL from the District Court of the parish of Catahoula, *Barry*, J.

Mayo, for plaintiffs. *Hendry*, for defendant and appellant.

Slidell, J. Parties who rely upon merely technical exceptions, should be careful to keep within technical rules themselves. The present appellant pleaded but one of the numerous exceptions relied upon in his brief, in such a manner as to require this court to pass upon it. No specific defect in the form of the citation, or of the Sheriff's return, was pointed out upon the record, so no such defect can be noticed here. The defendant's complaints as to the non-joinder of other parties defendant, and the mis-joinder of parties plaintiff, came too late after the exceptions taken *in limine*, were overruled, and the case stood upon its merits.

We think there was no error in overruling the plea to the jurisdiction of the District Court of Catahoula. It does not appear that the defendant had any establishment or agent in the parish of West Feliciana, at the time suit was brought, and it does appear that he had a house and home in Catahoula. Even if he resided alternately in the two parishes, he might have been sued in either. "The domicil of each citizen is in the parish wherein his principal establishment is selected. The principal establishment is, that in which he makes his habitual residence; if he resides alternately in several places, and nearly as much in one as in another, and has not declared his intention in the manner hereafter prescribed, any one of the said places where he resides, may be considered as his principal establishment, at the option of the persons whose interest are thereby affected. C. C., Art. 42.

The nature and extent of the services of counsel could be proven by parol. Their signatures to pleadings were immaterial, as they appear to have been employed to advise and assist other counsel.

It is true the opinion of witnesses as to the value of the services is not conclusive upon the court. But there are facts disclosed in the testimony relative to the property and sums in controversy, which corroborate the estimates of counsel, and we are not convinced that the charges allowed by the District Judge were exorbitant.

It is therefore ordered, that the judgment be affirmed, with costs.

Merrick, C. J., took no part in this decision.

Anderson & Metcalfe v. Coxe & Shelton.

Any device, by which a larger amount is sought to be obtained, for the use of money, than the highest rate of conventional interest is usurious and operates as a forfeiture of the advantage thereby sought to be illegally obtained.

The Act of 1852, allowing interest at the rate of five cent. per annum, upon all debts from the time they become due, is applicable only in cases where no stipulation for interest has been made.

APPEAL from the District Court of the parish of Franklin, *Barry*, J.

Morrison, for plaintiffs and appellants. *Ramage & Jones*, for defendants.

Lea, J. This is a suit upon a promissory note given for a balance due upon a factor's account, including an advance of $1,000 in addition to the amount due upon the account.

The defendants deny the advance of $1,000, plead usury and claim credit for the proceeds of seventy-five bales of cotton shipped to the plaintiffs, of which shipment, as defendants aver, they had received no account of sales; also for the sum of $1787 44, received from Messrs. *Kendall, Carter & Co.*, for account of defendants. This last credit has been allowed by the judgment appealed from, and the plaintiffs assent to the correctness of the deduction. The proceeds of the seventy-five bales of cotton were improperly imputed to the payment of the note, as before its maturity, the proceeds had been credited to the defendants in their running account with the plaintiffs.

It is admitted, that the interest upon the note was usurious. It must therefore be deducted; the charges for advancing were under the circumstances also usurious, and were, therefore, properly disallowed. Any device by which a larger amount is sought to be obtained for the use of money, than the highest rate of conventional interest, is usurious, and operates as a forfeiture of the advantage thus sought to be illegally obtained.

It is urged, that although the usurious interest should be disallowed as such, the plaintiffs are nevertheless entitled to legal interest under the provisions of the Act of 1852, allowing interest at the rate of five per centum upon all debts from the time they become due. See Act of 1852, p. 95.

When we consider the policy of our laws prohibiting usury, together with the provisions of the Statute of 1844, we think the plaintiffs' claim for legal interest is, under the circumstances, inadmissable. See 2 Ann. 363. The Act of 1852 is applicable only in cases where no stipulation for interest has been made. After making the deductions and imputations of payment recognized in the foregoing opinion, viz., $559 75, for usurious interest and commissions for advancing; $1,140 93, being the proceeds of the seventy-five bales of cotton after the payment of the account for $903 66, advanced upon the cotton, and the further sum of $1,787 44, received by the plaintiffs from *Kendall, Carter & Co.*, for account of the defendants, the plaintiffs would be entitled to a judgment for $1,461 88, without interest.

It is ordered, that the judgment appealed from be reversed, and that the plaintiffs, *Anderson & Metcalfe*, do have and recover of the defendants, *Charles P. Coxe* and *Caroline M. Shelton*, administratrix of the succession of *John M. Shelton, in solido*, the sum of $1,461 88, without interest; said judgment, so far as it effects the estate of *John M. Shelton*, to be paid in due course of administration, according to law. It is further ordered, that the defendants and appellees pay costs in both courts.

WATERS, CAMDEN & CO. *v.* R. B. BRISCOE.

It is not necessary to add to the plea of usury that the obligation sought to be avoided was given in error. The policy of the law was intended to extend relief in cases where there was no error. The fact that a party gave his promissory note for the balance due, as set forth in an account, does not operate as an estoppel to a subsequent inquiry into the correctness of the account. Such a doctrine would abolish all equitable defences upon promissory notes or upon accounts stated. The defendant was entitled to the production of plaintiffs' accounts, or such of them as, in his opinion, might tend to establish his defence, subject to the plaintiffs' right to introduce all of his accounts having any bearing upon the matters in issue.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J. *Todd & Brigham*, for plaintiffs. *Newton & Hull*, for defendant and appellant.

SPOFFORD, J. In this case the appellee has moved for the dismissal of the appeal, on the ground that the record comes up without any evidence, statement of facts or assignment of errors.

The grounds upon which the defendant relies for a reversal of the judgment are apparent upon the face of the record, and the certificate of the Clerk states that the transcript contains all the evidence adduced on the trial. If those grounds are well taken, the appeal must be maintained.

The question may, therefore, be referred to the merits.

The defendant resists the payment of two promissory notes, on the ground that the consideration of said notes was illegal and usurious to the extent of about eight hundred dollars, having been given in liquidation of an account made up of usurious items amounting to that sum; and on the further ground that, for $225 of the principal sum for which said notes were given, there was no consideration, said sum being an overcharge for commissions not earned.

For the purpose of establishing the defence thus urged, the defendant propounded interrogatories to the plaintiffs, the answers to which might either have established or overthrown the defence. But the plaintiff objected to the interrogatories:

1st. On the ground that the credits claimed by the defendants were not specific in amount.

2d. That there is no allegation in the answer that the notes were given in error, or through ignorance of the facts as they existed.

3d. That the defendant, having assented to the charge of $225 contained in the account, by giving his notes, is estopped from inquiring into its correctness.

4th. Because the answer is confused and unintelligible.

These objections were maintained by the court, we think erroneously.

The credits claimed by the defendant are set forth in such manner as to give the plaintiff complete notice of the character of the defence, and of the extent to which his demand would be disputed. It is not necessary to add to the plea of usury that the obligation sought to be avoided was given in error. The policy of the law was intended to extend relief in cases where there is no error.

The fact that the defendant gave his promissory notes for the balance due, as set forth in the account, does not operate as an estoppel to a subsequent inquiry into the correctness of the account. Such a doctrine would abolish all equitable defences upon promissory notes or stated accounts.

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Our attention has been directed to the ruling of the District Judge in refusing to order the production of extracts from the plaintiffs' books, showing the state of the accounts between the parties. The defendant was entitled to the production of the plaintiffs' accounts, or such of them as, in his opinion, might tend to establish his defence subject to the plaintiffs' right to introduce all of his accounts having any bearing upon the matters in issue.

By a reference to the pleadings, it appears that, after crediting the defendant with the amount of the effects claimed by him, there would still remain an indebtedness to the plaintiffs.

For this amount, at least, the plaintiffs are entitled to a judgment.

It is ordered, that the judgment appealed from be reversed; that the plaintiffs, *Waters, Camden & Co.*, do have and recover of the defendant, *Robert B. Briscoe*, the sum of $715 31, with interest thereon at the rate of eight per centum per annum from the 23d day of May, 1854, till paid, less the sum of $500, with like interest from the 27th day of February, 1856. And it is further ordered, that as respects the remainder of the plaintiffs' demand, the case be remanded for further proceedings to be had therein according to law, in accordance with the principles announced in the opinion of this court. It is further ordered, that the costs in the District Court be paid by the defendant and appellant, and that the costs of the appeal be paid by the plaintiff and appellee.

GEORGE WILSON *v.* H. M. BOSSIER.

The fact that an overseer had shot at one of the negroes under his charge, who was endeavoring to escape punishment, justified his employer in discharging him.

APPEAL from the District Court of the parish of Caddo, *Drew*, J.

Hodge, for plaintiff and appellant. *Crain & Nutt*, for defendant.

LEA, J. The plaintiff sues for a year's wages due to him, as he alleges, as overseer of a plantation belonging to the succession of *Sylvester Bossier*, deceased, he, (the plaintiff,) having been discharged, as he avers, without cause, before the expiration of the year for which he was employed.

The defendant avers that the discharge of the plaintiff was justified by his improper conduct, he having shot at one of the negroes who was endeavoring to escape punishment. This fact is not disputed, and we concur with the District Judge in the opinion that this was such an abuse of the authority delegated to the plaintiff as justified his discharge. Such a mode of maintaining discipline among slaves is wholly inadmissable and cannot be justified under the pretence that it was resorted to merely for the purpose of intimidation.

We think there was no error in allowing the plaintiff his wages up to the period of his discharge.

Judgment affirmed.

JOHN TEMPLE v. MARSHALL & JAMES et al.

A party will not be allowed, collaterally, to vary or complete a record by parol evidence, but when the ground of action was solely to obtain a remedy for an injury suffered by plaintiff through a clerical omission of an important entry connected with and indispensable to a certain legal proceeding, namely, the omission to enter the order of appeal, and when the plaintiff had laid the foundation for the introduction of proof of the omission, by the production of the bond of appeal and the transcript made for the review of the proceedings in the Supreme Court. Under these peculiar circumstances, parol proof, by the custodian of the record, of the omission to enter the order of appeal, should have been allowed.

APPEAL from the District Court of the parish of Morehouse, *Richardson*, J. *McGuire & Ray*, for plaintiff. *Hunter*, for defendants.

BUCHANAN, J. This suit grows out of that of the same title, No. 469, of the docket of this court, just decided. The Clerk of the District Court having neglected and omitted, as it is alleged, to enter on the minutes the motion and order of appeal from the judgment dissolving the injunction obtained by plaintiff in that other suit, the defendant, plaintiff in the execution injoined, after the legal delay for a suspensive appeal from that judgment had elapsed, caused another execution to issue against plaintiff, which execution was injoined by the present suit, on the ground that plaintiff had taken and was prosecuting a suspensive appeal from the judgment dissolving his previous injunction, and that, although no order for such an appeal appeared on the minutes, yet this was through an omission of the Clerk, bond having been given and a transcript made out for and filed in the Supreme Court.

On the trial of the case, plaintiff offered to prove, by the Clerk of the District Court, that plaintiff, at the term of the court in which the judgment of dissolution of his injunction had been rendered, had moved, through his attorneys, in open court, for an appeal, which was granted, and the amount of the bond for a suspensive appeal fixed by the court, and the appeal made returnable to the Supreme Court at Monroe on the first Monday of October, 1855, which evidence was rejected by the court, on the ground that an omission of the Clerk to enter an order of appeal could not be supplied by parol testimony.

We think this ruling of the court wrong under the circumstances. It is unquestionably true, that a party would not be allowed to vary or complete a record by parol evidence, collaterally. *State* v. *Lonjimeau*, 6 An. 700. But here the whole ground of action was an injury suffered by plaintiff through a clerical omission of an important entry connected with and indispensable to a certain legal proceeding. The object of the suit was solely to remedy the omission, and the plaintiff had laid the strongest foundation for the introduction of proof of the omission, by the production of the bond of appeal and the transcript made for the review of the proceedings in the Supreme Court by appeal.

Under these peculiar circumstances, the proof, by the custodian of the record himself, of the omission to enter the order of appeal should have been allowed.

But it will be unnecessary to send the cause back for the purpose of procuring this testimony. The only result in favor of appellant of such a proceeding could be the perpetuity of his injunction. But in the case No. 469, just decided, we have passed upon the merits of his previous injunction, and have dissolved it. That injunction was the sole basis of the present one, and that

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having fallen, it is impossible that this can stand. This injunction was well taken, however, under the state of facts existing at the time it was applied for and the plaintiff should be exonerated from the costs of a suit rendered necessary by the fault of his adversaries.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, that this suit be dismissed, and the injunction dissolved, and that the defendants, *Marshall & James*, pay costs in both courts.

PRESENTIA GARCIA v. KITCHINGS et al.

It is a sufficient evidence of a Clerk of a District Court in this State, being the administrator of an estate, which he assumes to administer *ex officio* under the Act of 1855, that he files a written appearance in this court as such. No order of court, oath, bond or letters of administration are required to authenticate his capacity.

APPEAL from the District Court of the parish of Caddo, *Bullard*, J. *Nutt*, for plaintiff. *Hodge & Austin*, for defendants.

BUCHANAN, J. (SPOFFORD, J., recused himself.) This cause has stood continued in this court ever since 1852, for the purpose of making parties, the plaintiff and appellee having died. At length, on the 16th July, 1856, the Clerk of the District Court for the parish of Caddo files an appearance, "as *ex officio* curator or administrator of the succession of *Presentia Garcia*, deceased, which administration he has assumed, as required by law," and prays that the judgment of the District Court be affirmed, with costs.

The appellant, *Kitchings*, objects to the filing of the appearance of the Clerk of the District Court as a party to this suit, on the ground that there is no evidence before the court that he is *ex officio* administrator of plaintiff.

We take official cognizance of the fact of *William G. Kisby* being Clerk of the District Court of Caddo parish. As such, the 19th section of an Act to regulate and define the duties of Clerks of District Courts generally, (Session Acts of 1855, page 52,) makes it his duty to assume the administration of successions which are so small or so much in debt that no person will apply for or will be willing to accept the administration. The expression used in this statute is "assume the administration." No order of court, oath, bond or letters of administration are required to authenticate his capacity. It is sufficient evidence of the Clerk being the administrator of plaintiff's estate that he files a written appearance in this court as such.

The exception of the appellant is, therefore, overruled.

Upon the merits, the verdict of the jury and judgment appealed from seem justified by the proof.

Judgment affirmed, with costs.

STATE *v.* BRADLEY, Administrator, et al.

The plea of discussion is one that must be pleaded *in limine litis.*

The objection that a Sheriff's bond was not executed until more than thirty days after the Sheriff's commission, and that it was not approved until some months after, and that it was not recorded by the Recorder in the separate book kept for its registry, but there being no such book, that it was recorded in another book, cannot avail the sureties in seeking to avoid liability.

The amount of taxes, which it is shown could not have been collected, will be allowed as a credit in an action against the sureties on a Sheriff's bond.

APPEAL from the District Court of the parish of Franklin, *Barry*, J.

Stubbs and *Hough*, for plaintiff—cited, 7 A., 595, 178 and 377. *Morrison*, for defendant and appellant—cited, C. C., 2294, 3030, 3008; O. C., p. 432, Art. 22.

MERRICK, C. J. This suit is brought against the succession of *A. H. Bradley*, deceased, formerly Sheriff of the parish of Franklin, and the sureties upon his bond as tax collector of the taxes of 1848.

The claim of discussion, under the Acts of 1847, p. 175, sec. 64., and p. 109, sec. 4, cannot be awarded to the defendants in this case. The plea of discussion is one which must be pleaded *in limine litis. Dwight* v. *Linton*, 3 Rob., 57; *Zacharie*, p. 66.

The objection that the bond was not executed until more than thirty days after the date of the Sheriff's commission, and that it was not approved until the 12th February following, and that it was not recorded by the Recorder in the seperate book to be kept for its registry, but there being no such book, that it was recorded in another book, cannot avail the defendants.

The Statutes are directory in these particulars, and it does not become the Sheriff who has received and undertaken to collect the tax roll, nor his sureties, who bind themselves for his acts, to say that the bond which they have given, and by means of which the Sheriff has obtained possession of the tax roll, is inoperative. See the case of the *State* v. *Hays et al.*, 7 An., 118, and *State* v *Sureties of A. J. Law*, 11 An.

As this judgment is final between the State and the defendants, the amount really due the State and no more ought to be ascertained according to the proof and judgment rendered accordingly. There is no reason, therefore, why the succession of *Bradley* should not be allowed a credit for $259 42, the amount of those taxes which it is shown could not be collected. As to the compensation for services in criminal matters, the salary of $100 was subject to be drawn quarterly, and the state of that account is not before us.

The judgment as it respects the sureties requires no material change, because the amount they are decreed to pay, respectively, will not meet the amount due by the succession of *A. H. Bradley*, but they are interested in the change made in the judgment as it may lessen the balance which they may be compelled to pay.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the lower court be avoided and reversed, and that the State of Louisiana do have and recover of the defendant, *Madison E. Cox*, in his capacity of administrator of the succession of *Augustus H. Bradley*, deceased, the sum of thirteen hundred and thirty-three dollars and fifteen cents, with two per cent.

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interest thereon per month, from the first day of June, 1850, until paid; to be paid in the due course of administration, and that the said State of Louisiana do recover judgment against said *Wm. E. Rapp*, as surety in part for said debt and interest for the sum of five hundred dollars with five per cent. interest thereon from the judicial demand, and against *Enos Mackey*, as likewise surety for the sum of five hundred and ten dollars with five per cent. interest from said judicial demand, and against *David R. Wilcox*, as likewise surety for five hundred and six dollars and seventy-seven cents with like interest from judicial demand, and against *William C. Bradley*, for one thousand and sixteen dollars and seventy-seven cents., with five per cent. interest from the judicial demand. And it is further ordered, that any legal claims which the succession *A. H. Bradley* may have against said sureties be reserved, and also any claim the said succession may have for services rendered the State in matters of a criminal nature, be likewise reserved to said succession, and it is further ordered, that the defendants pay the costs of the lower court.

PARGOUD *v.* PACE.

The certificate of the Clerk stated that "the foregoing pages contain a full, true and complete transcript of all the proceedings had and documents filed on the trial in the case of P. v. P., *as on file in my office*," &c. *Held:* that this does not answer the requirement of Art. 896 C. P. It is not certified that the transcript contains all the evidence adduced on the trial. Appeal dismissed.

APPEAL from the District Court of the parish of Ouachita, *Richardson*, J. *McGuire & Ray*, for plaintiff. *Baker & Harris*, for defendant and appellant.

BUCHANAN, J. The motion to dismiss is in time. This appeal, granted in December, 1855, was made returnable in October, 1856. By a statute, approved March 13th, 1856, (Session Acts, page 73,) the term of this Supreme Court in Monroe was changed from the first Monday in October to the second Monday in July. This appeal was filed the 11th July. The second Monday this year was the the 14th July. The motion to dismiss was filed on the 17th July, within three days after the legal commencement of the term, and in fact before the day on which the appellee was cited to appear.

The motion is based upon the want of a legal transcript. The certificate of the Clerk states that "the foregoing four pages contain a full true and complete transcript of all the proceedings had and documents filed on the trial in the case of *H. Pargoud* v. *James Pace, as on file in my office*, except what is contained in the transcript of the previous appeal, and the opinion and judgment of the Supreme Court thereon." This certificate does not answer the requirements of Article 896 of the Code of Practice.

It is not certified that the transcript contains all the evidence adduced on the trial of the rule. No evidence, either documentary or oral, is copied in the transcript, neither is there any statement of facts or bill of exceptions. *Allain* v. *Preston*, 5 L. R. 478; *Nettleton* v. *Stephens*, 6 L. R. 166; *Anderson* v. *Stephens*, 6 L. R. 303; *Succession of Kemp*, 9 An. 190.

Appeal dismissed, at cost of appellant.

JOSEPH DONNELL *v.* JAMES M. SANDFORD.

A person is responsible, under C. C., Art. 2294, for the damages resulting from an assault and battery committed by him.

The future diminished capacity to earn wages, consequent upon injuries resulting from an assault and battery, properly enters into the computation of damages—also bodily pain and suffering occasioned by the battery may properly be considered by the jury in making up their verdict.

APPEAL from the District Court of the parish of Ouachita, *Richardson*, J. *Stubbs* and *Morrison*, for plaintiff. *McGuire & Ray*, for defendant and appellant.

BUCHANAN, J. Defendant has appealed from a verdict of a jury against him for eight hundred dollars, damages for an assault and battery upon plaintiff, after an ineffectual attempt to obtain a new trial in the District Court.

The evidence shows, that in January, 1854, without any provocation whatever, the plaintiff bit defendant several times, very severely, upon the left leg or thigh near the knee; that the wounds being very painful, a surgeon, of eminence in the profession, was called in some days afterwards, who found the plaintiff with his left leg swollen and inflamed, and with a high fever caused thereby. Suppuration commenced in the knee joint, and the heads of the bones became ulcerated, the flesh sloughed off the wounds caused by the bites and the leg became drawn up at nearly right angles and shrivelled. The bones of the leg and thigh became united; and the leg was amputated below the knee, in November, 1854, ten months after the injury.

The evidance leaves no doubt upon our minds that the diseased condition and consequent wasting and deformity of the plaintiff's limb were proximate and necessary results of the remarkably brutal and wanton assault committed by the defendant. The amputation was not, it is true, indispensible to save the plaintiff's life, which is the ordinary nature of such operations; but the professional gentleman who performed this operation, declares that the limb was so incurably distorted, as to be an incumbrance to its owner much more than a wooden leg would be.

The defendant is therefore responsible, under the 2294th Article of the Civil Code, for the damages resulting from his act.

The elements of damage would seem to be, under the proof in the cause:

1st. Loss of time and labor from the date of the assault until plaintiff's restoration to health.

2d. Expenses of medical and surgical attendance during his illness.

3d. Diminished capacity to work at his trade, consequent upon the loss of his leg.

I. The plaintiff is proved to have been a carpenter and gin-wright by trade, and a first-rate mechanic, well capable of earning two dollars and a half or three dollars a day. His loss of time while confined to his bed, at the rate of $3 per day, might therefore be reckoned at very nearly, if not quite, the whole amount allowed by the verdict of the jury.

II. The charge for medical and surgical services is proved to be three hundred dollars.

DONNELL v. SANDFORD.

III. The future diminished capacity to earn wages at his trade, consequent upon the loss of a leg, is estimated by witnesses at one half. In other words, they are of opinion, plaintiff would not be able to obtain, in his present condition, more than half the rate of wages of an able-bodied workman. In the case of *Black* v. *Carrollton Railroad Company*, 10th An. Rep., we allowed prospective damages of this kind. And the present case is stronger than that, inasmuch as it is the maimed individual himself who is plaintiff in this case; while in the case quoted, the damages were allowed to a father for the mutilation of his son.

It will be perceived that we have made no account of the bodily pain and sufferings of the plaintiff—matters of which an exact pecuniary assessment is impossible, yet which might very properly have entered into the consideration of the jury in making up their verdict. C. C., 1928, paragraph 3.

A reasonable approximate estimate of plaintiff's damages, under the three heads above mentioned, would exceed rather than fall short of the sum awarded by the jury.

The appellee has prayed in his answer for an amendment of the judgment by increasing the damages.

It is, therefore, adjudged and decreed that the judgment of the District Court be amended, and that plaintiff recover of defendant one thousand dollars damages, with costs in both courts.

MERRICK, C. J. I cannot think that one thousand dollars is an adequate compensation to a laboring man for the loss of so important a member as a leg. Still, as the jury have assessed the damages at eight hundred dollars, and my colleagues have thought one thousand dollars sufficient, I am unwilling to oppose my single opinion to that of a majority of the court.

SUCCESSION OF PETERSON G. PARHAM—Opposition to the Probate of a Will.

"The testament falls by the birth of legitimate children of the testator posterior to its date." C. C. Art. 1698.

APPEAL from the District Court of the parish of Catahoula, *Barry*, J.

C. Mays, for plaintiffs. *Hendry*, for *Sarah A. Parham*, appellant.

SPOFFORD, J. The only question in this case touches the caducity of a last will, executed by the deceased *Parham*, in the State of Alabama, where he then resided, but who, subsequently, removed to Louisiana, where he accumulated most of his property, and where he died domiciliated.

It is admitted, that there were legitimate children born to the testator after the confection of the will, but it does not appear whether they were born in Alabama or in this State.

Article 1698 of the Civil Code is unqualified and imperative. "The testament falls by the birth of legitimate children of testator posterior to its date."

We see nothing in the record to take this case out of the rule.

Judgment affirmed.

Heirs of Singleton v. Dicey Kelly & Dicey Kelly, Tutrix.

Construction of a written instrument purporting to transfer title to slaves, executed in Mississippi, containing the following clause: "The condition of the above bill of sale is such that, whereas, the said *Ichabod Kelly* has paid and furnished the said *Vincent Singleton* divers sums of money which, when fully paid by the said *Singleton* to the said *Kelly*, will render this bill of sale null and void; and, provided, further, that should the said *Singleton* die without refunding said *Kelly* said sum of money, then and in that case, the said *Ichabod Kelly*, his heirs or assigns, is hereby and forever exonerated from any further liability for any further sum or sums of money to the said *Vincent B. Singleton*, his heirs or assigns. But that the absolute right and title of said negroes shall fully vest in the said *Ichabod Kelly*, his heirs and assigns, forever."

Held: that it is, to all intents and purposes, an act of sale defeasible upon the performance of certain acts by the grantor in his lifetime. Even were it to be considered in the nature of a mortgage, it would have conveyed the legal title under the law of the place where the contract was made. And before the mortgagor could have exercised his equity of redemption, he would have been obliged to tender a full discharge of the debt for which the security was given.

Merrick, C. J., dissenting. The instrument is a deed of trust to secure the payment of a sum of money.

APPEAL from the District Court of the parish of Morehouse, *Barry*, J.

Matthews, for plaintiff and appellant. *Robertson* and *Todd*, for defendant.

Spofford, J. The motion to dismiss the appeal is overruled. The consolidated cases in which the appeal was taken, are identified by the petition and order of appeal, and the bond is given in favor of the proper party, both in her individual and representative capacities. The pleadings disclose the names of the minors to whom she is tutrix, and the bond would inure to their benefit.

Upon the merits, the cause must be decided by the construction given to the written instrument executed in Mississippi, by the ancester of the plaintiffs, on the 17th December, 1845. The instrument must speak for itself, unaided by parol evidence. It is, to all intents, an act of sale with a condition that it shall be defeasible upon the performance of certain acts by the grantor in his lifetime. So far as appears, the grantor died without performing the acts, and the deed thus becomes absolute. Indeed, the plaintiffs, heirs of the grantor, have not pleaded that their ancestor ever paid to the grantee the moneys which were necessary to operate a defeasance of the deed.

They argue that the act was a pledge and not a sale; and that, neither at its date nor at the death of their ancestor did it convey any title to the defendant's author. There were all the requisites of a sale; a thing, a stipulated price, and a consent. Even were it to be considered in the nature of a mortgage, it would have conveyed the legal title under the law of the place where the contract was made. And, before the mortgagor could have exercised his equity of redemption, he would have been obliged to tender a full discharge of the debt for which the security was given, a tender which has not been made. There is nothing to show that the contract was an antichresis made in contemplation of the law of Louisiana, whither the contracting parties subsequently removed.

The judgment is, therefore, affirmed with costs.

Merrick, C. J., dissenting. The instrument set up as title by the defendants is evidently one of those deeds of trust, common in the State of Mississippi, to secure the payment of a sum of money. The sum of two thousand dollars, named in the body of the instrument, is merely a nominal sum, as is apparent from the condition, which is in these words: "The condition of the above bill of

sale is such, that, whereas, the said *Ichabod Kelly has paid and furnished the said Vincent Singleton divers sums of money* which were fully paid by the said *Singleton* to the said *Kelly*, will render this bill of sale null and void; and, provided, further, should the said *Singleton* die without refunding said *Kelly* said sums of money, then, and in that case, the said *Ichabod Kelly*, his heirs and assigns, is hereby and forever exonerated from any *further liability for any further sum or sums of money to the said Vincent B. Singleton*, his heirs or assigns, but the absolute right and title of said negroes shall fully vest in said *Ichabod Kelly*, his heirs and assigns, forever." This instrument bears date 17th December, 1845. It does not appear to have been recorded in Mississippi, and was not recorded in Louisiana until December, 1849.

Singleton died in November, 1846, within a year from the date of the instrument. This estate was administered by the Clerk on the oath of *Kelly*, as an estate under the value, ($500,) and as consisting entirely of movables. *Kelly* having bought at the probate sale of *Singleton* property to the amount of $187 75, presented the remaining notes which were secured by the deed of trust, and which amounted to $401, and a note of a later date of $167 89, to the administrator, and obtained from him a credit to that amount upon the purchases, by allowing the same as a credit upon the notes of *Singleton*. Having, therefore, instead of living content with his stipulation, that he should not be compelled to pay anything more for the negroes after the death of *Singleton*, undertaken to exact the notes which were secured by the instrument, a Court of Chancery, in my opinion would, notwithstanding *Singleton's* death, at once hold the instrument as a mere security for the loan of a sum of money, and decree the property to the plaintiff, on paying the defendants the excess, if any, of the notes over the time of the negroes. I, therefore, think the same judgment ought to be rendered here, and that the judgment of the lower court ought to be reversed.

THE STATE v. N. A. DELERNO.

An indictment which charges the selling liquor to a slave without the written consent of the master does not necessarily charge any offence by the Acts both of March 18, 1852, p. 245, and of March, 15, 1855, p. 380, It is of the essence of the offence that the selling to the slave should be "without the consent in writing, of the owner, overseer or employer of such slave." Selling liquor to a slave, without the written consent of the owner is no offence, if the slave has the written consent of the overseer or employer for the time being.

Such a defect in an indictment is one of substance and not of form. The Statute of March 14, 1855, p. 171, to "regulate the mode of procedure in criminal prosecutions," did not debar the accused from moving to arrest the judgment for such a material omission in the indictment. Section 17 of same Act relates only to *formal* defects.

APPEAL from the District Court of the parish of Ouachita, *Richardson*, J. *Stubbs*, District Attorney, for plaintiff. *J. D. & J. McEnery*, *Benton* and *Garrett*, for defendants and appellants.

SPOFFORD, J. It becomes immaterial to notice the constitutional question raised in this case, for it is conceded by the District Attorney that the indictment must rest either upon the 1st section of the Act of March 18th, 1852, p. 235, or upon the 23d section of the Act of March 15th, 1855, p. 380. It matters not

which be considered in force—for, by both Statutes, it is of the essence of the offence that the selling to the slave should be "without the consent, in writing, of the owner, overseer or employer of such slave." These words are in the body of both Statutes, and not introduced by way of proviso. 1 East. Rep. p. 613. Selling liquor to a slave without the written consent of the owner is no offence, if the seller have the written consent of his overseer or employer for the time being. So the language of this indictment, which charges a selling without the consent, in writing, of the owner merely, does not of necessity charge any offence. This is a defect of substance, and not of form. It was not waived by pleading to the indictment, nor aided by verdict. The Statute of March 14th, 1855, p. 171, "to regulate the mode of procedure in criminal prosecutions," did not debar the accused from moving to arrest the judgment for such a material omission in the indictment. Section 17 declares that "every objection to any indictment for any *formal* defect apparent upon the face thereof, shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards. As we do not regard this as a formal defect, the motion in arrest should, in our opinion, have prevailed.

It is, therefore, ordered that the judgment of the District Court be avoided and reversed, and that judgment on the indictment in this case be arrested, without prejudice to a further prosecution under a valid indictment.

VICKSBURG, SHREVEPORT AND TEXAS RAILROAD COMPANY v. THE PARISH OF OUACHITA.

Parol evidence which does not contradict anything in the written proceedings of a corporation is admissible to explain omissions in its proceedings.

Giving full weight to the ordinance of the Police Jury of the parish of Ouachita, of June 27, 1853, as an ordinance legally adopted, its adoption cannot be considered as constituting *per se* a subscription to the capital stock of plaintiff.

C. C. 1794, 1799.

The Act of 12th of March, 1852, which authorizes Police Juries to subscribe to works of internal improvement, while it required the Police Jury subscribing, to insert in the ordinance the number and amount of shares proposed to be subscribed, and the provision by taxation for the payment of the subscription, does not inhibit the insertion of such other clauses and conditions as the Police Jury may think expedient. The ordinance as adopted by the jury, is its proposition to contract, and the corporation to whom this proposition is made must accept it according to its terms and conditions, or else there is no contract.

The Act relative to Police Juries approved 9th of April, 1847, provided that "vote of all the members elect of Police Juries shall be required to levy any parish tax or to make any appropriation." There is nothing in the Act of the 12th of March, 1852, which is inconsistent with that of 1847, in this particular.

APPEAL from the District Court of the parish of Ouachita, *Richardson*, J. *McGuire & Ray*, for plaintiffs and appellants. *Ludeling & Garrett*, for defendant.

BUCHANAN, J. The plaintiffs set forth in their petition, filed April 11th, 1856, that the parish of Ouachita, through its Police Jury, passed an ordinance for the subscription, by said parish, of six thousand shares, or one hundred and fifty thousand dollars, to the capital stock of the Vicksburg, Shreveport and Texas Railroad Company, payable in ten annual instalments, from March

1854 to March 1863, inclusive, of $15,000 each; that all the forms of law have been fulfilled to make the said subscription perfect, and to constitute it a valid and binding contract on the part of the parish, which the plaintiffs are entitled to enforce; and in virtue of which, the defendants are now the debtor of the plaintiffs in the sum of forty-five thousand dollars, for three of the instalments above mentioned, of the price of six thousand shares of stock, according to the terms of the ordinance of the Police Jury. The prayer of the petition is, that "petitioner have judgment, decreeing that said subscription of six thousand shares to the capital stock of plaintiffs, made by said Police Jury, is legal, regular and binding on said parish and Police Jury; and further, that said Police Jury, by its President, be required and ordered to enter said stock subscription on the stock books of said corporation, according to law, and the ordinances aforesaid, and the requirements of plaintiffs' charter. And further, that inasmuch as in the original ordinances of said Police Jury subscribing said stock, said Police Jury provided for the payment of said stock by a levy of eighteen and three-quarters per cent. tax on the landed property of said parish of Ouachita, one-tenth or one seven-eighth per cent. thereof, was payable annually for ten years, making fifteen thousand dollars payable annually, commencing on the 1st of March, 1854, leaving due petitioners of said stock, forty-five thousand dollars on the 1st of March, 1856, with five per cent. per annum interest," &c. prays for judgment for said amount, and that the parish Tax Collector be commanded to collect the same, according to the assessment of landed estate by the tax rolls of 1853, 1854 and 1855.

Defendants except that no cause of action is shown against the parish; and in case the exception was overruled, plead:

1st. The general issue.

2d. The unconstitutionality of the Act of 12th March, 1852, which authorized the subscription by parishes and municipal corporations, to the stock of corporations undertaking works of internal improvement.

3d. That the parish ordinances of the 27th of June, 1853, relied upon by plaintiffs, were illegal, null and void, and plaintiffs have acquired no rights under said ordinances.

4th. That the formalities to be observed, according to the law of March 12th, 1852, for the regularity of the proceedings to carry into effect the said parish ordinances, were not observed, in various particulars, detailed in the answer.

5th. That said ordinances were not approved and ratified by a majority of the voters on whose property the tax was proposed to be levied, as required by the Act of 1852.

6th. That the President of the Police Jury gave notice to plaintiffs, that the parish ordinances of the 27th June, 1853, had not been ratified and approved by a majority of said voters.

7th. That the ordinance authorizing the subscription and imposing a tax to pay the same, has been suspended by an ordinance passed in Januray, 1854, which prohibits the President of the Police Jury from subscribing to the plaintiffs' stock in the name of the parish of Ouachita.

8th. That plaintiffs never communicated in writing to the President of the Police Jury, their consent to accept said subscription.

9th. Special denial of the existence of any contract, or of any rights in plaintiffs to claim the amounts set forth in their petition.

In an amended answer, defendants pleaded that the subscription alleged by plaintiffs is invalid and not binding, because five per cent. was not paid, and the parish ordinance contained no provision for its payment at the time when the subscription may be made.

All these grounds of defence, with the exception of the plea of unconstitutionality of the Act of 12th March, 1852, may be treated collectively as the denial of the existence of a perfect contract between those parties, which confers a right of action upon the railroad company against the parish.

The question of unconstitutionality needs not to be considered in this case, as we are of opinion the plaintiffs have failed to establish a sufficient *causa petendi*.

The plaintiff and defendant are both corporations. Their function are defined by law; and their conditions and modes of action are prescribed and regulated by law. Their agents for the transaction of business, are, in the case of plaintiffs, a board of directors; in the case of defendants, a Police Jury. The subject-matter of the contract which is supposed to have been made between these corporations, is the subscription of the latter to the capital stock of the former. The plaintiffs being a joint stock company, whose purpose is the making of a great work of internal communication and transportation by the united means of the corporators, its charter, which is found at page 183 of the Acts of 1853, contains provisions in relation to the form of contribution to its capital.

Section 4th says: "The said corporation shall go into operation and be organized as soon as shares of capital stock to the amount of two hundred and fifty thousand dollars *shall have been subscribed.*

Section 8th names commissioners to receive *lists of subscription.*

Section 3d. A payment of five per cent. on the amount of each share shall be made *at the time of subscribing.*

Section 9th. In case of failure on the part of any subscriber to pay the instalments on his stock as required, the Board of Directors shall have the option, after thirty days written notice to the defaulter, of forfeiting the stock, and selling it for the benefit of the company, or of compelling, by suit, the payment of such instalments.

The general form, then, of becoming a corporator in this corporation, was *subscription*, or a signing of the name of the corporator upon lists in the hands of commissioners, or (section 16) upon stock-books kept in the office of the company, with the number of shares of such corporator added to his signature. Such was the form adopted by the original contributors to this enterprise, as shown by the preamble to their private act of incorporation, and embodied in their charter by the Legislature.

In the year 1852, by Act approved March 12th, (Session Acts, page 128,) a power was given by the Legislature to Police Juries and Municipal Corporations, of *subscribing* to the stock of corporations undertaking works of internal improvement under the laws of this State, *on complying with the provisions of this Act.*

As the charter of the corporation of plaintiffs herein, defined the manner in which subscriptions to the capital stock of that corporation could be received, so are we to gather from the law of 1852, how subscriptions by Police Juries to that or any other corporation created for purposes of internal improvement are to be given. And first, we are to notice that the Police Jury is to signify

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its intention to subscribe to such stock, by an ordinance. Two principal things are required by law to be mentioned in that ordinance—the number and amount of shares to be subscribed, and the levy of a tax on the landed estate of the parish to defray the subscription.

An ordinance was promulgated as having been passed by the Police Jury of Ouachita, on the 27th of June, 1853, of which the first section is in the following words: "Be it ordained by the Police Jury of the parish of Ouachita, that the parish of Ouachita, in the State of Louisiana, subscribe to the stock of the Vicksburg, Shreveport and Texas Railroad Company, shares to the number of six thousand, amounting to one hundred and fifty thousand dollars, and that a tax of one and seven-eighth per cent. be levied on the landed estate," &c.

An objection is made by the defendants, the present Police Jury of the parish of Ouachita, to this ordinance of their predecessors, that it was passed by less than the competent number of members of the Police Jury. The Act relative to Police Juries, approved 9th of April, 1847, section 5, (Session Acts, page 82,) provides as follows: "A vote of a majority of all the members elect of Police Juries, shall be required to levy any parish tax, or to make any appropriation."

The objection is, that out of nine members elect of the Police Jury of Ouachita, only seven were present at the meeting which adopted the ordinance in question, and that the vote stood, four for adopting and three against adopting the ordinance. The evidence of this fact comes up to us, in the shape of an admission appended to a bill of exception, and to be considered only in case we should sustain the exception to the decision of the District Judge, who excluded parol evidence. The minutes of the Police Jury merely stated that the ordinance was adopted, but did not give the yeas and nays. The defendants offered to prove by the Secretary and President of the jury which adopted the ordinance, and by other witnesses, the facts above recited, but the court rejected the testimony, on the ground that parol evidence is inadmissible to contradict the recorded proceedings of the Police Jury, and the Police Jury being a party, cannot contradict its own acts.

We think this testimony was improperly rejected. It does not contradict any thing in the written proceedings of the Police Jury.

There are several precedents for supplying by parol omissions in the minutes of the proceedings of corporations. 1 Ann. 215, *Millaudon* v. *First Municipality;* 2 Ann. 939, *Prother* v. *Minden Seminary.*

By the admission annexed to the bill of exceptions, it appears that the tax imposed by the ordinance of the 27th of June, 1853, had not the sanction of the majority of members elect of the Police Jury, as required by the Act of 1847. There is nothing in the Act of the 12th of March, 1852, which is inconsistent with that of 1847, in this particular; and we therefore conclude, the latter statute to be applicable to the present case.

But were this not so, and giving full weight to the ordinance of June 27, 1853, as an ordinance legally adopted, we cannot consider its adoption as constituting *per se* a subscription to the capital stock of the plaintiffs.

The Act of 12th of March, 1852, which authorized such subscriptions, while it required the Police Jury subscribing to insert in the ordinance the number and amount of shares proposed to be subscribed, and the provision by taxation for the payment of the subscription, does not inhibit the insertion of such other clauses and conditions as the Police Jury might think expedient

Accordingly, after imposing the tax and providing for its collection, the ordinance proceeds as follows:

Section 5. Be it further ordained, that this ordinance shall not take effect, until the Board of Directors of said Railroad Company shall have communicated, in writing, to the President of the Police Jury of said parish, their consent to accept the subscription herein ordained, payable in the manner herein set forth.

Section 7. Be it further ordained, that within ten days after the closing of the polls, as is provided for in the foregoing (6th) section, it shall be the duty of the President of the Police Jury to notify, in writing, the President of the said Railroad Company, whether the ordinances have been approved and ratified by a majority of the voters on whose property the tax is proposed to be levied: provided, that if said ordinances be approved and ratified according to law, that the stock subscription shall be entered on the stock-books of said company, by the President of the Police Jury, so soon as the President and Directors of said company shall signify their assent to said subscription, as is provided for in the foregoing ordinance.

The 6th section directs the President of the Police Jury to order an election to take the sense of the land holders of the parish, as provided by law.

The approval of the tax payers evidenced by a vote, was a *sine qua non* to the validity of the subscription, by the terms of the statute. But this is not the object of our present remarks. We are considering the 5th and the 7th sections, which are all important, in their bearing upon *the existence* of a contract. The ordinance is the proposition to contract, and the terms of that proposition cannot for a moment be left out of sight, in arriving at the intention of the party who proposes.

We find, then, that in the 5th section, the Police Jury require that the Board of Directors of the Railroad Company shall communicate, in writing, to the President of the Police Jury, their consent to accept the subscription, payable in five annual instalments. And there was great reason for requiring the consent of the Board of Directors. For we have seen that the charter of plaintiffs required the payment of five per cent. at the time of subscription. And other sections authorized the Directors to call in the subscriptions as they should think proper, provided the calls did not exceed ten per cent. at one time, nor two calls in a year, and provided ninety days notice of a call was given. Now, here was a proposition to accept a subscription without a cash payment, and payable at the limited rate of ten per cent. per annum. It is evident that these terms of subscription were an essential part of the proposed contract; because the tax imposed to defray the proposed subscription in accordance with the requirements of the statute, could only have effected its object by an acceptance of the subscription upon the terms proposed by the ordinance.

We express no opinion as to the right of the Railroad Company to accept subscriptions on terms different from those prescribed by their charter.

This question, although made by the pleadings and argument, does not require solution at our hands; for there is no proof before us that the plaintiffs, through their Board of Directors, ever gave consent in writing to the terms of defendants proposed subscription. It is true, the Board of Directors, at a session of date the 1st of November, 1853, or more than two months after they had been notified by the President of the Police Jury that the parish ordinance

of Ouachita, for subscribing to their stock, had not been ratified by the taxable voters, passed a resolution, by which they (the Board of Directors) accepted the ordinance of the 27th of June, 1853, "as a stock subscription to said company, according to the terms of the ordinance of the Police Jury."

But it is not proved that this resolution was communicated to the President of the Police Jury. *Mr. John Ray* was the only witness examined on this subject, and his evidence, which is before us, is vague and inconclusive upon this material point of the notification by plaintiffs to defendants of their acceptance of the proposition to subscribe, contained in the ordinance of the 27th of June, 1853. The 7th section contains internal evidence that this ordinance was merely a proposition to subscribe, and not, as plaintiff's counsel contends, a subscription. See the proviso in that section copied above, which directs the President of the Police Jury to enter the subscription of the parish on the books of the company, so soon as the President and Directors of the company shall signify their assent to the subscription, in the mode provided for in the ordinance.

In the mean time, the evidence shows us that, on the 18th of August, 1853, five days after the election held for the purpose of taking the sense of the taxable voters upon the proposed subscription, the President of the Police Jury notified the Railroad Company, that the subscription had *not* been ratified and approved in the mode required by law; and the Police Jury, by ordinance of January, 1854, suspended their proposition to subscribe, until the question of ratification should be again submitted to the people.

From this review of the facts, it is apparent that there has not been that concurrence of two wills, which constitutes a perfect contract, that can be enforced by an action at law. "A contract consisting of a proposition and the consent to it, the agreement is incomplete until the acceptance of the person to whom it is proposed. If he who proposes should, before that assent is given, change his intention on the subject, the concurrence of the two wills is wanting, and there is no contract." C. C. 1794.

"The acceptance, to form a contract, must be in all things conformable to the offer." C. C. 1799.

Judgment affirmed, with cost.

W. W. GEORGE, Curator, *v.* W. S. LEWIS.

An action for the dissolution of a sale for non-payment of the price is not, in legal parlance, action of *nullity* or *rescission*, and is not regulated, as to prescription, either by Art. 3507 or Art. 2218 C. C.: it falls rather within the general category of personal actions, limited to ten years by Art. 3508.

An action of nullity or rescission of a contract lies only for an alleged vice in the contract itself, tainting it *ab initio*: whereas, the dissolving condition is never enforced except upon the happening of some event posterior in date to the contract and not affecting its original validity. Nullity and rescission imply the total avoidance of the convention of the parties for some inherent defect therein; the dissolution of a commutative contract for non-compliance by either party with his engagements, is really the carrying into effect of a part of their convention either express or implied.

APPEAL from the District Court of the parish of Caddo, *Land*, J. *Williamson*, for plaintiff. *Winans*, for defendant and appellant.

SPOFFORD, J. The plaintiff's intestate sold a tract of land to the defendant, in 1845. By the terms of the written contract, the defendant promised to pay a stipulated price within three years from the first day of January, 1845.

The defendant having failed to pay the price the suit was brought in December, 1855, wherein the plaintiff demanded a dissolution of the sale and a return of the property, in pursuance of Articles 2041 and 2539 of the Civil Code. There was a judgment ordering the defendant to pay the price on or before the 1st December next; and, in default thereof, to surrender the land to the plaintiff, in compliance with the resolutary condition implied in the sale.

The defendant has appealed from this judgment, and contends that it should be reversed because the prescription of five years was pleaded to the action.

It is conceded that, if the action is not barred by a shorter term than ten years, the judgment is correct.

The point has been expressly adjudged in *Jones* v. *Crocker*, 1st An. 442, where it was held that actions for the dissolution of sales on account of the non-payment of the price can be prescribed by the lapse of ten years only.

We do not perceive that this doctrine was impugned by any expression of the court in the subsequent case of *Mulford* v. *Wimbish*, 2 An. 443. The subject of the resolution of sales for non-payment of the price was not there discussed, as it was irrevalent to the case.

Counsel seems to have misapprehended the technical meaning of the terms "nullity or rescission of contracts" as used in the Civil Code, and especially in Articles 2218 and 3507. The action to enforce the resolutory condition, express or implied, in a bislateral contract, (C. C., 2040, *et seq.*,) is not, in legal parlance, an action of nullity or rescission. The Code itself distinguishes the two classes of actions. Article 2126 declares that obligations are extinguished in nine specified modes. "Nullity or rescission" being classed as one, and "the effect of the dissolving condition" as another and a different mode.

The action of nullity or rescission of a contract lies only for an alleged vice in the contract itself, tainting it *ab initio*: whereas, the dissolving condition is never enforced except upon the happening of some event posterior in date to the contract, and not affecting its original validity. Nullity and rescission imply the total avoidance of the convention of the parties for some inherent defect therein: the dissolution of a commutative contract for non-compliance by either party with his engagements, is really the carrying into effect of a part of their convention either express or implied.

In the present case, for example, there is no "nullity or rescission" sought, but rather an enforcement of the contract of the parties; for, by the judgment appealed from, the defendant is first ordered to comply with his express engagements—that is, to pay the price he promised for the land he bought; in default thereof, he is condemned to comply with his tacit alternative engagement to restore the land, under the resolutory condition which, by legal implication, formed a part of his original contract, as binding upon him as if it had been expressed.

The French commentators differ somewhat as to the true distinction between "nullity" and "rescission," but they agree that both spring out of such informalities only as affect the contract from its inception, whilst the term "resolution" is technically applied to valid contracts dissolved for causes subsequently arising.

Rogron says, "il y a *nullité* lorsque l'acte est entaché d'un vice radical, de

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manière qu'il ne peut produire aucun effet. Il y a *rescision* lorsque l'acte valable *en apparence, renferme* cependant *un vice* qui peut le faire annuller si l'une des parties le demande ; par exemple, l'erreur, la violence, le dol, une cause fausse, la minorité, etc." Code Civil, liv. III, tit. III, ch. V, sec. 7.

Troplong clearly developes the distinction between the rescission and resolution of a contract: "Mais c'est la première fois peut-être que deux choses aussi dissemblables que *la rescision* et *la résolution* se trouvent confondues.

La résolution suppose que le contrat a existé valablement; la rescision suppose, au contraire, qu'il n'y a eu qu'une apparence de contrat, et qu'un vice radical empêchait la convention d'avoir une existence réelle.

La cause de la résolution réside dans un événement postérieur à la naissance du contrat, comme une condition qui se réalise *ex post facto*, un réméré qui s'exerce d'un certain temps; la cause de la rescision réside dans une nullité viscérale qui remonte à la naissance du contrat.

La résolution peut avoir lieu de plein droit, la rescision n'a jamais lieu de cette manière.

La résolution peut-être amicable.

La rescision est toujours forcée." *De la Vente*, No. 689.

So *Marcade*, commenting upon the Napoleon Code, whence the terms in question have been imported into our Code, remarks: "Ce qui distingue l'acte *résoluble* de l'acte *rescindible*, c'est, comme nous l'avons dit, que celui-ci peut-être annulé par l'effet d'un vice qui l'a entaché *ab initio* et dès sa formation, tandis que l'autre s'est formée régulièrement, et n'a vu naître que *ex post facto* la cause qui permet de l'anéantir." And again, "*la demande en résolution* n'est pas précisément une action *en rescision* du contrat. Dans cette demande, en effet, on n'attaque pas la convention, on l'invoque au contraire, et on demande l'exécution de la clause, expresse ou sous-entendue qui y est insérée ou reputée insérée. L'action ne tomberait donc pas sous la prescription déceunale de l'art. 1304; elle ne se prescrirait que par 30 ans d'après l'art. 2262." 4 *Marcadé*, No. 570.

We conclude that the present action not being an action of nullity or of rescission, is not regulated, as to prescription, by Article 3507 of our Code as contended by the defendants, nor yet by Article 2218, as maintained by the plaintiff; it falls rather within the general category of personal actions, limited to ten years by the Article 3508. And prescription only began to run when the defendant was in default for the price.

But the appellant's counsel has argued that the demand for the price was prescribed when this suit was brought, and that, in consequence, the auxiliary remedy afforded to the plaintiff by the implied dissolving condition was lost. The act of sale signed by both vendor and vendee, is the only evidence of the price, or of the terms of payment. The debt, thus evidenced, did not become exigible until the 1st of January, 1848, and the defendant was cited to answer this suit in December, 1845, within ten years from the maturity of the claim.

The Statute of March 5th, 1852, (p. 90,) did not reduce the term of prescription, as that Act relates only to open accounts and promissory notes, whilst the plaintiff's claim for the price of his land does not fall under either of those denominations.

The plaintiff might then have sued successfully for the price, and claimed the vendor's privilege upon the land. He resorted to a concurrent remedy by demanding the dissolution of the sale, in case the defendant should persist in refusing to comply with the express terms of his contract, enlarged in his favor

as they have been by the District Judge, under the equitable discretion vested in him by Articles 2042 and 2542 of the Louisiana Code.

The plaintiff has not complained of the judgment; the defendant has no reason to complain: for, by its liberal provisions, he has his election to pay the price or to restore the thing on or before the first of December next. If he should do neither he would despoil the plaintiff.

Judgment affirmed.

HANNAH GEE *v.* G. W. THOMPSON.

The decree of separation from bed and board does not dissolve the bonds of matrimony. C. C. Art. 138; C. C. Art. 152.

The surviving wife is not precluded from claiming the marital portion, under Art. 2359 C. C., by the fact of having obtained a judgment of separation from bed and board, and of having lived separate from her deceased spouse up to the time of his death, for though separated in bed and board, she is still the wife, and incapable of contracting a second marriage.

When the husband died worth $31,000, and the surviving wife was fifty-five years of age, and all the means she had was $1,180, *Held:* that the husband died rich, and the surviving wife was in necessitous circumstances within the meaning of Art. 2359 of the Code.

The Art. 918 C. C., which provides the heir to the entire succession, does not repeal nor introduce an exception into Art. 2359, which provides for the sole case where one of the spouses dies rich, leaving the other in necessitous circumstances.

The husband or wife, separated in bed and board, is not entitled to the marital portion. LEA, J., dissenting.

APPEAL from the District Court of the parish of Bossier, *Drew*, J.

Landrum & Ray, for plaintiff. *Looney*, for defendant and appellant.

MERRICK, C. J. (LEA, J., dissenting.) This suit is for the marital fourth. By consent of parties at Monroe, the case was reserved to be decided at New Orleans. The judgment in favor of the plaintiff, decreeing her a separation of bed and board against *Benjamin L. Saunders*, deceased, establishes by that verity which belongs to judgments, that said *Saunders* forcibly expelled and drove the plaintiff away from their common dwelling, without any just cause or provocation whatever; that she remained separated from him by reason of his unlawful acts, notwithstanding her desire to return; that he defamed the plaintiff, and that his conduct was cruel, excessive, and of such a nature and character as to render the living with her said husband absolutely unsupportable.

The wife was, therefore, driven by the conduct of *Saunders* to place herself under the protection of the law, and we cannot believe that she has placed herself in a worse condition by so doing. The law would be a strange one which should hold out rewards to violence and injustice even by its consequences.

By Article 2359 C. C. it is provided, that when the wife has not brought any dowry, or when what she has brought as dowry is inconsiderable with respect to the condition of the husband, if either the husband or the wife die rich, leaving the survivor in necessitous circumstances, the latter has the right to take out of the succession of the deceased what is called the marital portion, that is, the fourth of the succession in full property, if there be no children, and the same in usufruct only where there are but three or a smaller number of children; and if there be more than three children, the surviving, whether hus-

band or wife, shall receive only a child's share in the usufruct, and he is bound to include in this portion what has been left to him as a legacy by the husband or wife who died first.

This Article remains unrepealed, and being unaware of any law making exceptions to it, we think we are prohibited from distinguishing where the law does not distinguish.

Two questions, therefore, arise under this Article:

1st. Was the plaintiff the *wife* of *Saunders* at the time of his death?

2d. Did he die rich, leaving her in necessitous circumstances?

I. Article 133 of the Civil Code answers the first of these questions in the affirmative. It declares in the last sentence of the Article that "separation from bed and board does not dissolve the bond of matrimony since *the separated husband and wife* are not at liberty to marry again, but it puts an end to their conjugal cohabitation and the common concerns (intérêts) which existed between them. The parties are left in this condition for two years, in the hope that a reconciliation will take place between them. The law lends itself with such facility to the furtherance of this idea, that the reconciliation without any form of law annuls the separation from bed and board." Troplong du Mariage, No. 1465.

The law, therefore, while it prevents the wife from marrying again, and forming any other establishment, ought not to deprive her of all rights upon the estate of her husband, if he should die in the interval in which she is obliged to consider herself his wife.

The civil and common law writers agree that the decree of separation of bed and board does not dissolve the bonds of matrimony.

Zachariæ says: "La séparation de corps ne rompt pas, mais rélâche seulement le lien du mariage. En général, elle laisse subsister *tous les effets juridiques* que le mariage produit et n'entraine que l'extinction de ceux de ces effets qui sont une conséquence de la vie commune." Seconde Partie, § 489. See also Troplong du Mariage, 2 vo., Nos. 1268 and 1464; 5 Pothier, 523.

At common law it is said: "A divorce *a mensa et thoro* dissolveth not the marriage, for the cause of it is subsequent to the marriage, and supposes the marriage to be lawful. And as it doth not dissolve the marriage, *so it doth not debar the woman of her dower*, or bastardize the issue or make void any estate for the life of the husband and wife." Co. Lit. 235; Tomlin Law Dict., title Divorce.

Our own law looks with favor upon a person occupying the position of the plaintiff in this case, for it expressly declares: "In case of a separation from bed and board, the party against whom it shall have been pronounced shall lose all the advantages or donations the other party may have conferred by the marriage contract, or since, and the party at whose instance the separation may have been obtained shall preserve all those to which such party would have been entitled, and these dispositions are to take place even in case the advantages and donations were reciprocally made." C. C. 152.

The marital fourth, it appears by the fifty-third novel of Justinian, originated in cases of divorce. No decree from the magistrate was required under that law. To protect the divorced wife (in those cases in which she had no dower) from want, was the origin of the marital fourth. The fifty-third novel extended the relief to the wife in the case of the death of her husband, and afterwards, by chapter five of the one hundred and seventeenth novel, the same

right was given to the necessitous husband in the estate of his deceased wife, if she died rich.

If we, therefore, consider the origin of the marital fourth, it was designed at first to apply to such a case as we have before us.

But it is said that Article 918 C. C. proves that it was not the intention of the lawgiver that the wife, separated in bed and board, should inherit, to the exclusion of any natural child or children duly acknowledged, much less any legitimate children of the deceased.

An answer to the foregoing argument is this: The marital fourth is provided for under the head of marriage contract, and depends upon contingencies, and is exceptional in its character. The surviving husband or wife is to have the marital fourth only when the pre-deceased spouse died rich, leaving the survivor in necessitous circumstances. If both of these things do not happen, the survivor takes nothing. Moreover, it has been held by this court that, whether the pre-deceased husband or wife died rich or not, could only be determined after the settlement of his estate in the Probate Court. 17 L. R. 376. Hence the right to the marital fourth not only depends upon the contingencies named, but also, in order to ascertain the existence of the conditions, time is required for the settlement of the estate in the Probate Court.

Now, on the contrary, in regard to successions, it interests the public order that the instant a person dies it should be known what persons should succeed to his effects. Hence those provisions of law were established under the head Successions, declaring who shall inherit, and casting the inheritance upon the heir so designated, even unknown to himself. The person upon whom the inheritance is by law conferred, and who is called the heir, is so different from the surviving husband and wife claiming the marital fourth, that such demand, like a demand for a legacy, must be made upon the heir.

The heir, on the contrary, is not obliged to apply to a court of justice in order to be invested with the effects of a succession. He has the right at once to take possession as proprietor. Article 918 of the Civil Code is found under the title Successions, and it provides for the entire effects of the intestate, and designates who shall receive them as heir where the deceased husband left no ascendants, lawful descendants or collateral relations, and did leave a surviving wife not separated from bed and board from him. It declares that such wife shall inherit from him, to the exclusion of any natural child or children duly acknowledged. The law makes her the heir of her husband, whether she be rich or poor.

It is thus apparent, that even as they are embraced under different titles in the Code, so were Articles 918 and 2359 intended to apply to different classes of cases.

The one to provide an heir to an entire succession, the other to relieve the surviving husband or wife when in want.

Now are these two Articles so repugnant to each other that the one repeals the other? If so, which is repealed, the first or the last? For it is the duty of the court, where it is possible, to give effect to every Article of the Code, and it is incumbent on those who hold an Article void for repugnancy to some other to make the repugnancy appear by the clearest logic, and then also to show that the law, so alleged to be abrogated, is older in date than the repealing statute.

But when we look to the object of the Legislature, we see no repugnancy in the two Articles, and if it should please us to say, that the marital fourth is taken by inheritance, we may read the two Articles together in this way. If a married man has left no lawful ascendants or descendants, nor any collateral relations, but a surviving wife not separated from bed and board, the wife shall inherit from him his whole estate, to the exclusion of any natural children which he may have left, but if she be separated from her husband from bed and board, and if her husband die rich, and leave her in necessitous circumstances, then, instead of inheriting the whole estate, as she would have done if not so separated, she shall have only one-fourth thereof.

Any other conclusion seems to be based upon this fallacy. Article 918 of the Civil Code does not give to the surviving wife the *whole* of the husband's estate, where she is separated from him *a mensa et thoro*, therefore it is not possible that any other Article of the Code can be intended to give the wife, under any circumstances, one-fourth or a less portion of his estate.

And that this is not an unfair statement of the argument must be manifest from the reflection that if the wife, separated *a mensa et thoro*, can demand the marital fourth, as against the natural children duly acknowledged, she can, by force of the Article, also demand it against every other relation.

We therefore conclude, that Article 918, which provides the heir to the estate succession, does not repeal nor introduce an exception into Article 2359, which provides for the sole case where the one of the spouses dies rich, leaving the other in necessitous circumstances.

II. In regard to the question whether *Saunders* died rich, leaving the plaintiff in necessitous circumstances, we think a comparison of the estate left by *Saunders*, with the means of support of the widow, will show that this question must also be answered in the affirmative. It is conceded that *Saunders'* estate, after all debts are paid, is over $31,000. He, therefore, died comparatively rich.

The witnesses say the plaintiff is poor. But it shown that she had, in cash, in October, 1850, $825 65, and in November of the same year she lent to *Jackson Burnham* $1,130, at eight per cent interest; that he paid her $800 in February, 1852, fifty dollars being in money, and that about the same time she lent *Cason* $100. *Burnham* also swears that *S. P. Gee* told him that, between 1843 and 1846, he paid plaintiff some $1,600. Now, if this hearsay testimony were to be considered and believed, it would only show that in 1846, seven years before this suit was instituted, the plaintiff had received, either for herself or some one else, $1,600. If *S. P. Gee* told *Burnham* the truth, of which we have no evidence, then it is probable that the $825 65, which *Thompson* testified to, was a part of it, and that the $825 65, seen by *Thompsan* in October, was increased to $1,130 by November, when it was all loaned to *Burnham*. Treating these loans as successive, as they appear to be, which is in perfect harmony with the testimony of the witnesses who say they consider the plaintiff poor, it makes her probable means about $1,180. If we add into one sum these successive loans of the plaintiff, we make, indeed, $3,600, but it seems to be fictitious rather than real.

The plaintiff is now about fifty-five years of age. She cannot be expected to labor with her hands. It is not shown that she is capable of managing any business. The interest on her $1,180 will produce her ninety-four dollars and forty cents a year, not quite eight dollars a month for boarding, clothing and necessaries. We think her estate inconsiderable with respect to the condition

of the husband, and that she is in necessitous circumstances in the contemplation of the Code.

The common law of England gives the surviving wife, whether rich or poor, dower in her husband's lands, and by statute she receives one-third of his personal estate. By the same law the husband inherits the personal effects of his wife as next of kin, and if there be issue of the marriage born alive, he holds all of her lands during his life as tenant by courtesy.

Our law, if less generous in this respect, affords something to the necessities of the survivor. We think it should receive a fair if not liberal construction.

We see no hardship, therefore, in decreeing to the plaintiff the usufruct of one-ninth of the property belonging to the succession of *B. L. Saundrs*, deceased. The plaintiff will be obliged to give security for the property, and in the ordinary course of nature it will return in a few years to the defendants.

We think the judgment ought to be affirmed.

Judgment affirmed.

Sprorord, J., having been of counsel for one of the parties, takes no part in the decision of this cause.

Lea, J., dissenting. This case is presented on an appeal, taken by the defendants from a judgment condemning them to pay to the plaintiff one-ninth part of the net proceeds of the estate of *Benjamin L. Saunders*, in usufruct as a marital portion. In her petition the plaintiff alleges that she is the surviving wife of *Benjamin L. Saunders*, who died rich, leaving her, his widow, in necessitous circumstances.

Wherefore she claims the benefit of the provisions of Article 2359 of the Civil Code, allowing her the usufruct of a share of the estate equal to a child's portion.

She further alleges, in a supplemental petition, that there existed a community interest of acquests and gains between her and her deceased husband, of which she prays the court to grant a decree for a liquidation and settlement. Upon the claim for a recognition and liquidation of the plaintiff's community rights, there was a judgment for the defendants, which we are not called upon to disturb.

As respects the demand for the usufruct, as before stated, the facts of the case, as disclosed by the evidence, appear to be substantially as follows: The plaintiff and the deceased, after living together as man and wife for about three years, were separated by a judgment of separation from bed and board, obtained by the plaintiff against her husband on the 22d May, 1852, the suit having been previously instituted in February of the same year. About the middle of October, 1852, *Saunders* died leaving a considerable estate, and the question to be determined is whether, under the circumstances, as disclosed by the evidence, the plaintiff is entitled to the benefit of the provisions of Article 2359 of the Civil Code, allowing the widow in necessitous circumstances the marital portion.

It is insisted that the wife, separated in bed and board, is yet the wife, and continues to be such until a final divorce, and that, where a judgment of separation has been rendered in her favor, (which establishes a presumption that she was not in fault,) the express provisions of our Code secure to her all the advantages or donations the other party may have conferred by the marriage contract. See Civil Code, Art 152.

The misapprehension of the true meaning and spirit of this Article of the Code arises probably in part from its being placed under a title in the Code to which it does not belong. The Article, or at least that portion of it which is applicable to the case at bar, is as follows: "Article 2359. When the wife has not brought any dowry, or when what she has brought as a dowry is inconsiderable with respect to the condition of the husband, if either the husband or the wife die rich, leaving the survivor in necessitous circumstances, the latter has a right to take out of the succession of the deceased what is called the marital portion," &c.

Now this Article is found under the title which treats of marriage contracts. It is evident that it has no proper connection with that title. It is a legislative provision, conferring and regulating a right to a portion of the estate of a deceased person, precisely as other legislative provisions confer and regulate the rights of parents, children, brothers, and other relatives of deceased persons upon their estates. It is therefore a law of inheritance, and has nothing to do with marriage contracts. In a certain event it makes the surviving spouse not only an heir but a forced heir, and, with certain qualifications, puts him or her (as the case may be) on a footing with the children or other heirs of the deceased.

Every reader of the Code is aware that many Articles are found under titles where a proper classification would never have placed them; but this fact has never been held to justify a construction at variance with their meaning and character. The surviving spouse, who acquires any rights under the Article in question, takes, therefore, by inheritance as other heirs. See 3 N. S. p. 1. See also the opinion of Chief Justice Slidell in the case of *Susan Conner* v. the *Heirs of Conner*, 10th Annual, in which the right of the wife to the marital fourth is expressly designated as one of inheritance.

This view of the case is illustrated by a reference to the laws from which our legislation on the subject is derived.

The marital portion was first allowed by the 53d and 117th novels of Justinian, but is more directly derived, as we find it in a modified form incorporated in our laws, from the legislation of Spain. The law 7th of the 6th Partidas, title 13, from which the Article 2359 of our Code is directly derived, is found in that work under its appropriate head of Inheritance, and it provides that "if the husband should not leave the wife the means of living independently, and she should not possess them herself, then she may *inherit* one fourth of the estate," &c. This law was established, says Gregorio Lopez, "in honorum præteriti matrimonii ut conserventur coryuges in solito statu."

The humane and salutary provisions of this Article were intended to provide against the consequences of a sudden change in the condition in life of a surviving spouse incident to the death of the other, "to prevent those who have lived together, in the enjoyment of wealth and the position which it gives, from being suddenly reduced to want." 3 An. 105.

The law provides that a right which is incidental to the marriage state, (viz: that of mutual protection and support,) should be extended beyond its termination by so regulating the law of inheritance as to appropriate a portion of the estate of a deceased spouse to the support of the survivor. If this view be correct in principle, it presupposes that, at the time of the death of the deceased spouse, the marital relation between the two was undisturbed; but no such doctrine is applicable to a case where there has been a separation from

bed and board. In such case the relation of the parties, in consideration of which the marital portion is allowed, have ceased to exist before death. If the husband is not bound to support the wife, separated from bed and board, before his death, it is difficult to conceive upon what principle of equity that event could give her a claim to stand on the same though an unequal footing with the forced heirs of his estate.

A judgment of separation from bed and board severs the personal relations of the parties, and with it the mutual obligations which are the considerations of the contract. After that event, as both parties are absolved from the duties so they are prohibited from claiming the rights incident to a relation which they have renounced.

It is proper, therefore, that the wife, separated from bed and board, should not inherit from the estate of the deceased husband, and while the law, in a spirit of humanity and wisdom, has, "in honorem præteriti matrimonii," provided for the support of her who is truly a widow, it has at the same time, in regard to any rights of inheritance, left the spouses who are separated in bed and board in the position which they occupy in the actual relations of life—that of strangers to each other.

The 918th Article of the Civil Code is as follows: "If a married man has left no lawful descendents, nor any collateral relations but a surviving wife, not separated in bed and board from him, the wife shall *inherit* from him, to the exclusion of any natural child or children duly acknowledged."

If the construction of Art. 2359 which has been contended for by plaintiff's counsel were correct, one Article of the Code would exclude the wife separated from bed and board altogether from a participation in the inheritance of her husband's estate, and another would place her on the footing of a forced heir to the partial exclusion of his blood relations. No such an anomaly in legislation was intended. The Articles are perfectly consistent with each other if construed with reference to the ordinary acceptation of language as applicable to the ordinary relations of life. Thus, when parents, children or relations are spoken of, we mean legitimate parents, children or relations, and legislation applicable to such, in general terms, is never extended by construction to bastard or illegitimate relations; so general legislation, having reference to the rights of married persons, may be supposed to refer to cases where the marital relation has been undisturbed, not where a partial divorce has been judicially decreed between the parties.

The "advantages" referred to in Article 152, as being "retained" by the party in whose favor a decree of separation shall have been granted, have reference evidently to such as have been conferred by the marriage contract, or afterwards by one of the parties, but can have no application to a legal provision regulating the order of inheritance.

In my opinion the judgment appealed from should be reversed.

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G. transferred the negotiable note of N. to M. B. & Co., and took from them their written agreement to hold the note as collateral security for the payment of a debt due by G. to them, and G. transferred that agreement to S.—all having been done before the maturity of the note, M. B. & Co. having been paid the debt due them by G.—*Held:* that S., by virtue of the transfer of said agreement, took the note unaffected by any equities, in relation to it, existing between G. and N.

APPEAL from the District Court of the parish of Caddo, *Drew*, J.

Crain, for appellant.

Merrick, C. J. This suit was brought to injoin the execution of a judgment rendered against the plaintiff and in favor of *McKee, Bulkley & Co.*, upon a note given to one *Thomas Gamblin*, now an absentee, as a part of the price of a tract of land. *Gamblin* sold the land with a full warranty. It proved, however, to be subject to a certain mortgage, which the plaintiff was apprehensive he would be obliged to pay, and on which suit had been commenced against him, and he has brought this suit to require the holders of the judgment to give security against such incumbrance before proceeding further with the execution issued on the judgment.

In July, 1849, six months previous to the maturity of the note in question, *Thomas Gamblin* indorsed the same and placed it in the possession of *Messrs. Iler & Kline*, the agents of *McKee, Bulkley & Co.*, to secure them the amount of an acceptance of $1000, and such further advances as they might make, and to account to *Gamblin* for the balance. He took from *Iler & Kline* their written agreement to hold the note for these purposes. On the 26th day of November, *Gamblin* transferred the receipt of *Iler & Kline* to *F. L. Scogin. McKee, Bulkley & Co.* having been paid the amount due them, out of the proceeds of the judgment, the question presented to us is: whether *Scogin* shall be considered as having acquired the balance due upon the note or judgment out of the regular course of business, and whether the note in his hands is subject to the equities between the plaintiff and *Gamblin?*

It is not unusual to indorse and deliver commercial paper as collateral security. By the indorsement and delivery of the note to *Iler & Kline*, the agents of *McKee, Bulkley & Co.*, the legal title to it passed to *Bulkley & Co.* By the subsequent transfer of the receipt to *Scogin*, *Gamblin* parted with his equitable interest also in the note before its maturity. There was, therefore, nothing left at the maturity of the note upon which the plaintiff's equities could attach, and it has not been shown that *Iler & Kline*, or *McKee, Bulkley & Co.*, or *Scogin* had notice of such equities at the time they became the owners of the note. The paraph "*ne varietur*," does not convey such notice.

Judgment affirmed.

Spofford, J., recused.

HENRY M. BRY et al. *v.* HENRY FOUCHÉ.

The petition alleged that plaintiff "is the owner of the following described tract of land, to wit, the lot or fractional number," &c. This description of title is too vague and general to satisfy the requirements of C. P. 172.

Defendant excepted to the petition on the ground that it did not set forth the plaintiff's title with sufficient clearness. The exception was overruled. On the trial plaintiff offered a patent to prove his title; defendant objected to it as inadmissible under the pleadings, the plaintiff's title not being set forth in the pleadings; his objection having been overruled, he excepted, and then filed an amended answer, and after alleging that he was taken by surprise, attacked the patent on the ground that it had been obtained by fraud. Defendant did not apply for a continuance nor move for a new trial. *Held:* That the exception was well taken, but that defendant, by his amended answer attacking plaintiff's title, was precluded from availing himself of the defect in the petition.

The plaintiff being in possession of a patent regular in form, and the settlement of the defendant having been suspended and his entry declared illegal by the General Land Office, the court declared that, even in a case of doubt, it would not hold that the patent had been granted for lands not subject to entry and sale.

APPEAL from the District Court of the parish of Ouachita, *Richardson*, J. *McGuire & Ray*, for plaintiffs. *Ludeling & Garrett*, for defendant and appellant.

MERRICK, C. J. This is a petitory action. The judgment of the lower court was in favor of the plaintiff, and the defendant appealed.

The defendant excepted to the plaintiff's petition, on the ground that it did not clearly state who was the plaintiff, nor how *H. M. Bry* is interested in the suit, and that it did not set forth *the nature of the plaintiff's title.* The exception was sustained so far as to compel the plaintiffs to disclose more fully for whose benefit the action was brought, but overruled in the other particulars. The plaintiff amended in order to conform to the opinion of the court. The allegation of title in the petition as amended is, that the said *Thankful R. Bry* "is the owner of the following described tract of land, to wit: the lot or fractional number," &c. No description of the title, whether by patent or French or Spanish grants; whether the plaintiff was the original grantee, or whether she holds by mesne conveyances, was given. The petition did not therefore contain a clear and concise statement of *the nature* of the title on which the action was founded, as required by Article No. 172, No. 4 of the Code of Practice. The exception was well taken, and the plaintiff ought to have been compelled to amend, or in default of amendment, the petition should have been dismissed.

The defendant prayed *oyer* of the titles of the plaintiff, and that she might be compelled to produce and file them in court, within a reasonable delay, and in default thereof, that the action be dismissed. The *oyer* was refused by the Judge. The ruling of the Judge on this point was excepted to, and the correctness of his decision is questioned by the defendant before this court. We are of the opinion that defendant was entitled to the *oyer* prayed for.

On the trial, the plaintiff offered to read in evidence the patent, which was objected to, on the ground that it was inadmissible under the pleadings, as the nature of the plaintiff's title was not set forth in her petition. This objection was overruled, and the defendant excepted.

After the patent had been received in evidence, the defendant filed an amended answer, in which, after alleging that he was taken by surprise, he avers that "said patent was obtained through fraud and issued in error, as the land, for which he is sued, is within the limits of a reserved Spanish claim known as the Bastrop Grant, and that at the time said patent bears date, and said entry was made, the said land was reserved from sale or entry, and the Register and Receiver of the United States were prohibited from selling the same, or in any manner disposing thereof." No effort was made to obtain a continuance of the case, and the defendant did not move for a new trial. Had the defendant relied solely upon his exception to the plaintiff's petition, and the bill of exception taken to the ruling of the court on the motion for oyer, he would have been entitled to a reversal of the judgment, but by his amended answer, he has cured the defective pleading of the plaintiff, by specially attacking the plaintiff's title, which he describes in the amended answer. After filing the amended answer, the defendant was precluded, by his allegations, from pretending ignorance of the plaintiff's title, and his only remedy, if surprised, was to move for a continuance, or a new trial, neither of which appears to have been done.

On the merits, we find that the plaintiff is in possession of a patent apparently regular in form, and that the settlement of the defendant has been suspended and his entry declared illegal by the Commissioner of the General Land Office at Washington, and the defendant has been notified that on making the proper affidavit, his purchase money will be refunded him. Moreover, it is not alleged nor shown, that the defendant had a prior equitable right which has been infringed by the patent granted plaintiff's vendor. We are without power, under the circumstance, to interfere with the action of the General Government in this matter, and whilst we find that the plaintiff's patent is recognized in the proper department at Washington, we will not hold, (even in a case of doubt,) that it had been granted for lands not subject to entry and sale.

The judgment ought to have reserved to the defendant the right to remove the improvements placed upon the land, unless the plaintiff should elect to pay him the value of the materials and the price of the workmanship.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be amended, so as to reserve to the defendant the right to remove the constructions and works put upon said tract of land by himself, unless the plaintiff shall, within thirty days after this decree becomes final, declare by writing, deposited with the Clerk of the lower court, her intention to keep the constructions and works upon said land, and pay the value of the materials and price of workmanship. And it is further ordered, that said judgment be in all other respects affirmed, and that the appellee pay the costs of appeal.

Re-hearing refused.

A. Miltenberger *v.* J. P. Elam, Tutor, et als.

Tutors have by law the *administration* of the estates of their pupils, but their powers of administration do not embrace an authority to contract debts. Any one who deals with a tutor, at least any one who lends or advances money to a tutor for account of his ward or pays drafts, exceeding the funds in his hands to their credit, unless said tutor acts within the limits of a previous legal sanction, does so at his peril. The minors being under an absolute disability, it is incumbent on the party who seeks to recover from them, to show, that their indebtedness was contracted in accordance with the specified legal proceedings, or that the consideration of the indebtedness inured to their advantage, to the extent claimed.

APPEAL from the District Court of the parish of Catahoula, *Barry*, J.

Taliaferro and *McGuire & Ray*, for plaintiff and appellant. *Mayo*, for defendants.

Lea, J. The plaintiff sues for a balance alleged to be due to him on a running account between himself, as a commission merchant and factor, and *Samuel Glenn*, the former tutor of the defendants, who at the time were minors. In 1847, *Samuel Glenn* was appointed tutor to the defendants, and acted as such until his decease in June, 1852. The property of the minors consisted of a plantation and slaves, which the tutor continued to work on their account.

In 1851, he opened an account with the plaintiff, which was not closed at the time of his death.

This account contains items for drafts accepted and paid, cash advanced, plantation supplies furnished, interest, commissions, &c.

After the death of the tutor, in consequence of a contest for the new tutorship, *Levi Morris* was appointed provisional administrator of the estate, and shipped the crop of 1852, part of it to the plaintiff, and the remainder elsewhere.

It is contended on the part of the defendants, that when *Glenn* was appointed tutor, the estate was but little in debt; that he squandered the revenues of the minors, and contracted debts without any necessity therefor, and without legal authority to an amount exceeding $20,000, for which they are in no manner bound; that at the time *Glenn* was their tutor, he had the management of three or four separate plantations, two of which were in the vicinity of the Elam plantation, and that he had a large family of his own to support; that a large portion of the supplies were furnished for said *Glenn's* individual use, or for the use of the other plantations under his control, and for his family and friends, and that a large amount of the supplies were neither needed nor used on the plantation of the defendants; and lastly, that of the account, as made up, a large portion is for illegal, compound, and usurious interest, and illegal charges.

The general principles by which the rights of the parties must be determined, we consider as well settled. Those who contract with the representatives of minors, know that those with whom they deal, are acting in a fiduciary capacity, and moreover, that they are acting on behalf of those who are by the law deemed incapable of acting for themselves. Tutors have, by the law, the *administration* of the estates of their pupils, but the powers of ad-

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ministration do not embrace an authority to contract debts. This is not left to inference, the prohibition is absolute.

"The tutor cannot borrow for the minor, without an authority from the Judge, granted on the advice of a meeting of the family." The object of the law is manifest; it was intended to prohibit the tutor from doing precisely what it is contended in this case that he had a right to do, to wit, to embarrass the estate of the minors with debts, thus practically alienating it. Any one who deals with a tutor therefore, at least any one who lends or advances money to a tutor for account of his ward, or pay, drafts exceeding the funds actually in hand to their credit, unless said tutor acts within the limits of a previous legal sanction, does so at his peril. The minors being under an absolute disability to contract, it is incumbent upon the party who seeks to recover from them to show that the indebtedness was contracted in accordance with the specified legal proceedings, or that the consideration of the indebtedness inured to their advantage, to the extent claimed. To recognize the doctrine contended for by the plaintiff's counsel, would place the estate of every minor entirely at the disposal of a corrupt or even an improvident tutor. The law has wisely provided against any such result.

It is unnecessary to inquire whether the plaintiff was or was not wrong in placing the proceeds of the shipment made by *Morris* to the account of the minors as contracted by *Glenn*. If the plaintiff has a good and valid claim against the minors, sufficient to absorb the proceeds of that shipment, he is entitled to a judgment in his favor.

The only question then is one of fact. To what extent has the plaintiff advanced money, or furnished supplies, which are shown to have inured to the advantage of the minors; and after crediting him with such sum, what balance exists in his favor or aginst him?

The plaintiff is chargeable with the nett proceeds of sales of cotton amounting in all to $16,114 41, including the proceeds of the shipment made by *Morris*.

The evidence shows that the drafts given to *Emerson*, to *Buchanan, Carroll & Co.* and to *Mrs. Thomas*, amounting in all to $4324 25, were justly chargeable to the estate, having been given in liquidation of actual liabilities due by the succession; nor is there any dispute about the supplies furnished by the plaintiff after *Morris* had charge of the place, these amounted in all to $739 22, making, with the undisputed drafts, an aggregate credit of $5063 47. The remainder of the items in plaintiff's account are disputed. The plaintiff's claim, if allowed, would not only absorb the entire proceeds, amounting as above stated to $16,114 91, but would leave the defendants indebted to the plaintiff in the sum of $3520 47; an indebtedness growing out of transactions covering a space of less than two years. The very nature and extent of the transactions were sufficient to put a prudent person upon inquiry, especially when it is considered that they were all based, as is alleged by counsel, upon the supposed ultimate liability of minors.

It is manifest, that under the pleadings and evidence, the minors can be held responsible only for such advances as were spent in liquidating debts actually due by them, and such supplies as are shown to have enured to their advantage. A reference to the evidence shows that the tutor *Glenn* mixed up the monied transactions on behalf of the minors with his own, and sometimes with those of his neighbors, in such a manner as to make it impossible to distinguish between them with any certainty. The evidence is altogether too vague and uncertain

to maintain a judgment for any specific amounts, except those above referred to.

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The District Judge has allowed to the plaintiff a credit upon the disputed items for supplies and advances, amounting to $4255; of what items this aggregate is made up we are not informed, but it exceeds any amount which we consider to be established by the evidence, and is perhaps based upon what may be considered an approximative and equitable estimate of the amount of supplies probably needed on a plantation such as that of the minors during the period of time in which *Glenn* was tutor.

The defendants have acquiesced in the judgment of the District Court, and nothing in the evidence would justify us in making any change in favor of the plaintiff.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

ALEXANDRIA.

AUGUST, 1856.

PRESENT:

HON. E. T. MERRICK, *Chief Justice.*

HON. A. M. BUCHANAN,
HON. H. M. SPOFFORD,
HON. J. N. LEA,
} *Associate Justices.*

SUCCESSION OF M. AARON.

Creditors of the succession of a deceased husband cannot question the constitutionality of the Act of 1852, to provide a homestead for widows, on the ground that it violates a marriage contract made prior to the passage of the Act.

Where the claim of the widow under the Homestead Act is set up by way of opposition to a tableau of distribution, the administrator may offer evidence to show that she has appropriated property, to her own use, belonging to the succession of her husband, or may urge any other defence tending to reduce her claim.

APPEAL from the District Court of the parish of Rapides, *Ogden*, J.

Hyman & Cazabat, for administrators and appellants. *Barlow*, for opponents and appellees.

MERRICK, C. J. The administrator has appealed from a judgment recognizing the claim of *Mrs. Aaron* on behalf of herself and the minor children of the deceased, to one thousand dollars, under the Act approved 17th March, 1852, entitled "An Act to provide a homestead for the widows and children of deceased persons." Acts of 1852, p. 171. The first ground upon which he hopes to obtain a reversal of the judgment of the court is the alleged unconstitutionality of the Act of the Legislature in question. The question of the constitutionality of this Act was discussed in the case of the *Succession of Lanzetti*, 9 An. 329. It was there held constitutional, in this respect, that it did not violate Article 115 of the Constitution. We see no reason to overrule that decision. But it is further urged, that inasmuch as the parties were married in 1848, the Act violates the obligation of the marriage contract, and is therefore unconstitutional. Without adverting to decisions on analogous statutes, it is sufficient to say that the Legislature has power to change or regulate the order of descents. If in so doing it has violated any contract, it has not been with the administrator or creditors of the deceased. The only per-

SUCCESSION OF AARON.

sons who could complain of such violation of a contract, if it existed, would be the husband and wife or their heirs. In this instance the wife and the heirs of the deceased, so far from making complaint that the contract of marriage has been violated by the statute of 1853, are claiming under its provisions.

The second ground urged for a reversal of the judgment is that the Judge of the lower court erred in refusing to admit the evidence of offered by the administrator to show that the widow had interfered with the community by concealing and disposing of a gold watch, horses, cows and calves, seventy dollars in money from *S. Bernestien*, a claim against *Gentry*, about $1500 in cash, and the books, accounts and papers belonging to the community. The testimony was refused by the court, on the ground that there was no allegation of such intermeddling and malfeasance, and to admit the evidence would be to take the party by surprise. The demand of *Mrs. Aaron* is set up by way of opposition to the tableau of distribution. This opposition was itself in the nature of an answer and required no replication. The administrator could, therefore, urge any defence he had to make, whether by general denial, confession and avoidance or peremptory exception. If the opponent is taken by surprise by the proof, the remedy is by a continuance or a new trial upon the proper showing for that purpose. The ground stated was insufficient to exclude the testimony.

On the trial of a question of this kind, it is competent on the part of those who oppose the claim of the widow and children, to show the amount of property they hold in their own right, and also the amount of property they have received and used belonging to the succession since it was opened. The widow can only recover the balance of $1000 after these sums are deducted. Whether the fraudulent concealment and use of property belonging to the succession by the widow may or may not occasion a forfeiture of some of her rights, is not now necessary to determine. If such proof should hereafter be adduced, it can then be considered.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that this cause be remanded to the lower court, with instructions to receive the testimony of the witnesses, *James C. Wise* and *Samuel Bernestien*, and others, to prove the facts in the bill of exception herein mentioned, and in other respects to proceed according to law; and it is further ordered, that the appellee pay the costs of the appeal.

W. H. BASSETT *v.* L. BARBIN, Sheriff.

An Act of the Legislature, directing the Sheriff of a parish to assess and levy a tax within a School District of the parish, to pay a judgment against the School Directors of such district, is not unconstitutional.

A peremptory mandamus will issue in such case, to compel the Sheriff to make the levy.

APPEAL from the District Court of the parish of Avoyelles, *Ogden*, J. *S. L. Taylor*, for plaintiff and appellee. *Hitchbern*, for defendant and appellant.

BUCHANAN, J. This is an application for a *mandamus* to compel the Sheriff of the parish of Avoyelles, to assess and levy a special tax within a certain

school district of that parish, in obedience to the requirements of an Act of the Legislature, approved March 15th, 1855, entitled an Act for the relief of *William H. Bassett.* Session Acts, No. 229, page 274.

The defendant resisted the application; and after hearing, the District Court ordered a peremptory *mandamus* to issue, as prayed for; from which judgment the defendant has appealed.

The reasons shown by appellant against this application for a *mandamus*, may be comprised under three heads:

1. That the Statute of 1855, was specially directed to the predecessor in office of respondent.

2. That said Act of the Legislature is unconstitutional.

3. That the statute does not designate with sufficient accuracy, the limits of the district within which the tax is ordered to be levied.

The statute in question being composed of only one section, we will preface our remarks upon the several points presented in this case, by transcribing it, at full.

"Be it enacted, &c. That it shall be the duty of the Sheriff of Avoyelles, to assess and levy a tax in addition to the State tax, equally on all taxable property within the Second School District of said parish of Avoyelles, sufficient to pay the judgment in the case of *W. H. Bassett* v. *School Directors of the Second District*, in the Thirteenth Judicial District Court of the parish of Avoyelles, together with the costs of collection, and to collect the same and pay to the plaintiff or to his assigns, the amount of said judgment and costs; and the fees of collection to be the same as the fees for collecting the State tax, and thereafter, if any balance remains, to pay the same over to the School Directors of said Second School District."

It is very clear that this statute is not directed to any one incumbent of the office of Sheriff of the parish of Avoyelles, more than to another. It was probably in the contemplation of the Legislature, that the duty would be performed by the Sheriff in office at the time of the promulgation of the law; but it surely was never intended that that functionary could nullify the law by neglecting or refusing to execute it. When he vacated the office without performing the duty thus imposed, his successor, the present incumbent, was equally bound to perform it, by the terms of the Act. The only plea that could have been listened to, on his part, having reference to his predecessor, would have been, that his predecessor had executed the law. But that is not pretended.

The respondent asserts the Act of the Legislature to be unconstitutional, for two reasons: first, because it is retroactive in its operation; second, because the provision in the Constitution that the Legislature shall provide for the support of public schools by general taxation, excludes the power to impose a special tax upon a particular district or parochial subdivision for a purpose connected with public education.

The right of this executive officer to raise these constitutional questions, is by no means clear. Such a discussion would be much more appropriate in the mouth of one of those from whom the tax might be exacted.

We are informed by the record, that this law was promulgated before the respondent became Sheriff. The duty of assessing and levying this special tax, appertained, therefore, to the office when he was elected. He has accepted the office with all the functions belonging to it by law; and he has no busi-

ness to question the validity of those legislative enactments which constitute his official rule of action. As well might he, if called upon to fulfil that sternest of his duties, the execution of a capital sentence, question the constitutionality of capital punishment, or the constitutionality of the particular law under which the convict had been prosecuted. Inasmuch, however, as these questions of constitutionality of section 229 of the Acts of 1855, might possibly be made the means of protracting still further, in the hands of other parties, a litigation which has already lasted too long, we will declare our settled opinion to be, that the Act of the Legislature in question, violates no provision of the Constitution.

The respondent also objects, that the statute does not inform him with sufficient precision, what is the parochial subdivision within the limits of which the special tax is to be levied. This is a matter, which according to the evidence before us, can offer no difficulty. There are two, perhaps three, Second School Districts in the parish of Avoyelles, but which of them is intended, cannot but be known to the parochial authorities. The claim of the relator against the School Directors, for which he has obtained judgment nearly six years ago, and to enforce which, after exhausting all other means, the sovereign power of the State has been called into action, originates in the building of a school house by relator. The site of that building must of course be a matter of notoriety, and must identify the district upon which the special tax is imposed.

Judgment affirmed, with costs.

SUCCESSION OF A. BALZARETTI—Opposition of ADÈLE MICHAMP.

The claim of a widow, under the Act of 17th March, 1852, providing a homestead for widows, &c., is not entitled to preference over those who were creditors of the community prior to the passage of the Act.

APPEAL from the District Court of the parish of Natchitoches, *Chaplin* J.

Hamilton & Chaplin, for opponent and appellee. *J. B. Smith* and *H. Sofford*, for administrator and appellant.

SPOFFORD, J. *Antonio Balzaretti* died in November, 1853, leaving an insolvent estate and a widow and children in necessitous circumstances.

One *Louis Dupleix* administered upon the succession.

The opponent, widow of the deceased, on behalf of herself and her minor children, obtained a judgment against the administrator recognizing her right to claim $1000 out of the succession, under the Act of March 17th, 1852, entitled "An Act to provide a homestead for the widows and children of deceased persons," (Sess. Acts, p. 171,) other creditors of the succession were parties to that suit.

Subsequently, the administrator filed an account and tableau, upon which it appears that the claim of the widow was postponed to those of divers creditors whose claims were sufficient to absorb the estate, upon the ground that their debts were contracted before the passage of the Act of March 17th, 1852.

The widow opposed the homologation of the tableau, and claimed a priority over all the creditors except those who had incurred expenses for the sale of the property; this opposition was sustained by the District Judge, and the creditors generally have appealed.

The court erred in disturbing the classification upon the administrator's tableau, to the prejudice of the appealing creditors.

In the *succession of Taylor*, 10 An. 509, we held that the Statute of March 17th, 1852, should not be so construed as to have a retroactive effect and to oust the claims of *bonâ fide* creditors before the passage of the Act. The language of the Statute does not require such a construction; and, unless the obvious meaning of this language imperatively demands it, we should not presume that our lawgiver intended to subvert, at once, the rules of logic and of justice.

This interpretation of the statute, to which we still adhere, renders it unnecessary to inquire whether it was competent for the Legislature, under the Constitution, to enact a law which would override and defeat the claims of anterior creditors upon the property of their debtor, by introducing a retrospective privilege.

The appealing creditors are not concluded by the judgment obtained by the widow *Adèle Michamp* against the administrator; they were not parties to the proceedings. That judgment did not settle the rank of the creditors *inter se*. That is done upon a tableau of distribution. *Succession of Day*, 2 An. 896.

There is evidence in the record that the requisite notices were published.

It is, therefore, ordered that the judgment of the District Court be reversed, and it is ordered, adjudged and decreed that the opposition of *Adèle Michamp*, widow and tutrix, to the account and tableau of distribution filed by *Louis Dupleix*, administrator, be overruled, and that the said account and tableau be homologated and confirmed, the cost of the opposition and of this appeal to be paid by opponent and appellee.

W. Hamilton *v.* Lewis Phillips et al.

Where a party whose interest is affected by the judgment is not made one of the obligees in the appeal bond, the appeal will be dismissed on motion.

APPEAL from the District Court of the parish of De Soto, *Land*, J. *Mitchell*, for plaintiff and appellant. *Elam*, for defendants.

Spofford, J. The motion to dismiss the appeal must prevail.

The object of the suit is not only to set aside the Sheriff's adjudication to *Phillips* of property seized in the hands of *Clancy* as a third possessor, but to have the property decreed to belong to *Clancy*, the plaintiff's vendee, and sold to pay the plaintiff a part of the price alleged to be still due him by *Clancy*, and for which he prays judgment against the latter.

Clancy was cited, and answered in the court below through a curator *ad hoc*, appointed to represent him in his absence.

There was a judgment against the plaintiff on all his demands, and he has appealed.

The appeal bond is given in favor of all the other parties defendant, except *Clancy*, who is not named therein.

He should have been made a party to the appeal, and a bond given in his favor. *Armstrong* v. *His Creditors*, 8 An. 368; *Hewson* v. *Creswell*, 10 An. 232; *Lobelle* v. *Lobelle*, 5 An. 174.

It is, therefore, ordered, that the appeal be dismissed, at the appellant's cost.

Heirs of Adelaide Bordelon v. Heirs of George Baron.

The terms "*caused it to be written*," in Art. 1574 C. C. mean that the testator must have himself dictated the provisions of a will reduced to writing by another.

A nuncupative will, written by one who does not understand the language in which the will is dictated, but who receives his instructions from the testator, through an interpreter, is invalid.

A nuncupative will, under private signature, which has been read to the testater in a language which he could not comprehend without the aid of an interpreter, is invalid.

It is necessary to the validity of such a will that the witnesses should understand the language in which it is written and read.

APPEAL from the District Court of the parish of Avoyelles, *Ogden*, J. *Barlow & Waddill*, for plaintiffs and appellees. *Taylor & Lewis*, for defendants and appellants.

Spofford, J. The appellees, as collateral heirs of *Adelaide Bordelon*, sue to recover from the heirs of her deceased husband, *George Baron*, her succession, consisting of the sum of twenty-eight hundred dollars, inherited by her and received by her said husband, and one-half of the estate in community between them, amounting to the further sum of thirty-one thousand two hundred and seventy eight dollars.

The appellants' title to the property in litigation rests upon the last will and testament, of the nuncupative form, under private signature, made by the deceased, *Adelaide Bordelon*, on the 9th of May, 1835, and which was admitted to probate on the 17th of February, 1853. The testatrix died in the month of January previous, and her husband, *George Baron*, in the April following. The testatrix survived her mother and only forced heir living at the date of the will, and at the time of her death had no issue born of the marriage.

The present action has a threefold object: first, to have the nullity of *Madame Baron's* testament declared for alleged vices in the confection thereof; secondly, to enforce an alleged compromise between the parties, whereby they are said to have agreed to set aside the will and partake the property in certain proportions; and thirdly, in case the former demands should fail, to procure a judicial construction of the will, which will defeat the pretensions of the defendants under the bequest to *George Baron*, and leave the property to descend to the plaintiffs as heirs at law.

The opinion of the District Judge was favorable to the views of the plaintiffs, on the first and third of the foregoing points; and the defendants have appealed from a judgment overruling their claims under the will.

The testament in question is of the following tenor:

"Parish of Avoyelles, State of Louisiana. In the name of God, amen. I, *Adelaide Bordelon*, of the parish of Avoyelles and State of Louisiana, considering the uncertainty of this life, and being of sound and perfect mind and memory, blessed be the Almighty God for the same, and in consideration of the love and affection which I entertain for *George Baron*, my true and lawful husband, and in consequence of my having no children or legitimate descendants, do make and publish this my last nuncupative will and testament, by private act, in the manner and form following, to wit:

"I do give and bequeath unto my true, devoted and beloved husband, *George Baron*, the whole of my property that I now possess, and which I may possess

at my death, including movables, immovables, slaves, rights and credits. But in case there should be, at my death, any heirs whom the law may deem forced heirs, then and in that case I do bequeath all that part of my property which by law I may be allowed to dispose of, whether movables, immovables, slaves, rights and credits, unto my beloved husband, *George Baron*, to have and to hold the same unto the said *George Baron*, my beloved husband, by the title of *donation mortis causa*. This donation is made upon the condition that if the said *George Baron*, my husband as aforesaid, should die without leaving children of the present marriage living at the time of her decease, that then and in that case, the aforesaid property shall revert to and become the property of myself, as if this donation had never been made. Finally, I do by these presents appoint my beloved husband, *George Baron*, my sole executor of this my last will and testament, and he is hereby authorized and empowered to take possession and make an inventory of my estate, without the intervention of any court of judicature in this State or any State of the Union.

"In testimony whereof, I have hereunto set my hand this day, by making my ordinary mark, not being able to write my name. Her

"Signed *Adelaide ✕ Bordelon.*

"May 9th, 1855. mark.

"The above named *Adelaide Bordelon* presented this paper, and declared the same to be her last will and testament, in the presence of *James Rey, Jr., John P. Sanders, Albert G. Morrow, Leandre Guillot* and *Ralph Cushman*, all residing in the parish of Avoyelles, who were called upon by the said *Adelaide Bordelon* to witness the same. The above will was written from her dictation by *Ralph Cushman*, one of the witnesses, and that she signed the same in our presence, after having been read to the testatrix by *Ralph Cushman*, one of the witnesses, to the other witnesses, in an audible and distinct voice, before signing.

"Signed, *Rey, Jr., John P. Sanders, Albert G. Morrow, Leandre Guillot, Ralph Cushman.*

"May 9th, 1855. Ne varietur: *J. H. Barbin*, Clerk."

Upon the first point, relative to the execution of the will, the proof is that the vernacular tongue of the testatrix was French, and that she could neither speak nor comprehend, in any degree, the English language; that the original, from which the will actually signed was copied, was written by *Ralph Cushman*, who, at the time, could not speak the French language, and could understand but a few words of it when spoken, so that, without the aid of an interpreter, he was incapable of transacting ordinary business with persons who spoke only French; that from the *projet* in his handwriting, his wife copied the foregoing instrument down to the proces verbal of the signing, which he wrote himself in presence of the witnesses; that he read the will in English to the testatrix, in presence of the witnesses; that one of the other witnesses attempted to make a literal translation of it to the testatrix at the same time, but, from ignorance of one of the languages, or of legal terms, succeeded so badly that another witness occasionally interfered to help him; but there is no proof of the mode by which *Cushman* was enabled to write a will for a testatrix with whom it was impossible for him to communicate by any language common to them both; or of the time when and place where the original draft was made.

A bill of exceptions was taken to the ruling of the District Judge in admitting testimony to show *Ralph Cushman's* ignorance of the French language.

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The objection was that such a fact was not put at issue by the pleadings. No surprise at the testimony was averred, and no continuance appears to have been asked, for the purpose of procuring rebutting evidence.

We do not perceive that the court erred. An amended petition, filed some time previously, had set forth, as a specific ground for annulling the will, that, from entire ignorance of the English language, the testatrix was absolutely disqualified from dictating her will in the language in which it was written, and further, that the said will was not written by the witness *Cushman*, as alleged. Now the proces verbal alleged, that "the will was written *from her dictation* by *Ralph Cushman*," and the evidence was competent, as tending to establish the averments of the amended petition.

Upon these facts, we are to pronounce whether the will can stand under our law as a valid will in the nuncupative form under private signature, for it is not pretended, that it meets the requirements of any other form.

The Louisiana Code declares, that such a testament "must be written by the testator himself, or by any other person from his dictation; or even by one of the witnesses, in presence of five witnesses residing in the place where the will is received, or of seven witnesses residing out of that place; or it will suffice if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament, or caused it to be written, out of their presence, declaring to them that that paper contains his last will." C. C. 1574.

"In either case the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest, in presence of the testator; it must be signed by the testator, if he knows how or is able to sign, and by the witnesses, or at least by two of them, in case the others know not how to sign; and those of the witnesses who do not know how to sign must affix their mark.

"This testament is subject to no other formality than those prescribed by this and the preceding Article." C. C. 1575.

What does the Article 1574 mean by the expression "caused to be written?" Does it mean merely that the testator may order some person to write a will for him, without intimating what its contents are to be, and then, without understanding what its provisions are, or even the language in which those provisions are couched, may make it his own by declaring it to be his last will in the presence of the competent number of witnesses?

We think not. The very term *will* implies an independent volition. To make a will at all, the testator is required to have a *disposing* mind, capable of originating, and which does originate, the plan whereby the descent of his property is to be regulated after his death. The term *nuncupative* also, as applied to this form of wills, is not without a meaning; it shows that the lawgiver contemplated a declaration by the testator of the intentions which he announces from his own mouth, although they may be clothed in a written form by the hand of another. But in all cases the office of the other person who writes the will is that of an amanuensis. If his is the controlling mind, if he originates and prepares the dispositions which are but imperfectly understood by the testator, the will is not the will of the latter but of the former. So also, if he writes from the dictation of another person than the testator. See *Heirs of De Bardelabon* v. *Averett*, 11 An.

But we are not left to inference upon this subject. So provident is the law respecting that highest of all the rights of property—the owner's right of

directing its descent by a sort of posthumous dominion—so jealous is it of any interference or suggestion on the part of other persons, that it has disclosed, in positive terms, how the thoughts of the testator shall be conveyed into the instrument which must faithfully embody them in order to constitute his *will*.

"Testaments, whether nuncupative or mystic, must be drawn up in writing, either by the testator himself or by some other person *under his dictation*, (soit par le testateur lui même, soit *sous sa dictée* par toute autre personne." C. C. 1568.

This injunction applies equally to both classes of nuncupative testaments. When, therefore, the subsequent Article 1574 speaks of a will which the testator has "caused to be written," it means that he must have caused it to be written in the only mode pointed out by the law itself, *i. e.* by some other person under his dictation. The draftsman who frames the will must take his instructions from the mouth of the testator. To do so he must comprehend the testator's language. See *Gonzales* v. *Gonzales*, 13 L. 105.

The wisdom of this provision of the law is apparent. Nothing is more evanescent than spoken words, nothing more liable to be changed and warped than such words passing successively from mouth to mouth. By writing under the dictation of the original speaker, an amanuensis may stamp his thoughts correctly upon paper, but by writing under the dictation of another person, who professes to report, from his own memory, the original speaker's words, there is a double chance for error; and the chances of error increase in geometrical progression with the number of intervening oral reporters. It is partly upon this principle that hearsay testimony is excluded by courts of justice.

But, without going further into the reason of the rule, it suffices that the rule is in the Code, and we cannot swerve from the duty of applying it to the cases that come before us for adjudication. It was manifestly impossible for *Ralph Cushman* to have written the will in question *under the dictation of the testatrix* in the sense of the law, although he doubtless thought that he had substantially complied with the directions of the Code ; and, therefore, no imputation is cast upon his good faith. At the time of the trial in the court below, he was no longer alive to explain the process by which he supposed he had attained to a knowledge of the wishes of the testatrix. But, one person at least must have stood between him and her, upon whose honesty, accuracy of recollection, and skill in translating French into English, the character of the will must depend. Perhaps more than one person intervened between the maker and the writer of the will. We know not who they were, for this subject is wrapt in obscurity. However reputable the character and fair the conduct of the parties who do appear in connection with this testament, we are compelled to pronounce its nullity.

If we once depart from the salutary rule that every will, unless written by the testator himself must be written under his dictation, we shall render it possible for any sort of a will to be palmed upon a person *in extremis*.

Without conceding that this radical defect in drafting the testatment of *Madame Baron* could be cured by a subsequent compliance with the requisites of Article 1575 of the Code, we may remark that the fact of such compliance is exceedingly doubtful. That Article declares that the will must be read by the testator or to the testator in the presence of the witnesses. This is not an empty form. It is intended to guard against imposition, and to verify the instrument as the real and unchanged will which the testator has writted or dictated. A

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deaf person cannot be a witness, because he cannot hear this reading and help to verify it. The reading is of no avail if the testator cannot comprehend the language. The reading of this will in English conveyed no information to *Madame Baron*, and did not enable it to say that it was her will. The attempted oral translation of it into French by one of the witnesses in her presence, did not enable the witness *Cushman* to say that she approved what he had written, for he could not know that the same ideas were conveyed by the French interpretation, as were embodied in the English original. The remarks of the court in *Herbert's Heirs* v. *Herbert's Legatees*, 11 L. 365, seem to indicate that this defect also would vitiate the execution of the will.

It is doubtful, in the present instance, whether the testatrix ever understood the will she signed.

Having found the first branch of the case in favor of the plaintiffs, we are spared the necessity of endeavoring to interpret an instrument which is ambiguous, if not incomprehensible upon its face.

Judgment affirmed.

BUCHANAN, J. The parties have agreed that the decree of the court rendered at this term and affirming the judgment of the District Court of Avoyelles, should be amended so as to conform to the evidence in the record in relation to the amount of the paraphernal rights of *Mrs. Baron.*

The petition in the cause states the amount of those rights to be two thousand eight hundred dollars, and judgment was rendered by the District Court for that amount.

The case was argued before us on appeal entirely in reference to the main question of the validity of *Mrs. Baron's* will, without any intimation that the amount of the paraphernal right stated in the petition, and recognized in the judgment, was not in accordance with the evidence.

The judgment was affirmed generally. Since this affirmation it is suggested, in a petition for re-hearing, by counsel of appellants, that the notarial receipt of *Mrs. Baron* to the administrator of her mother's estate, given in evidence on the trial of the cause, shows that the amount received by *Mrs. Baron* from the succession of her mother was $2336 87, instead of $2800.

The counsel of appellees admits the correctness of this suggestion, (which is also apparent from the record,) and has consented that the judgment be amended accordingly, without the formality of a re-hearing.

It is, therefore, adjudged and decreed that our judgment heretofore rendered in this case be set aside; that the judgment of the District Court be amended; that the plaintiffs recover of the succession of *George Baron* the sum of twenty-three hundred and thirty-six dollars and eighty-seven cents, instead of twenty-eight hundred dollars, with five per cent. per annum interest from January 31st, 1853, until paid; that in other respects the judgment of the District Court be affirmed; that the costs of the District Court be paid by defendants, and those of appeal by plaintiffs and appellees.

J. Calvit, Tutor, &c., v. Mulhollan & Carnal.

An action will not lie against third parties in possession of lands derived by regular conveyance from plaintiff's ancestor, without first impeaching, by direct action, the conveyance made by such ancestor.

Appeal from the District Court of the parish of Rapides, *Chaplin*, J.

A. N. Ogden, jr., for plaintiffs and appellees. *Elgee*, for defendants and appellants.

Merrick, C. J. *James Brewster* died in July, 1821, leaving the tract of land in controversy in this case, as a part of his separate estate, and seven children his heirs at law. Two of these children, *Hazard* and *Elizabeth Brewster*, died without issue in the year 1822, and *Nancy Long*, another, the wife of *William Long*, died in the year 1823 or 1824, also without issue.

On the 24th day of January, 1824, (whether before or after the death of *Nancy Long*, does not appear,) by act under private signatu re duly recorded, *Martha Calvit*, one of the children of *James Brewster*, and the mother of the plaintiff, assisted by her husband, *Isaac Calvit*, acknowledged to have received her portion of *James Brewster's* estate—"being all claim on either real or personal property in the following articles, viz: one negro girl named *Judy*, stock of cattle, fifty head more or less in numbers as may be found, one mare named Durkis and her colt;" and, in consideration thereof, they granted a discharge in full to *Smith W. Brewster*, the executor of the said estate.

On the 17th day of October of the same year, 1824, *James Brewster*, *Madison Brewster* and *Martha Calvit* assisted by her husband, by act under private signature recorded in the parish Judge's office, "relinquished, assigned and set over" to *William Long* the husband of *Nancy Long*, deceased, all their right, claim and pretensions to the property of his, then late wife, *Nancy Long*, deceased. No consideration is expressed as having passed from said *William Long*.

William Long appears to have considered himself as invested with his deceased wife's interest in the succession of her father, and on the fifth day of September, 1826, *Smith W. Brewster*, *James Brewster* and *William Long*, claiming to hold three-fourths of the inheritance of *James Brewster*, deceased, by inheritance and purchase, sold, by notarial act, duly recorded, to *Carter Beaman* three-fourths of the tract of land in controversy. The defendants claim under this deed and a subsequent conveyance of the remaining one-fourth, the interest of *Madison Brewster*; said *Smith W.*, *James*, *Madison* and *Martha*, who had executed said acts under private signature, being the only surviving children of said *James Brewster*, deceased.

Martha Calvit was a minor, emancipated by marriage, when she signed the acts under private signature. She was of the age of majority on the 3d day of May, 1827, and was consequently a major for nearly nine years before her death Whether she was in possession of or had sold or disposed of the property which she acquired under the act of 24th January, 1824, during that period, the record does not inform us.

The Judge of the lower court was of the opinion that the last mentioned act was binding upon the plaintiffs notwithstanding the minority of their mother,

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and as to the estates of *Hazard*, *Elizabeth* and *Nancy*, that prescription had run against them as vacant successions. The defendants did not introduce any proof to show that as to these estates no inventory or other mortuary proceedings were had, but left the court to infer that they were vacant for want of proof on the subject. See *McCollogh* v. *Minor*, 2 An., 466.

Without expressing any opinion on the merits of the plea, which case we leave entirely open, we think that so long as the act of 24th of January, 1824, remains unrescinded or not annulled, the plaintiffs are precluded from instituting an action against third parties who hold under it. The plaintiffs should have brought their direct action against the parties to that instrument as well as those who hold under to annul it, and then if it appeared that they were in a condition to return the slave *Judy* and her increase, and the other property their mother acquired under said instrument, and it should not be adversely shown that after her majority the said *Martha Calvit*, either expressly or tacitly, ratified said proceeding, the plaintiff may be entitled to relief unless barred by prescription. 10 L. R. 269; 9 L. R. 305; 1 An. 38; 11 M. 443, and 2 An. 466.

We have already observed that, it does not appear that *Nancy Long* was dead at the period of said act. We think that the judgment of the court ought not to operate as an absolute bar to further proceedings on the part of the plaintiff.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and now proceeding to pronounce such judgment as ought to have been rendered by the lower court, it is ordered, adjudged and decreed by the court that there be judgment against the plaintiff's demand and in favor of the defendant, as in case of a non-suit; and it is further ordered, that the defendants and appellees pay the costs of the appeal, and the plaintiff pay the costs of the lower court.

J. M. SOLIBELLAS *v.* THE CONSOLIDATED ASSOCIATION, &c.

The offspring of slave mothers, born whilst the mothers are affected by a mortgage or privilege, are born subject to the same mortgage or privilege.

APPEAL from the District Court of the parish of Rapides, *Cushman*, J.

W. B. Hyman, for plaintiff. *Elgee* and *Hyams*, for defendants.

SPOFFORD, J. (LEA, J., recused.) The offspring of slave mothers, born whilst the mothers are affected by a privilege or mortgage, are born subject to the same privilege or mortgage. *Bonner* v. *Mobile*, 3 An. 609.

As to the other point in this case, we are not called upon to decide whether parol testimony is admissible to show a mistake in the age of a slave, as stated in a notarial act of mortgage, for no objection was made to the introduction of the parol evidence in this case. From the testimony adduced, we are satisfied that the slave *Nancy*, for whose proceeds the plaintiff and the intervenors are contending, was included in the mortgage to the defendants.

The judgment is, therefore, affirmed, with costs.

G. Figuras v. Administrator of C. F. Benoist.

An exception of want of amicable demand will not lie when defendant, prior to being sued, has refused payment of a smaller sum than that claimed in the petition. C. P. 984.

The statement by an administrator that "he could not pay a certain claim until he had rendered his tableau," is not a sufficient acknowledgment of debt to bind the estate.

Although the witnesses are neither nurses nor physicians, they are competent to prove the value of the services rendered by a nurse.

APPEAL from the District Court of the parish of Natchitoches, *Chaplin*, J. *A. H. Pierson*, for defendant and appellant.

Merrick, C. J. This suit is brought to recover of the succession of *C. F. Benoist* $1029, for services rendered by the plaintiff and his wife as nurses during the prevalence of the yellow fever in 1853 to the deceased, his family and negroes, and for a small bill of medicines furnished. The personal services were alleged to be worth $1000.

The record furnishes no proof that any medicines were furnished, as alleged. The Judge of the lower court allowed $525 for the services as nurses, and the defendant appealed.

The defendant having filed, *a limine litis*, the exception of the want of an amicable demand under Article No. 984 of the Code of Practice, urges his exception before this court. It is in proof, that before the institution of the suit, the plaintiff presented to the administrator of *Benoist's* succession his claim for the same services and medicines, but estimated at $500 for the attention in nursing and $29 for the medicine, instead of $1029 for which the suit was brought. The *claim* presented to the administrator was the same, although there was a difference of the value of the services on the two occasions. C. P. 984. The Judge of the lower court correctly remarks that "it would be doing a vain thing to present a larger account when the smaller was refused." As a party does not lose his claim by demanding more than is his due, the amicable demand must be deemed sufficient.

The statement by the administrator in reference to the account of $29, that "he could not pay it until he had rendered his tableau," is not a sufficient acknowledgment by an administrator that the medicines were furnished, or the estate indebted in that sum.

In regard to the services rendered, the proof shows that the greatest consternation prevailed in the neighborhood at the time, and that nurses could not be obtained at any price. The plaintiff is shown to have been in attendance on the family and negroes thirty-five days. The testimony in regard to his wife is more indefinite. The Judge *a quo* considered the services worth fifteen dollars per day. When the plaintiff first presented his account to the administrator, he claimed but five hundred dollars. He could not be permitted to recover more, and we think ten dollars per day, or three hundred and fifty dollars, an ample allowance even in reference to the circumstances under which the services were rendered.

We do not think it important to consider the bill of exceptions as to the testimony of *Lattier*. The admission of his testimony does not in our opinion affect the case materially

In regard to the testimony of sundry witnesses to prove the value of the services of the plaintiff, we think the court did not err in receiving it, although

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the witnesses were neither physicians nor nurses. It was sufficient that they knew at that time the difficulties in obtaining nurses, and what price such services would at that time readily command. No professional skill is required for this purpose.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the plaintiff do recover of the defendant, in his capacity of administrator of said succession, the sum of three hundred and fifty dollars, with five per cent. interest thereon per annum from the 15th day of April, 1854, until paid, and to be paid in the due course of administration; that he be required to place on the tableau of distribution of said succession one hundred and ninety-five dollars of said sum of $350, and interest, as a privilege claim against the succession, to be classed as expenses during the last illness, and that the residue of said sum of $350, and interest, be classed as an ordinary claim against the succession; and it is further ordered, that the plaintiff and appellee pay the costs of the appeal, and the succession the costs of the lower court.

H. LEVASSEUR, Curator, *v.* AUGUSTE MARTIN, Bishop, &c.

The power to hypothecate must be express and special. C. C. 2966.

The Archbishop of the Catholic Church of Louisiana cannot, without authorization, lawfully mortgage or encumber the real estate belonging to the church.

C. C. 3267, 3269 and 3270.

APPEAL from the District Court of the parish of Natchitoches, *Chaplin*, J. *Tucker*, for plaintiff and appellant. *J. G. Campbell*, for defendant and appellee.

SPOFFORD, J. The plaintiff proceeded *via executiva* to enforce a mortgage against a tract of land alleged to be in the possession of the defendant, as Bishop of the Roman Catholic Congregation, for the Diocese of Natchitoches.

By consent, the executory process was converted into an ordinary action, and the defendant answered by a general denial, and by some special averments which put at issue the validity of the alleged mortgage.

There was a judgment as in case of non-suit, and the plaintiff has appealed.

It is conceded that the land sought to be subjected to the plaintiff's hypothecary action originally belonged to one *Madmoiselle Françoise Trichel*. She died, leaving a last will, whereby she made the following disposition of this land: "Je désire que toute ma terre, ma résidence, ainsi que la terre ou est batie l'eglise à Campté soit et reste à l'eglise. Telle est ma volonté."

Afterwards, *Antoine Blanc*, Archbishop of New Orleans, gave to the *Rev. Phillabert Jordain* a letter of procuration, empowering him "to grant a mortgage upon all the land which belonged to him (the Archbishop) at Campté to secure the payment of such sum as the mandatary should have borrowed for the building of the church, but for no other purpose."

Under the mandate, it would seem that the mortgage in question was executed a few months afterwards by the *Rev. Mr. Jordain*, in favor of *Luvini*, (the plaintiff's intestate,) to secure the sum of eight hundred dollars, acknowledged to be due to him by the Archbishop.

Afterwards the diocese of Natchitoches was established, and the church at Campté fell within its jurisdiction.

Property can be specially hypothecated only by the owner or by some one authorized to act for the owner. C. C. 3267. It cannot be pretended that *Archbishop Blanc* owned the property in question. We are not called upon to interpret the loose and ambiguous bequest of *Mademoiselle Trichel* any further than to say that it vested no right of property in the Archbishop. She gave her land to "the Church" not to the Archbishop. And whether we consider that flexible term to have meant, in this instance, the Roman Catholic Church in general, the diocese of Louisiana, or the particular congregation at Campté, still it is not shown that either of those bodies had empowered *Archbishop Blanc* to encumber this property by conventional mortgages, or that he was so empowered by law. The property of minors, of persons under interdiction, of absentees and *corporations*, cannot be mortgaged in any other form and manner than that directed by law." C. C. 3269. The power to encumber or hypothecate must be express and special. C. C. 2966.

There might, perhaps, be relief for the plaintiff upon a proper showing under the following Article of the Code: "An attorney can only hypothecate the property of his principal, so far as he has a special power for that purpose.

Nevertheless, if the attorney, on effecting a loan for his principal, had granted a mortgage, and the latter had received the money for the loan, or if it had been usefully employed for his benefit, the principal would be bound to ratify the mortgage, and might be compelled to execute it." C. C. 3270.

But the pleadings and evidence in this case are insufficient to fasten such a liability upon any party.

The judgment is, therefore, affirmed, with costs.

THE STATE *v.* AUGUSTUS REEVES.

The court, on a trial for murder, may rightfully reject as incompetent a juror who has conscientious scruples against finding an unqualified verdict of guilty in a capital case, even after he was accepted, both by the State and by the defendant, if he has not been sworn.

Where the whole of the regular panel of jurors has been exhausted, without securing a single juror, the prisoner has no right to require the service upon him, two days before the trial, of the list of the jury *de talibus* which is summoned. In such case the court may proceed with the trial *instanter*.

APPEAL from the District Court of the parish of Rapides, *Ogden*, J.

Hines, District Attorney, for the State. *Manning*, for defendant and appellants.

MERRICK, C. J. The defendant was convicted of the crime of murder. The jury qualified their verdict, and found without capital punishment. The record contains three bills of exceptions, but in the oral argument addressed to us by the defendant's counsel, only two of the bills were examined. They raise these two questions:

1st. Did the court err in rejecting a juror who, of his own accord, informed the court that he had conscientious scruples against serving as a juror in a capital case, after he had been accepted by both parties, but not yet sworn?

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2d. The list of jurors contained in the regular panel, which was served on the prisoner, having been exhausted, and not a single juror therefrom having been sworn upon the petit jury, did the court err in ordering a jury *de talibus* to be summoned instanter, and in refusing a delay of two days in order to serve the list of such jury upon the accused?

I. On the first question, we have to observe that it was settled in the case of the *State* v. *Kennedy*, 8 Rob. 590, that where a juror answers on his *voir dire*, that he has conscientious scruples against finding a verdict of guilty in a capital case, he may be set aside for cause. This principle has been recognized in one or more recent decisions since the statute of May 29th, 1846, authorizing jurors in capital cases to qualify their verdicts was passed. See *State* v. *Melvin*, 11 An.

The District Judge did not err in deciding that the juror was incompetent after he had been accepted by both parties. The statement was made by the juror voluntarily, and not having been sworn, nothing prevented the court from ordering the juror to be set aside. He could not impartially try a case in which he was conscientiously opposed to finding an unqualified verdict in favor of the State under any circumstances, no matter what the proof might be. The Judge violated no right of the accused by requiring the jurors to be free and unbiased, (so to speak,) as well on the part of the State as the accused. Although the bill of exceptions does not expressly state that the juror was conscientiously opposed to finding an unqualified verdict of guilty in a capital case, yet we understand that to be the meaning of the bill of exceptions, and it was so argued, as we understand, by the counsel for the accused, and is so regarded in his brief.

II. On the second point the court did not err. The statute requiring the list of the jury which are to pass upon the trial of the accused to be delivered to him, at least two entire days before the trial, was complied with. The regular panel of jurors drawn to serve upon the trial of the accused is that intended by the statute, and it was served upon the accused. But this pannel was exhausted without securing therefrom a single juror. It was as much the duty of the Judge to order the jury to be impanneled from the bystanders, after exhausting the list served upon the accused, as it would have been to complete it, had it been partially formed from such list. The very terms of the law, bystanders or jurors *de talibus circumstantibus*, imply that the jury is to be impanneled from such persons as may be casually present having the qualifications of jurors. All idea of delay to form a list and make formal service is excluded. We see no error in the ruling of the District Judge in this respect.

We understood counsel to say that the other bill of exceptions in this case was abandoned. At all events it presents no serious question and requires no formal notice from us.

Judgment affirmed.

APPOLINE RACHEL, WIDOW LANDRY DESLOUCHER, *v.* LOUIS B. RACHEL et al.

The tacit mortgage in favor of a minor cannot be enforced against the purchasers of property of a succession which was sold to pay a community debt, to which the minors' interest was subordinate.

The debt due a community creditor is not necessarily novated by his taking the individual note of the surviving spouse, with mortgage to secure its payment.

It is unnecessary for the Judge to fix the amount of a suspensive appeal bond, nor is it necessary for the appellant to execute bond in favor of a party who has no interest in maintaining the judgment so far as appealed from.

APPEAL from the District Court of the parish of Natchitoches, *Chaplin*, J.

A. H. Pierson, for plaintiff and appellee. *W. J. Mamelon*, for defendant and appellant.

LEA, J. The plaintiff seeks to subject property in the possession of the defendant, to the operation of her alleged general and special mortgage under the following circumstances:

In 1841 *Sylvestre Rachel* died leaving a considerable property encumbered with debts.

The evidence does not enable us to say that the estate was absolutely insolvent.

His widow, and partner in community, was appointed administratrix of the estate and natural tutrix of the minor children, issue of her marriage with the deceased, in whose name the succession was accepted, with benefit of inventory.

The widow, in accordance with the provisions of the Civil Code to that effect, caused to be adjudicated to herself a portion of the community property, including that which is the subject of contestation in this case. *Louis Lecarpentier*, one of the largest creditors of the community, made an arrangement with the widow by which he took her individual notes for the amount of his debt, taking at the same time, as additional security, a mortgage upon the property referred to. These notes not being paid at maturity, *Lecarpentier* proceeded by executory process to enforce the payment. The property was seized and sold, and under the title thus acquired, by a subsequent purchase from the vendee, the defendant holds possession.

It is unnecessary to review the proceedings by which the plaintiff in this case has obtained a judgment for $4881 against her mother's estate, together with a recognition of her mortgage upon the property which belonged to her mother, dating from the 15th November, 1851. In our opinion, the plaintiff (whatever may be her claims against her mother and tutrix) should not be permitted to disturb the possession and title of the defendant.

The property, which was community property, was sold to pay a community debt, and the proceeds enured to the benefit of the minors. If there have been any irregularities in the proceedings they are not such as have operated to the disadvantage of the heirs. The debt due to *Lecarpentier*, for which the plaintiff as one of the heirs of *Sylvestre Rachel* was responsible, has been paid at least to the extent of the proceeds of the property in dispute.

In the account, upon which the judgment, now sought to be enforced, was based, this debt due to *Lecarpentier* formed one of the items, and is there charged as paid.

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It is urged, however, that *Lecarpentier*, by taking the individual note of the tutrix novated the debt, and that all the rights of *Lecarpentier* upon the new obligation were subordinate both to the legal and special mortgage of the minors. It does not appear that in taking the individual note of the tutrix, *Lecarpentier* intended to abandon his claim upon the succession. Novation will not be presumed "Without an express declaration to that effect by the creditors, or acts tantamount to such a declaration, it can never be held that an original debtor is released." See 4th Annual, 281.

Nothing in the circumstances of this case justifies the conclusion, that *Lecarpentier* intended to do more than, as the price of indulgence, to obtain additional security for the payment of his claim upon the succession.

If, then, there was no novation, if the original debt has been paid, or at least liquidated to the extent of the proceeds of the property sold, (and the sale is not shown to have been made at any sacrifice,) it would be inequitable to allow the heirs after having profited by the sale to the full extent of the proceeds realized, to subject the property to the payment of the claims against their tutrix, which was itself subordinate to the claim for which the property was sold.

Our attention has been directed to a motion to dismiss the appeal.

1st. On the ground that the amount of the required appeal bond was not fixed by the Judge granting the appeal.

2d. On the ground that the bond was not given in favor of the party called in warranty.

It is not necessary that the amount of a bond for a suspensive appeal should be fixed by the Judge. The law itself has provided that the bond in such cases shall be for a sum exceeding by one-half the amount for which the judgment is given. C. P., 575.

It was not necessary for the appellant to execute a bond in favor of a party who had no interest in maintaining the judgment so far as appealed from. The motion to dismiss the appeal must therefore be rejected.

It is ordered that the judgment appealed from be reversed, and that there be judgment for the defendant.

It is further ordered that the plaintiff and appellee pay costs in both courts.

PHŒBE, f. w. c., et als. *v.* F. VIENNE, Sheriff, et als.

An exception to the capacity of plaintiff to sue will be considered as waived by a trial on the merits without any judgment on the exception.

A defendant in execution is not a competent witness to prove ownership in a third person, of property seized as his own, upon the trial of an issue of fraud or simulation in his transfer of such property.

Damages will not be awarded against a plaintiff who has seized property belonging to a third party, under an execution against his debtor, where the plaintiff acts in good faith and has reasonable ground to suspect that such property is really the property of his debtor.

APPEAL from the District Court of the parish of Natchitoches, *Chapman*, J.

A. H. Pierson, for plaintiffs and appellants.

LEA, J. The plaintiff sues for the recovery of certain property, consisting of lots of ground situated in the town and parish of Natchitoches, with

the improvements thereon, also of $345 95 in gold and silver coin, seized in execution by the Sheriff of the parish of Natchitoches, at the suit of *Taylor, Hart & Co.* v. *Valery B. Shultz*, as the property of said *Shultz*. The plaintiff asserts title to the property thus seized, and claims restoration of the same, with damages for the alleged illegal seizure and detention.

The defendants deny ownership in the plaintiff of the property seized, allege that the purchases in her name were mere simulations, made with funds furnished by *Shultz*, and intended to screen the property of *Schultz*, with whom she had been living in concubinage for many years, from the pursuit of his creditors. The exception taken to the plaintiff's capacity to stand in judgment, must be considered as waived, the case having been determined upon its merits, without any action of the court thereon.

The case was submitted to a jury, who found a verdict upon which the judgment of the court was based, decreeing the lots of ground seized on execution to be the property of the plaintiff, and the money to be the property of *Shultz*. No damages were awarded by the jury to either plaintiff or defendant. The plaintiff alone has appealed.

It is unnecessary to inquire into the correctness of any part of the judgment from which the plaintiff has not appealed. Our inquiry is therefore confined to the claim of the plaintiff for damages, and for the restoration of the gold and silver coin seized by the Sheriff. An examination of the evidence has not enabled us to perceive any error in the verdict of the jury, upon the contested ownership of the gold and silver coin. The issue presented was one of fact, and we think the plaintiff has no reason to complain of the verdict of the jury. The evidence of *Shultz* himself, (which was properly rejected,) could have had but little weight in the minds of the jury, when considered in connection with the relation which subsisted between himself and the plaintiff, and with the direct interest which, as the defendant in execution, he had in releasing any property from seizure which might belong to him. A defendant in execution is not a competent witness to prove ownership in a third person of property seized as his own, upon an issue of simulation or fraud.

Upon the claim for damages, we think the plaintiff is entitled to no relief at our hands. Those who by their own conduct have created a reasonable belief that property held in their name, is so held for the purpose of screening it from the pursuit of the creditors of another, cannot reasonably ask that the expenses of a litigation which is to some extent invited, should be reimbursed to them as damages. The plaintiff in execution was not a willful trespasser, but evidently acted in good faith.

Judgment affirmed.

H. B. KELLY *v.* C. V. LEDOUX.

The defendant who has been sued on his draft, has the right to interrogate plaintiff on facts and articles, to show that the draft was given in error, or without consideration.

The rule as to exclusion of parol testimony to contradict written agreements, does not apply in such a case.

APPEAL from the District Court of the parish of Rapides, *Cushman*, J.

M. Campfield, for plaintiff and appellant. *M. Ryan* and *W. B. Hyman*, for defendant.

KELLY v. LEDOUX.

LEA, J. The defendant is sued upon a protested draft, payable at sight, of which he is the drawer, and of which he resists the payment, on the ground that it was given in error, the consideration being (as he alleges) a contingent fee for services to be rendered as counsel in the prosecution to a final judgment and actual collection of a debt due by *Monaghan* to the defendant. It is proved that at the inception of this suit, the amount due had neither been realized nor had the suit been prosecuted to a final judgment.

The defendant propounded interrogatories to the plaintiff, tending to establish his defence, to the answering of which, the plaintiff, by his counsel, excepted, on the ground that the matters sought to be established in the answers were inadmissible, as tending to show a contemporaneous parol agreement contrary to the tenor of the draft sued upon.

We think the District Judge was wrong in maintaining the exception. Assuming the rule of evidence to be such as is contended for by the defendant's counsel, it could not operate to the exclusion of the right conferred by the Code of Practice upon a party litigant to probe the conscience of his opponent; nor does the rule of exclusion apply either in reason or principle to evidence of this character.

But even assuming that the plaintiff's answers to the interrogatories propounded by the defendant would have been in the affirmative, we think that the evidence fails to show that the draft sued upon was given in error.

Admitting that the draft sued upon was "given as a contingent fee in the suit of *Ledoux* v. *Monaghan*," and that it was the original agreement that the fee should be paid only when the money should be collected and the suit finally decided, it nevertheless appears from the testimony of *Mr. Caldwell*, who was introduced as a witness by the defendant, that the defendant was perfectly aware at the time of giving the draft, that the suit had not been finally determined, and that he expected that an appeal would be taken from the judgment which had been obtained in his favor. It was distinctly intimated to him also, that the plaintiff considered himself entitled to immediate payment for his services, as he (the plaintiff) had been superseded by the employment of other counsel. Under these circumstances, however well founded may have been an objection on the part of *Ledoux* to the drawing of the draft, it is clear that at the time of so doing he was not laboring under any misapprehension of the facts as they actually existed. It is unnecessary to inquire into the admissibility of the testimony of *Miltenberger* and *Hennen;* their testimony, if admitted, would prove no more than would have been established by an affirmative answer of the plaintiff to the interrogatories propounded to him, the effect of which we have already considered.

The equitable interest in the estate of *Halsey* to a portion of the proceeds of the draft when paid, is no bar to a recovery by the holder and payee, in the absence of any defense as against the representative of *Halsey's* estate.

It is ordered, that the judgment appealed from be reversed, and that the plaintiff, *Henry B. Kelly*, do have and recover of the defendant, *Charles V. Ledoux*, the sum of seven hundred dollars, with interest thereon at the rate of five per centum per annum, from the 23d day of December, 1853, till paid, with costs of protest, and costs of suit in both courts.

PATRICK HENRY *v.* MRS E. M. BRYCE.—WELLS and WIFE, Garnishees.

A married woman, cited as garnishee, must answer the interrogatories propounded, though she be not authorized by the court or her husband, under penalty of having them taken *pro confesso*.

APPEAL from the District Court of the parish of Rapides, *Cushman*, J. *M. Canfield*, for plaintiff. *A. N. & O. N. Ogden*, for defendant and appellant.

MERRICK, C. J. The plaintiff having obtained judgment against the defendant, caused an execution to issue, and propounded interrogatories to *J. M. Wells* and wife, *Mary Ann Wells*, as garnishees, under the Acts of 1839, p. 166, and 1840, p. 43. Both were cited, and having neglected to answer the interrogatories within the delay, the same were taken as confessed, and judgment rendered against them severally for the amount of plaintiff's demand. The defendant, *Mrs. Wells*, appealed, and it is assigned as error that she was not authorized to defend the suit either by her husband or the Judge, and that the judgment is, therefore, erroneous.

By Art. 264 of the Code of Practice, which is also applicable to this sort of garnishment, it is provided that: "If the garnishee, to whom interrogatories have been put, refuse or neglect to answer the same, under oath, in the delay of the law, such refusal or neglect shall be considered as a confession of his having in his hands property belonging to the debtor sufficient to satisfy the demand made against such debtor, and judgment shall be rendered against him for the amount claimed by the defendant, with interest and costs."

In the case of *Sturgis* v. *Kendall*, 2 An. 566, it was held that the mere neglect to answer the interrogatories is considered as a confession, and that no formal entry of a judgment by default is required, nor are the garnishees entitled to notice of plaintiff's intention to render them liable upon the confessions which the law infers from their silence. It seems, therefore, to us that the neglect or refusal to answer the interrogatories within the time prescribed by law is equivalent to an actual default in other cases. There is also reason in this conclusion, for in general nothing more is expected of the garnishee by way of appearance in the suit than his answers to the interrogatories. It is only when his answers are traversed and denied that the suit partakes properly of the character of a legal controversy between the parties.

There is nothing, therefore, in the first step in the proceeding of garnishment which requires the wife to be authorized. She is called upon as a witness to testify the truth with a penalty only in the case of a refusal to answer. Now it has been held in the cases of *Stone, Syndic*, v. *Tew*, 9 Rob. 195, and *Gilmore* v. *Gilmore*, 9 An. 204, that the tacit issue formed by the default against both husband and wife in an ordinary action is a sufficient authorization of the husband to the wife to defend the suit. Much more may, we presume, (if needed,) the authorization of the husband to the wife to answer interrogatories when a favorable answer, if true, will relieve her estate from liability and herself from further trouble with the suit.

We see no error in that part of the judgment of the lower court of which complaint is made.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NEW ORLEANS.

NOVEMBER AND DECEMBER, 1856.

PRESENT:

HON. E. T. MERRICK, *Chief Justice.*

HON. A. M. BUCHANAN,
HON. H. M. SPOFFORD,
HON. J. N. LEA,
HON. C. VOORHIES,
} *Associate Justices.*

GABRIEL GUZMAN v. P. A. WALKER.

Decision in the case of *Holmes* v. *Wills* affirmed.

APPEAL from the District Court of the parish of East Baton Rouge, *Robertson*, J. *Burk*, for plaintiff and appellant. *Joor*, for defendant.

SPOFFORD, J. On the 10th March, 1854, the Governor of the State issued a commission in favor of the respondent *Walker*, appointing him a Notary Public, in and for the parish of East Baton Rouge.

The respondent was qualified and is now in possession of the office.

On the 15th February, 1856, the present Governor of the State issued a commission in favor of the relator *Guzman*, appointing him "a Notary Public in and for the parish of East Baton Rouge, *vice P. A. Walker*, whose term of office has expired."

The relator having applied to *Walker* for his notarial books and papers, under the pretence of being his successor in office, (a pretension that was denied by the latter, who insisted that his term had not expired,) procured a mandamus *nisi* to compel a delivery of the books and papers in question. Upon a hearing the mandamus was dismissed and the relator has appealed.

It seems to be conceded that the defendant *Walker* was duly appointed and qualified in 1854.

His term of sevice, under the old law of 1813, was during good behavior, It was reduced to four years by the Act of March 14th, 1855, unless, indeed, his office was abolished and a new one created in its place by that statute.

It is contended that, such was the legal effect of the statute of March 14th, 1855, "Relative to Notaries Public;"—Session Acts, p. 322. This Act forms

GUZMAN v. WALKER.

one of the series of "Revised Statutes" adopted in 1855, and contains the repealing clause which was the subject of judicial interpretation in the late case of *Holmes* v. *Wiltz*.

By reference to the *projet* printed in 1855, and prepared by the commissioner, *Mr. U. B. Phillips*, under the direction of a joint committee of the Legislature, it will be seen that the statute in question is but a digest (with some slight alterations) of pre-existing laws concerning Notaries Public passed in 1805, 1807, 1808, 1809, 1813, 1821, 1822, 1827, 1838, 1845 and 1853.

For the reasons given in the case of *Holmes* v. *Wiltz*, we are of the opinion that it was not the intention of the Legislature, in adopting the statute of March 14th, 1855, "Relative to Notaries Public," to abolish all the notarial offices then existing, and to create new and different offices in their stead.

The term of the respondent, therefore, had not expired when the relator was appointed in his place. If he had acquiesced in the appointment of *Guzman as his successor*, by giving up the office or otherwise, his conduct would have amounted to a tacit resignation. As he has always resisted the construction of the law which seems to have been placed upon it by the relator and the Governor who appointed him, we think the District Judge did not err in discharging the mandamus.

Judgment affirmed.

SUCCESSION OF EMILIE PEYRAN, f. w. c.—MARIE LOUISE *alias* PETRONNI MONTMAIN, Applicant.—MARIA LORENZA *alias* HERMINIE PEYRAN, Intervenor, Appellee.—SIMON O. and ETIENNE G. ST. HERMAN, Intervenors, Appellants.—STATE OF LOUISIANA, Intervenor.

The intervenors S. O. and E. G. St. H., having, by the evidence adduced to show their maternal descent, shown also their paternal origin, it was competent for the other parties in interest to show that the connection, of which the intervenors thus declared themselves the offspring, was an adulterous connection.

The avowed father having been, at the time of the conception of said intervenors, the husband of another woman and not of their mother, they fall within the prohibition of Art. 914 C. C., and their claim to the succession of their mother was rightfully repelled. C. C. 201.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Foulhouze, for appellee. *Seghers*, for appellants. *Filleul*, for the State of Louisiana.

SPOFFORD, J. The intervenors, *Simeon Oscar* and *Etienne Gustave St. Herman*, having, by the evidence adduced to show their maternal descent, shown also their paternal origin, we are of opinion that it was competent for the other parties in interest to show that the connection, of which the intervenors thus declared themselves the offspring, was an adulterous connection.

The evidence is clear that their avowed father was, at the time of their conception, the husband of another woman, and not of their mother.

They, therefore, fall within the prohibition of Article 914 of the Civil Code, and the District Judge did not err in repelling their claim to the succession of *Emilie Peyran*. C. C. 201; *Succession of Fletcher*, 11 An.

The judgment is not complained of by any other party. It is, therefore, affirmed, with costs.

Claudius Redon v. Charles Caffin.

The damages which a tenant has the right to recover from his landlord, under Art. 2665 C. C., are those which are the immediate result of the defect in the thing leased. The plaintiff claimed as damages, not only the price of his fixtures, which he lost in consequence of being obliged to abandon *Caffin's* house, by the defect of its construction, but, also, the difference in the amount of his profits in the store rented of defendant, and in that to which he removed. *Held:* That plaintiff cannot under his contract recover consequential damages of this latter sort.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

Roselius and *Philips*, for plaintiff. *Niles* and *H. H. Taylor*, for defendant and appellant.

Buchanan, J. The damages which a tenant has the right to recover of his landlord, under Article 2665 of the Civil Code, are those which are the immediate result of the defect in the thing leased.

Redon hired of *Caffin* a house and store at the corner of Customhouse and Chartres streets, for the term of five years. The lease was annulled at the demand of the lessee, by decree of the Supreme Court rendered in May, 1851, (6 Ann. 487,) on account of a defect in the construction of the house, which threatened ruin, and rendered it unsafe to inhabit it. *Redon*, previously to the rendition of that judgment, to wit, on the 1st of November, 1850, had hired another store, to which he removed.

Redon's business was that of a jeweller, and he had fitted up the store which he hired of *Caffin*, at an expense of more than three thousand dollars. These fixtures were nearly a total loss to him, in consequence of being obliged to abandon *Caffin's* house, by the defect in its construction.

In February, 1853, *Redon* instituted this action, claiming as damages, not only the price of his fixtures, but the difference in the amount of his profits in the store rented from *Caffin*, and in that to which he removed.

We are of opinion that plaintiff cannot, under his contract, recover consequential damages of this latter sort. But as the verdict of the jury, twenty two hundred and fifty dollars, does not appear to exceed the amount lost by the plaintiff in fixtures of the store, which loss was a direct result of the defect in the construction of the house leased to him by defendant, we do not feel called upon to disturb the verdict as excessive.

The defendant applied for a new trial in the court below, on the ground of misconduct of the jury. But we agree with the District Judge, that the evidence of the alleged misconduct is not satisfactory.

Finally, the appellant's counsel, in his printed brief, argues that the plaintiff's claim is barred by prescription. But no plea of prescription appears to have been pleaded either in the District Court, or in this court.

Judgment affirmed, with costs.

STATE OF LOUISIANA *v.* THE JUDGE OF THE FOURTH DISTRICT COURT OF NEW ORLEANS.

In cases in which a party has an adequate remedy by appeal, this court will not listen to an application for a writ of prohibition.

APPLICATION for a Prohibition.

G. L. Bright, for application.

VOORHIES, J. This is an application by *Jesse Harlam* for a rule *nisi* on the Judge *a quo* to show cause why a writ of prohibition should not be issued forbidding him from taking any further cognizance of a cause in which *James A. Kelly* is plaintiff and the relator defendant.

James A. Kelly, it appears, instituted an action against the relator in the Fourth District Court of New Orleans, for the recovery of $2800, besides interest. The relator excepted to the jurisdiction of the court, on the ground that his domicil was in the parish of Franklin, Louisiana, where he was suable alone. He complains that his exception was improperly overruled and the action sustained against him in favor of *Kelly*.

In cases in which a party has an adequate remedy by appeal, this court will not listen for a moment to an application for a writ of prohibition or mandamus. 8 A. 92, 288. In the case at bar we think the relator will, if injured by the overruling of his plea, have an adequate remedy by appeal from such final judgment as may hereafter be rendered against him in the case.

It is, therefore, ordered, that the rule prayed for be refused, at the applicant's cost.

MRS. CHARLES LEVISTONES *v.* THOMAS R. BRADY et al.

Although it may be true, that when creditors of the husband attack a judgment of separation, it is incumbent on them to allege and prove that they were creditors at the time of its rendition, and further, that it was obtained by fraud and collusion in order to defeat their recourse on the husband's property, *yet* this must be held to apply to a case where the judgment is ostensibly valid, and not to a case which does not appear to have dissolved the community.

The judgment offered in evidence was "that M. de M., wife of L., have judgment against her said husband, decreeing a separation of property between her and her said husband, and granting to her the administration of her private and individual property," &c. No other part of the record of said suit was before the court. *Held:* that the judgment, as it reads, creates a strong presumption that it was a consent judgment—a voluntary separation of property which did not dissolve the community. C. C. 2401, and besides, there being no publication, as required by Arts. 2402 and 2403 C. C., that the creditors of the husband were justified in making a seizure of property apparently belonging to it.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

L. Eyma, for plaintiff and appellant. *Wolfe & Singleton* and *Mix*, for defendant.

MERRICK, C. J. The marriage settlement, produced in evidence by the plaintiff, renders it probable that the wife had, at the time of her marriage, a joint

interest in certain property, slaves and movables in Georgia, where the parties appear to have resided at the time of the marriage.

There is nothing, however, to show that this property was brought to Louisiana, or that the same has been disposed of by the husband to the prejudice of the right of his wife.

It may be true that, where creditors of the husband attack a judgment of separation, it is incumbent on them to allege and prove that they were creditors at the time of its rendition, and further, that it was obtained by collusion in order to defraud them of their recourse upon their husband's property. See *Morris* v. *Williams*, 6 An. 392, and *Brosac* v. *Ducross*, 4 Rob. 336. But this must be held to apply to a case where the judgment is ostensibly valid, and not to a case which does not appear to dissolve the community.

The judgment presented to us in this case is separated from the pleadings, and all we have in the record of the suit of separation is the judgment, which is in these words, viz:

"*Melanie De Mestre, wife of Charles Levistones*, v. *Her Husband.*

"In this case, the court considering the admission of the defendant, and the evidence on file, it is ordered, adjudged and decreed, that the plaintiff, *Melanie De Mestre*, wife of *Chas. Levistones*, have judgment against her said husband decreeing a separation of property between her and her said husband, and granting to her the administration of her private and individual property, and it is further ordered that the defendant pay the costs of this suit."

Now, it occurs to us that the plaintiff would have produced the whole record of her suit of separation, had it not been that her counsel thought it would be more unfavorable to her than the judgment alone. That judgment, as it reads, creates a strong presumption that it was a consent judgment—a voluntary separation of property, which did not dissolve the community. C. C. 2401. *Jones* v. *Morgan*, 6 An. 632.

In addition, there is no evidence of its publication or execution, as required by Article 2402 and 2403 of the Civil Code.

We are of the opinion that the judgment of separation produced does not appear in itself to have dissolved the community, and the creditors were justified in making a seizure of property apparently belonging to it.

Judgment affirmed.

SAME CASE ON A RE-HEARING.

MERRICK, C. J. A re-hearing was granted in this case on the question whether the allowance of one thousand dollars special damages for counsel fees was not too much. As the judgment allows the highest rate of conventional interest, and damages at the rate of ten per cent on the amount injoined, we think the special damages as counsel fees should be reduced.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be amended, by reducing the special damages therein allowed for counsel fees from the sum of one thousand dollars to the sum of three hundred dollars, and that the judgment of the lower court, so amended, be affirmed, and that the appellees pay the cost of appeal.

Ship Rappahannock *v.* John O. Woodruff & Co.

Where hay was shipped, according to the bill of lading, in good order and condition, and on its delivery, at the place of destination, was damaged, it is incumbent on the owners of the vessel, to show that the damage was not caused by bad stowage or want of care.
C. C. 3.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.
Durant & Hornor, for plaintiffs. *Wolfe & Singleton*, for defendants and appellants.

Voorhies, J. The plaintiffs seek to recover the sum of $633 21, for freight and primage on 1500 bales of hay, carried by the ship Rappahannock.

The defendants set up a demand, in reconvention, alleging that the hay was shipped in good order and condition; that whilst in the custody of the plaintiffs, 522 bales of it, weighing 142,750 pounds, were stained and injured to the extent of $7 per ton, and 24 bales, weighing 6330 pounds, were damaged to to the extent of $14 per ton, making an aggregate of $543 93, which damage was caused by the negligence and carelessness of the plaintiffs, who are consequently responsible, *in solido*, therefor.

The hay, according to the bill of lading, was shipped in good order and condition. On its delivery at the place of destination, the evidence shows that a part of it was damaged. Under the circumstances, it was incumbent on the plaintiffs to show that the damage was not caused by bad stowage or want of care. However, we consider the evidence entirely too loose and vague to enable us to ascertain with sufficient certainty the extent or amount of the damage which the appellants have sustained.

But it is insisted by the appellants, that damages in regard to such cargoes are regulated by the custom in this city, as established by merchants, by claiming all hay as stained when the damage it has received does not amount to 25 per cent., and as damaged whenever the damage exceeds that amount.

A classification of the damaged hay in this case was made under the alleged custom, and the appellants rely on it in support of their claim. The estimate thus made of the damage to the hay appears to us to be altogether conjectural and arbitrary, even supposing such a custom to prevail. The witness who made it says: "Stained hay is one-fourth off, and damaged or cropped one-half. This is the usual custom between buyer and seller. No difference is made upon stained hay if damaged 5 per cent. or 25 cent.; it is all stamped as stained hay." We do not think there is sufficient proof of such a custom. Admitting that it prevails between buyer and seller, it would be extremely doubtful whether it could have any binding force upon the plaintiffs, or others not parties to it. C. C. Art. 3; 7 L. R. 524; 11 ibid, 523; 4 R. R. 381.

We do not think the court below erred in giving judgment against the appellants as in case of non-suit.

It is, therefore, ordered, that the judgment of the court below be affirmed, with costs.

Heirs of Delord v. City of New Orleans.

The course of the side lines of property, in front of which alluvion is formed, is of no consequence in the division of the alluvion formed subsequently to the conveyance or grant. The line of such division must be drawn in such manner, as that each of the contiguous riparian proprietors shall have such proportion of the alluvial soil as the total extent of his front line bears to the total quantity of the alluvial soil to be divided. C. C. 508.

The mere omission to figure on the plan of the Delord estate the alluvion that may have existed in front of it, and to divide it among the heirs, cannot be construed into an abandonment of the ownership in favor of the public.

Decision in *Kennedy* v. *Municipality No* 2, 10th A; *Remy* v. *The City;* and *Heirs of Gainnié* v. *The Same*, 11th A. affirmed.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Janin & Griffon, for plaintiffs. *Livingston*, for defendants and appellants.

Buchanan, J. The plaintiffs, heirs of *Madame Delord Sarpy*, claim in right of their ancestor a portion of the alluvion or batture in front of the faubourg Delord, from the defendants who are in possession of the same. The defence turns upon three points:

1st. That the division line of the alluvion in front of the faubourg St. Mary and Delord should be a prolongation of the line of division of those faubourgs; which mode of running the line, would exclude the land in contest from the share of the *Heirs of Delord* in said alluvion.

2d. Dedication of the property to public use by the *Heirs of Delord.*

3d. Prescription.

I. The mode of dividing the alluvial deposit on the banks of the river of Louisiana between contiguous proprietors, whose titles call for a front on the river, is clearly and concisely *prescribed* in Article 508 of the Civil Code: "If an alluvion be formed in front of the property of several riparian proprietors, the division is to be made according to the extent of the front line of each, at the time of the formation of the alluvion." The judgment of the District Court has followed this plain rule of law in awarding the land in contestation to the plaintiffs. A prolongation of the division line of the faubourgs would cross the batture in front of them obliquely up the river, and in course of time would exclude the plaintiffs from the river altogether. This mode of division of the batture is contrary to the spirit as well as to the letter of the law. The title by accretion, or right of accession in relation to land, is a sort of legislative donation of what would, without such donation, be public property. It is a pure gratuity by the State to the riparian proprietor. For there is no reason whatever, in the nature of things, why the purchaser or grantee of an arpent of land extending to the river bank should become, without any price paid or consideration passing, the owner of another arpent of land added to the first arpent by the effect of alluvial deposit. His title to the second arpent is not the conveyance which he holds of the first; but it is the law. This legal title refers, it is true, to one of the lines of the riparian proprietor's original title, as the measure of his right of accession in the alluvial accretions of soil. But the line so referred to is not the side line of the original conveyance or grant. It is its front line, and the front line alone. The course of the side line is a matter of no consequence in the division of alluvion formed subsequently to the conveyance or grant. The line

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of such division must be drawn in such manner as that each of the contiguous riparian proprietors shall have such a proportion of the alluvial soil as the total extent of his front line bears to the total quantity of the alluvial soil to be divided.

There is no case in our Reports of any decision upon the construction of Article 508 of the Code; an indication that the understanding of the community and of the profession has been unanimous upon the subject. There is a case in 17th Louisiana Reports, page 573, somewhat analogous, in which a pretention of the First Municipality of the city of New Orleans to prolong one of its wharves so as to interfere with the wharves of the Second Municipality, was rebuked by the Supreme Court. But, that case turned upon the construction of the Act of 1836, dividing the city of New Orleans into three Municipalities.

II. The answer pleads that plaintiffs are estopped in law; for, by their silence and inaction, they have assented to the mode in which the batture has been laid off into squares and streets, and to the prolongation of the side lines of the faubourg across the batture.

In argument, this plea is amplified into one of the *locus in quo* by the plaintiffs to public use. In support of this view of the subject, defendants have given in evidence an act of partition between the heirs of *Madame Delord Sarpy*, on the 7th April, 1827, and the plan attached thereto. The argument is, that inasmuch as the land now claimed does not figure upon that plan, and as the plan and the act profess to represent and to divide all the real estate of *Madame Delord's* succession in New Orleans, therefore it must be inferred the heirs of *Madame Delord* have renounced all right of property in the *locus in quo*, if they ever had any, and have dedicated it to public use. And the learned counsel of the city relies upon the decision of this court in *Sarpy* v. *Municipality No. Two*, 9th An. 597, in which these same plaintiffs claimed the Tivoli Circle, and the same act of partition and plan were in evidence, and were commented upon by the court as acts of the plaintiffs, which, taken in connection with other acts in evidence, established a renunciation of the proprietorship of Tivoli Circle by the plaintiffs, and a dedication of the same to public use.

The two cases are not analogous. Without going into a review of the points of difference between them, it is sufficient to say that the existence of alluvion susceptible of private ownership outside of New Levee street, in the faubourg Delord, in 1827, is not proved; and if it were, the mere omission to figure it on a plan as part of the Delord estate, and to divide it among the *Delord heirs*, could not be construed into an abandonment of ownership in favor of the public. This would be pushing the doctrine of estoppel to an extent that none of the authorities warrant. In fact, the *Heirs of Delord* might very well have supposed in 1827 that the batture did *not* belong to them. Two years later the Supreme Court decided the case of *Cochrane* v. *Port*, (7 N. S., 622,) adversely, to a claim of batture by the riparian proprietor, within the limits of the city. It is well known that the late *Chief Justice Martin*, to the end of his career, maintained the right of the city to such batture; and the contrary doctrine was only finally settled, in the face of his dissenting opinion, in the Orleans Cotton Press case in the year 1841. 18th La. Rep.

III. The plea of prescription set up by the city rests upon the same foundation as that pleaded and overruled in *Kennedy* v. *Municipality No. Two*, 10th Annual, 54, a decision subsequently twice affirmed in the case of *Remy*, and of the *Heirs of Gaiennié* v. *the City*, in 11 Annual.

An error has been committed by the District Court in the amount of the judgment rendered against the city upon the call in warranty of its co-defendant *George May*. The city is only bound to refund what it received from its vendee *Holt*; and, although *Holt* afterwards received an advance upon what he had paid, from *his* vendee *May*, yet the latter, who, as he was authorized to do by the terms of his deed, has exercised *Holt's* right of warranty against the city, can evidently only do so to the same extent that *Holt* himself might have done.

It is, therefore, adjudged and decreed, that the judgment appealed from, be reversed, by reducing the amount awarded in warranty, from $8000 to $7350, for which sum judgment is hereby rendered in favor of *George May* (in restitution of cash and notes) against the city of New Orleans; that, in other respects, the judgment appealed from be affirmed, and that the costs of the court below be paid by all the defendants, and those of appeal by the defendant *May*.

WILLIAM SULLIVAN *v.* MRS. URILDA SMITH.

The fact that the plaintiff was indemnified by the insurance company *for his portion* of the wall damaged by the fire, does not impair his right to recover from defendant, reimbursement, to the extent of its value, of that portion of the wall which he had rebuilt, and which he was not paid for by the company, and which was not protected by the policy of insurance, and which defendant had used.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Oliver, for plaintiff. *Labatt*, for defendant and appellant.

LEA, J. The plaintiff and defendant were owners of adjoining stores on Magazine street.

A fire having destroyed the store of the defendant, the division wall, which was also a wall in common, was injured to such an extent as to make it necessary that it should be demolished and rebuilt. This was done by the plaintiff, who contracted for the rebuilding of the wall, and paid for it. The defendant at the same time, and while the party wall was being rebuilt, commenced rebuilding her own store, and used the party wall for the purpose of supporting the building.

The plaintiff sues for the value of that portion of the wall used by the defendant, which is shown to be worth the full amount claimed in the petition. The fact that the plaintiff was indemnified by the insurance company for *his portion* of the wall damaged by the fire does not impair his right to recover from the defendant reimbursement, to the extent of its value, of that portion of the wall for which he was not paid by the company, and which was not protected by the policy of insurance, and which the defendant has used. It is shown by the evidence that a wall has been built by the plaintiff, which supports the store of the defendant, and that the defendant has not paid for it.

We think she is liable for the value of her share of the common wall. We are not prepared to say that the case is one which justifies damages as for a frivolous appeal.

Judgment affirmed.

O. Wickham *v.* Charles Levistones et al.—Hunneville, Hill & Co. Intervenors.

Ships and vessels are classed, by Art. 3256 C. C., among the objects susceptible of mortgage; but this is modified by Art. 3272, which declares that hypothecations of ships and other vessels are made according to the laws and usages of commerce.

The only privileges which exist on vessels, are those which are expressly recognized and enumerated in the Code, Art. 3152. The extreme term of the duration of privileges on steamers, when engaged in making voyages between this port and those of other states, is sixty days.

Where the owner of a vessel makes a contract, by which he stipulates, in consideration of advances to be made by the other party, to give him *the entire management and control of the vessel, with the right and authority, to employ all the officers and crew necessary to navigate it, and to hold the vessel as security until the reimbursement of the whole amount of said advances, &c.*—*Held*: That such a contract cannot be construed as having the effect of a pledge on the vessel, nor can it be looked upon as creating a privilege on the vessel or its proceeds. Such a claim not being recognized as a privilege in Art. 3204 C. C.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Wolfe & Singleton, for plaintiff. *Emerson & Huntington*, for intervenors and appellants.

Voorhies, J. The object of this suit is to distribute between the creditors of the defendant, all of whom claim to be paid by preference on account of their respective privileges, the proceeds of the sale of the steamship Cincinnati, in the hands of *Harris & Morgan*, as garnishees.

The intervenors, *Hunneville, Hill & Co.*, are the only appellants from the judgment of the court below; none of the appellees have filed an answer in this court, praying for its reversal.

The appellants sued the defendant, *Charles Levistones*, for the sum of $940 50, with six per cent. interest thereon from the 1st of October, 1851, for money advanced to supply the steamship Cincinnati, which amount, it is alleged, is secured by mortgage on said vessel in accordance with the laws of the United States, and the usages of admiralty. The defendant on purchasing the vessel, assumed the payment of this claim.

Ships and vessels are classed by the Civil Code, Article 3256, among the objects susceptible of mortgage; but this is qualified by the Article 3272, which declares that hypothecations of ships and other vessels, are made according to the laws and usages of commerce. In the case of *Malcom* v. *Schooner Henrietta*, 7 L. 490, it was held, that this was a restriction on mortgages of ships to cases in which such hypothecation would be considered as valid by the usages of commerce or the commercial law.

The mortgage set up by the appellants, does not fall under the denomination of any of the different species of hypothecations known in the commercial world. It was given on the steamer Cincinnati, whilst in port, sometime before leaving on a contemplated trip to California; and its object was to secure the payment of a sum of $1000, advanced by the appellants to the then owners of the vessel. It was stipulated, that if the latter paid or caused to be paid a certain bill of exchange, therein fully described, and payable nine months after date, then the act of mortgage should be void, otherwise to remain in full

force and virtue. Such a mortgage is not recognized by our laws, and consequently cannot be enforced by our tribunals. 7 L. 490; 4 Ann. 310.

There was a consent judgment in favor of the appellants against *Levistones*, for the sum of $940 50, with privilege on the steamer and on the proceeds of the sale thereof. The judgment was signed on the 5th of June, 1852, and on the same day, the proceeds of the vessel were attached in the hands of *Harris & Morgan*. The effect of this garnishment was to give the appellants a privilege on the proceeds from its date, unless the debtor had previously become bankrupt. C. P. 722. But it would seem that the vessel had already been levied upon at the suit of *J. C. Shannon* v. *C. Levistones et als.* It is clear that the judgment rendered in that case, and which is classed as a privilege in the name of *G. W. Spratt*, the transferree of the plaintiff *Shannon*, cannot be disturbed at the instance of the appellants.

It is contended, that the item of $2,106 56, for claims paid by *R. B. Sykes*, was erroneously classed as a privileged claim by the court below. *Sykes* is not a party to this suit, but was employed as an auctioneer to sell the steamer Cincinnati. This amount was settled and paid over by *Harris & Morgan*, previous to the service of the garnishment on them; hence, they can be made responsible as garnishees only for the amount which they then had in hand, subject to the appellants' claim. This item, apparently for the benefit of *Sykes*, was in reality a deduction allowed on the total amount which *Harris & Morgan* had in hand for the defendant, previous to the garnishment.

We think the court below erred, as urged by the appellants, in allowing the respective claims of *Salter & Marcy*, *R. & J. Watson*, *H. Seibrecht*, *J. M. Relf & Co.*, *John Armstrong*, *F. Evans*, *Thomas R. Brady*, and the *Crescent Insurance Company*, as privileges. The only privileges which exist on vessels, are those which are expressly recognized and enumerated in the Code. Art. 3152; 2 Ann. 602. The extreme term for the duration of privileges on steamers, when engaged in making voyages between this port and those of other States, is sixty days. Prior to the respective oppositions of these creditors, their privileges had already ceased to exist, by the lapse of more than sixty days. Hence, it follows that their claims must yield to that of the appellant.

The plaintiff, *O. Wickham*, whose claim for the sum of $8,744 91, was allowed as a privilege on the residue of the proceeds, asserts a right of pledge under a contract entered into between him and *Levistones*, on the 8th of January, 1852, whereby the latter stipulated, in consideration of sundry advances to be made to him, not exceeding the sum of $6,500, to give to the former the entire management and control of the said steamship, with the right and authority to employ all the officers and crew necessary to run the said vessel for the period of six months, and to hold her as security until the reimbursement of the whole amount of said advances, with eight per cent. per annum interest thereon, from the date of making the same until paid, to be effected at the expiration of the six months, provided the earnings of the steamer should be insufficient to effect that purpose. It was also stipulated that the plaintiff should be entitled to receive, as compensation for his services in managing the business of the steamer, five per cent. commissions on the gross amount of her earnings. The act concludes with the stipulation, that the earnings shall be applied, first, to the payment of the necessary expenses to run the steamer; secondly, to the reimbursement of the advances to be thus made by the plaintiff; and lastly, the balance, if any, was to be subject to the order of the defendant.

It appears to us that such an act cannot be construed as having the effect of a pledge on the steamer; for it could, at the most, secure to the plaintiff only the right to apply her net earnings to the reimbursement of his advances. Nor can it be looked upon as creating a privilege on the vessel or its proceeds, for the claim set up is not one of those recognized as a privilege to which ships are subject under the Code. Art. 3204. It may be true that the advances were made to pay debts due by the steamer, and which were secured by privilege on her; but, if such be the fact, there is no evidence that the plaintiff was legally subrogated to the rights of such creditors. His claim allowed by the court below as a privilege, must therefore yield to that of the appellants.

It is therefore ordered and decreed, that the judgment of the court below be amended in favor of the appellants, *Hunneville, Hill & Co.;* that said appellants, in the distribution of the proceeds of said steamer Cincinnati, be ranked for the whole amount of their claim, as a privilege to be paid in preference to the claims of said appellees, *Salter & Marcy, R. & J. Watson, H. Seibrecht, J. M. Relf & Co., John Armstrong, F. Evans, Thomas R. Brady,* and *Crescent Insurance Company;* the said appellees to pay the costs of this appeal; and that in every other respect said judgment be affirmed.

JAMES F. BOYD *v.* JOSEPH H. ESTIS et al.

Gratuitous bailees are not liable, except for losses occasioned by their fraud or gross negligence. A package of bank notes was delivered by the agents of plaintiff on board a steamboat for transportation, the amount of which was specified on the face of the package and the attention of the officers called to its value—*Held:* That *gross negligence* is fairly to be inferred, from the fact that the officers of the boat could give no account whatever of its disposition.

APPEAL from the Second District Court of New Orleans, *Lea*, J. *Bonford*, for plaintiff. *Singleton*, for defendants and appellants.

SPOFFORD, J. The plaintiff seeks to recover the sum of $2,850, from the defendant, it being the amount of a package of bank notes alleged to have been delivered by his agents on board the steamer Frank Lyon, of New Orleans, for transportation to Lake Providence, but never restored to him or carried to its destination.

The answer of the defendants was a general denial, and they have appealed from a judgment rendered against them upon the verdict of a jury.

They contend that the package was never received by any officer of the Frank Lyon, for the purpose of carrying it to Lake Providence.

Upon this point, there is the positive testimony of two witnesses in favor of the plaintiff's assertion, witnesses who were deemed credible by the court and jury before whom they were examined.

We find no evidence in the record, which countervails this positive testimony.

But the defendants further say, if they did receive the money, they charged nothing for its transportation, and, therefore, cannot be responsible for its loss, except upon proof of gross negligence on their part, the burden of proving which devolves upon the plaintiff.

This line of defence is not quite consistent with the first position they assumed, to wit, that there was no bailment.

The general rule is, that gratuitous bailees are not liable except for losses occasioned by their own fraud or gross negligence.

But we think that gross negligence in this case is fairly to be inferred from the fact, that the defendants can give no account whatever of the disposition of the package after they received it. The amount of money inclosed was specified on the face of the letter, and the attention of the officer who received it was called to the fact of its value. In the exercise of even slight diligence, he should have put it away immediately in a safe place.

Judgment affirmed.

Jonathan Davis, Sen., *v.* Carroll, Pritchard & Co. et al.

Usufructs are not exempt from seizure, except in the single case of the usufruct, given during the marriage to the father and mother, to the estate of a minor child. C. C. 289. In all other cases it is subject to seizure and sale. C. C. 525, 547.

The seizure of *all the right, title and interest* of the debtor in and to the thing seized, is a sufficient seizure of the thing itself.

If the donor reserves to himself the usufruct of the property donated, the donation is considered void, and if the vendor retain the possession of the thing sold, the sale is presumed to be simulated. With these presumptions in his favor, the judgment creditor of the donor may seize the property donated, without having obtained a judgment annulling the donation. C. C. 1520, 2456, 1915.

C. P. 649, 654, 655.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Durant & Hornor*, for plaintiff. *McCay & Edwards*, for defendants and appellants.

Merrick, C. J. On the 13th of March, 1854, the plaintiff subscribed his note in favor of the defendants, *Carroll, Pritchard & Co.*, payable on the 18th day of March, 1855, for $1536 80. On the 23d day of June of the same year (1854) the plaintiff and his wife made a donation of the house and lot in controversy to their daughter, *Mrs. L. Leeds*, wife of *John Leeds*, the lot and improvements being estimated at $10,000.

The donors reserved to themselves, during each of their natural lives, the usufruct of the property, with all the rents, profits, advantages, rights, ways and privileges thereunto belonging. The donee, in the same act, was prohibited from *selling*, affecting, mortgaging, donating, leasing or encumbering said lot of ground without the previous written consent of the donors. The right of return was also stipulated in the event of the death of *Mrs. Leeds*, without issue, before the donors.

The plaintiff's note being unpaid at its maturity, the defendants, *Carroll, Pritchard & Co.*, obtained judgment, and issued execution against the plaintiff in injunction, the defendant in that action. The Sheriff seized "all the defendant's right, title and interest in and to a certain lot of ground situate in the First District of New Orleans, in the square bounded by Julia, Carondelet, St. Joseph and St. Charles streets. Said lot measuring, more or less, twenty-seven feet six inches front, on the north side of St. Joseph street, between St. Charles

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and Carondelet streets, by a depth of about one hundred and forty feet, (more or less,) between parallel lines, bounded on one side by the property now or lately belonging to *Mary A. Davis*, and in the rear by property belonging to the Poydras Female Orphan Asylum; said property being known by the No. 166 St. Joseph street."

The plaintiff enjoined the sale of the property, on the ground that the right to the usufruct of the property is exempt from seizure, and that the seizure of the right, title and interest of said plaintiff in and to said lot is not a sufficient description of what was intended to be sold.

We remark, in reference to the first of these grounds, that were it conceded that a usufruct was validly retained, we are not aware of any law which exempts usufructs from seizure, except in the single case of the usufruct given during the marriage to the father and mother in the estate of a minor child. C. C. 239. In all other cases it is subject to seizure and sale. C. C. 525, 547; Act of 1842, p. 380, § 1.

The other ground of injunction presents, under the somewhat conflicting decisions of this court, more difficulty.

In the case of *Trudeau* v. *McVicar*, 1 Ann. 427, this court uses the following language, viz: "The Sheriff, under his instructions, seized all *the right, title and interest* of the debtor in a lot of ground and buildings thereon, and advertised for sale the *right, title and interest* of the debtor in the property seized. This was a seizure and advertisement of the property itself. All the rights of ownership of the debtor are embraced in the description. The terms *right, title and interest*, used in the advertisement are not such as designate any other rights to be sold than those which the Sheriff is required by law to convey or notify the purchasers that they are to acquire anything short of the property itself. The Sheriff is only directed by law to convey to the purchaser, at a sale under execution all the rights of the former owner to the thing sold. Code of Practice, Arts. 694, 690."

If the case just cited is to be recognized as authority, the seizure made in the present case was sufficient in form. But the cases of *McDonogh* v. *Gravier*, 9 L. R. 542; *Gales* v. *Christy*, 4 An. 295, and *Pickersgill* v. *Brown*, 7 An. 304, are cited as authorities the other way.

In the first of these cases the objection was not so much that the right, title and interest of the party was seized, as that the land, the property in which the interest was claimed, was not sufficiently described. Indeed it does not seem to have been questioned that the seizure of the right, title and interest of a party in a thing was not a sufficient seizure of the thing itself.

In the second case it was held that "the judicial sale of the rights, claims and demands of the heirs of T. B., in right of their inheritance of their deceased father, on their mother and tutrix, was void, by reasen of the vagueness and insufficiency of the thing sold," and that "the nature of the rights, interests, claims, demands, should have been stated in such a manner as to give bidders a claim to their value." Here again the objection was not that the rights and interest of the heirs were seized, but that they were not sufficiently described. A contrary doctrine would place beyond seizure the undivided interests of heirs in a succession, or a partner in a partnership, whereas it has often been affirmed by this court that the creditor cannot seize an undivided interest in an individual thing belonging to the succession or partnership, but must seize the undivided interest of the heir or partner in the whole inheritance or partnership.

The case of *Pickersgill* v. *Brown*, 7 An. 304, depends upon its peculiar circumstances. The description of the interest seized was so complicated with the uncertainties in regard to the mortgages, that in the language of the court "It was calculated to raise doubts and conjectures in the minds of bidders without supplying any means at the time of the bidding by which such doubts could be solved or such conjectures confined within any reasonable limits."

This case, therefore, cannot be considered as overruling the case of *Trudeau* v. *McVicar*, 1 An. 427, and the seizure of all the right, title and interest of *Davis* in and to the lot described, must be held to be a sufficient seizure of the lot itself.

But it is contended that the question of the reality of the act of donation can only be tried in a direct action, and not in this summary proceeding; that peradventure on such trial that which appears to us to be void may be shown to be valid.

To this it may be answered, that if the donor reserve to himself the usufruct of the property donated, the donation is considered void, and if the vendor retain the possession of the thing sold, the sale is presumed to be simulated, and with these presumptions in his favor, it would be absurd to compel the judgment creditor to fight declared shadows and combat unreal pretensions. C. C. 1520, 2456, 1915.

If arguments of this kind could be listened to at all by courts of justice, they would be more specious in the mouth of the donee claiming something under the act of donation, than from the donor in possession using his act of donation as a shield to protect himself whilst deriving from the property all the advantages of a real owner. Those who create clouds upon their titles for the purpose of defeating the pursuit of their creditors, have little reason to complain of seizures designed to meet the condition in which they have placed their estates, particularly as the debtor may give up property to satisfy the execution at any time within three days after notice of the seizure, and nothing prevents him from notifying the Sheriff, and giving him a true description of the property to be sold. C. P. 649, 654, 655; 6 N. S. 88; 3 Rob. 152; 9 Rob. 42, *Pumphrey* v. *Delahousaye*.

In the present case we are satisfied that the donation must be treated as null, and that, under the seizure made, the property itself can be sold, and the ownership of *Jonathan Davis, Sen.*, divested by such sale.

The judgment of the lower court must be reversed, and the injunction dissolved, with damages; but as the judgment injoined bears the highest rate of conventional interest, no additional interest can be allowed.

As no appeal was taken as it respects the surety on the injunction bond, the judgment cannot be disturbed as to such surety.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that the injunction issued in this case be dissolved, and that there be judgment against the demand of the said *Jonathan Davis, Sen.*, and in favor of the said defendants; and it is further ordered, that said *Jonathan Davis* pay the said defendants, *Carroll, Pritchard & Co.*, the sum of one hundred and eighty dollars, as damages for the wrongful suing out of the said injunction; and it is further ordered, that said *Jonathan Davis, Sen.*, pay the costs of both courts.

Mrs. Harriet Fort, Wife, &c., *v.* Union Bank of Louisiana.

Facts:—Not creating legal subrogation. Code, 2157.
Where there is no price there is no sale.
C. C. 2439, 2440.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Elmore & King, for plaintiff. *Denis*, for defendant. *R. H. Marr*, for executor, appellant.

Voorhies, J. The plaintiff claims the ownership of 230 shares of the capital stock of the Union Bank of Louisiana, alleging that she acquired the same by purchase under an execution issued on a judgment in her favor against her husband, *F. M. Hereford*, and prays to be recognized as such owner.

As no appeal has been taken from the judgment rendered by the court below, between the plaintiff and the bank, it is therefore unnecessary to notice the issues raised by the action of the latter. It is proper, however, to observe, that whatever may be the result of the controversy between the other litigating parties, the interest of the bank, as settled by that judgment, cannot be affected.

The executor of the late *James McCalop*, as intervenor, alleges that *F. M. Hereford* is indebted to the estate of the testator in the sum of $2379 84 with interest, according to the charter of the Union Bank, from the 26th of January, 1844, until paid, balance due on a promissory note of $3400, given by him to said bank for a loan on the 23d of December, 1842, and payable twelve months after date to the order of and endorsed by *J. B. Hereford* to *John L. Lobdell*, and by the latter also endorsed; that in order to secure the loan thus obtained by him, *F. M. Hereford* also gave in pledge the 230 shares of the stock in question; that the note was duly protested at maturity for non-payment, and subsequently reduced by partial payments to the amount claimed; and thus reduced, *McCallop* became the owner thereof, on the 7th of January, 1847, by payment, and as such subrogated to all the rights of the bank as plegee. The executor thereupon prays that the stock be sold after due proceedings, and the proceeds applied by privilege and preference to the payment of his claim.

The answer to the intervention sets up as matter of defence that *McCalop* had assumed, and was bound under his agreements of the 28th of October, 1844, and 7th of February, 1848, to pay all the debts due by *F. M. Hereford* to the Union Bank; that he not only refused to fulfil his obligations, but violated the same by obtaining the control of those debts, and thereby procuring the forced alienation of *F. M. Hereford's* slaves, mortgaged to the bank at a great sacrifice, to wit: $9000, the difference between the price of adjudication and the real value thereof. *F. M. Hereford* claims as damages in re-convention this amount, and also the sum of $5000 as the hire of said slaves.

Prescription is also pleaded in bar to the action of the intervenor.

On the 10th of March, 1848, *McCalop* brought suit against *F. M. Hereford* for the recovery of the balance due on the note, (in which the allegations are similar to those set forth in the intervention,) and therein prayed for judgment in his favor, with all the rights and privileges attached to the note as subrogee of the bank. The plea of prescription is therefore unavailable.

The question which arises between the plaintiff and intervenor, and which is the principal question in the cause, is whether any right of pledge exists as

claimed by the latter; or, in other words, was there any subrogation, either conventional or legal, which resulted from the alleged payments. As to conventional subrogation, it is not pretended that any such ever existed, but it is insisted that there was a legal subrogation. Subrogation takes place of right in certain cases enumerated in the Code, one of which is, "for the benefit of him who being bound with others, or for others, for the payment of the debt, has an interest in discharging it;" Article 2157, § 3. The question thus presents itself, had *McCalop* such an interest? The record shows that *F. M. Hereford's* plantation and slaves were mortgaged to secure 230 shares of the capital stock of the Union Bank of Louisiana, and also a loan obtained thereon. On the 14th November, 1843, the plantation was sold by *F. M. Hereford* to *McCalop*, the former binding himself to give to the latter a guarantee against the mortgage of the bank. Subsequently, the bank having taken steps to obtain an order for the seizure and sale of the plantation, the proceedings were suspended at the request of *Hereford* to effect an arrangement, through *McCalop*, for the payment of the debt. Accordingly, on the 28th of October, 1846, the bank received of *McCalop* a draft on *J. B. Shaw & Co.* for the sum of $5000, payable on the 4th of January, 1847, the proceeds of which when collected were to be applied, first to the payment of the note, and the remainder thereof on account of the arrearages on *Hereford's* stock bond. In his written agreement with the bank, making this application, *McCalop* declares that he has assumed the payment of the stock loan, and that *Hereford* is to transfer the stock to him. This agreement appears to have been ratified by another of the 7th of February, 1848, in which *McCalop* declares that he has given to *Hereford* five years to pay the debt, the latter binding himself to transfer the stock to the former at a price to be fixed by *Messrs. Jacob & Frey*, the president and cashier of the bank, and to give him also a mortgage on the same slaves then mortgaged to the bank, whenever so required by *McCalop*. The transfer of the stock was not effected, owing, it would seem, to the disagreement of the parties as to the standard by which its value should be fixed, one of them contending that it should be according to its intrinsic value, and the other, its real value in the market. An attempt appears to have been made by *Hereford* to put *McCalop* in default. Subsequently, the slaves of the former, thus mortgaged, were seized and sold under executory process procured, it would seem, at the request of *McCalop*. After the sale of the slaves, the stock was seized and sold under the plaintiff's execution, as alleged by her.

Under these circumstances, it is evident that *McCalop*, in making the alleged payment, had not such an interest as that required by the section of the Article of the Code to which we have adverted, so as to give rise to a legal subrogation in his favor. According to the clear and explicit terms of his agreement with the bank, the draft of $5000 must be considered as given in payment, and not merely as collateral security as contended for.

The plea in reconvention set up by *F. M. Hereford* is not well founded. As a pre-requisite to the recovery of damages the debtor must be put in default; C. C., 1905, 1906; 3 R., 400. It is clear, under the circumstances, that *McCalop* could not have been put in delay. The stock was to have been transferred to him at a price to be fixed by the President and Cashier of the bank. No such price has ever been fixed. "It is of the essence of a sale that the price should be certain, fixed and determined by the parties. It may be left to the arbitration of a third person; but if such person cannot, or be unwilling to make the esti-

mation, there exists no sale; C. C., 2439, 2440." In the absence of any specific price, it is clear that the promise of *Hereford* to transfer the stock to *McCulloch* could not be carried into effect, and was therefore null and could give rise to no damages.

It is, therefore, ordered, adjudged and decreed that the judgment of the court below be affirmed, with costs in both courts.

N. T. EDSON, Curator, *v.* FRERET BROTHERS—SYKES, HYDE & Co., Intervenors.

Writs of attachments are to be satisfied out of the proceeds of the property attached according to the order of date in which the respective seizures thereof are made. Seizure secures a lien. Allegations contradictory of each other cannot be heard.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Bartlette, for plaintiff and intervenors.

Le Gardeur, for defendant and appellant:

"There was no *actual* seizure by the Sheriff in any of the attachment cases, and consequently no privilege in favor of the intervenors."

VOORHIES, J. (SPOFFORD, J., absent.) The litigation in this case originated as follows: Several creditors instituted respectively attachment suits against *Isaac Donshea*, their common debtor, who had absconded; among others, the defendants, *Freret Brothers*, and the intervenors, *Sykes, Hyde & Co.* The attachment of the latter was levied on the 2d, and that of the former on the 9th of June, 1849, on all the property of *Donshea*; *Freret Brothers* claiming besides the vendors' privilege, to secure $1992 55, alleged to be the price of a certain engine and boilers, included among the effects thus attached. *William Wilker* also brought an attachment suit against *Donshea* for the recovery of $1000, alleged to be for work and labor done, &c., for which he also claimed a privilege. An order granting the writ as prayed for issued on the 31st of May, 1849. No judgments appear to have been rendered in these suits, except in that of *Sykes, Hyde & Co.*, in which they recovered on the 6th of December, 1849, the sum of $968 70, "with privilege on the property attached."

The evidence shows that *Mr. Freret* was, in the meantime, "appointed keeper of all the machinery, engines, &c., in the building at the corner of Julia and St. Paul streets," the same on which the attachments had been levied. On the 23d of January, 1850, *Freret Brothers* sold the property thus attached for the price of $1600, payable at six and twelve months credit. *Donshea* having died, the plaintiff was appointed curator to his estate, and as such instituted the present suit against *Freret Brothers* on the 22d of December, 1852, claiming the restoration of the property thus sold by them, or, in default thereof, $3500 as the value of said property.

Sykes, Hyde & Co., through the liquidator of this firm, intervened in the present suit, alleging that the property claimed by the plaintiff had been seized by the Sheriff at their suit, and also at the suits of others, and delivered to *Freret Brothers*; that the judgment rendered in their favor gave them a lien on the property attached, whereby they were entitled to be paid by preference over all others out of the proceeds of the sale thereof.

The court below gave judgment against the plaintiff, dismissing his action, and in favor of the intervenors against the defendants, *Freret Brothers*, for the sum of $400, with interest. This appeal was taken by *Freret Brothers* alone from that judgment.

It is well settled in cases of attachment, that the first levy gives to the creditor a higher privilege to have his judgment satisfied out of the proceeds of the sale of the property attached, than that of a posterior levy. The intervenors' privilege in this case must therefore be considered, under the evidence, as higher than that of any of the other attaching creditors. 3 L. 183, 17 L. 160, 8 L. 59, 15 L. 461, 3 R. 457.

It is alleged in the defendants' answer that *Donshea* had sold the property attached to *Miss Mary Collins* previous to the levying of the attachments thereon, and that the sale made by them was authorized by her and the attaching creditor. No proof of any such authority on the part of the intervenors is to be found in the record. Neither is it shown that *Miss Mary Collins* ever asserted any claim to the property in question during the pendency of the attachment suits. The evidence, on the contrary, justifies the inference that *Donshea* had never parted with his possession. Moreover, the appellants must be considered as estopped from setting up the alleged transfer as a ground of defence. In this attachment suit against *Donshea*, it is alleged in the affidavit that the property on which their privilege as vendors existed was still in their debtor's possession. "He is not to be heard who alleges things contradictory to each other."

In relation to the appellants' claim, as subrogees of *Wilber*, we do not think the Judge, *a quo*, erred in disregarding it. *Wilber* himself, sworn on behalf of the appellants, says that he sold to the latter his claim against *Donshea* for the sum of $150. This, coupled with his affidavit to obtain the writ of attachment, is the only evidence in the record to sustain the claim.

We do not think that the appellants, under the evidence, have any reason to complain as to the value of the property fixed by the Judge *a quo*.

It is, therefore, ordered and decreed that the judgment of the court below be affirmed, with costs.

JOHN DONOVAN *v.* THE CITY OF NEW ORLEANS.

An action will not lie for damages resulting from a lawful act. C. C. 2294.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Bright, for plaintiff and appellant. *Michel*, for defendant.

VOORHIES, J. This is an action for the recovery of damages. In widening Roffignac street, under an ordinance of the Second Municipality, a portion of a lot of ground belonging to the plaintiff was required for that purpose. To effect the expropriation, proceedings were instituted in accordance with the provisions of the Act of 1832. Those proceedings, in which other proprietors were also parties, gave rise to a protracted litigation, as may be seen by reference to the decision of our predecessors, reported in 7 Ann. 76.

The gravamen of the plaintiffs' action in the present case is, that he was deprived of the use of his property during the existence of that litigation, in

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consequence of which he was unable to rent his property on favorable terms, or to venture upon making any improvements upon the same, &c. He alleges that he has sustained damages resulting therefrom, to the amount of $2000, which he seeks to recover of the defendant.

The only plea set up in the defendant's answer, is a general denial.

The court *a qua* gave judgment in favor of the defendant, and the plaintiff appealed.

An act done under a lawful authority, if done in a proper manner, as correctly observed in the opinion of the Judge *a quo*, will not, as a general rule, subject the party doing it to an action for the consequences which may flow from it. The Article 2294 of our Code, on which this action rests, is identical with Article 1382 of the Napoleon Code. Marcadé's commentary upon this article, as to its meaning and application, leaves no room for any doubt in our minds. He says: "Il faut bien remarquer ce mot *faute*, dont on a quelquefois fait abstraction et qui est essentiel à l'exactitude du principe. On entend souvent dire que tout fait causant du dommage, oblige son auteur à réparer ce dommage. C'est une grave erreur. L'auteur du fait dommageable n'est tenu à réparation que quand ce fait est en même temps répréhensible, c'est-à-dire illicite et imputable tout à la fois, (comme on l'a vu plus haut;) en un mot, quand l'acte constitue *une faute* de la part de son auteur, qui, d'une part n'avait pas le droit de l'accomplir, et qui, d'un autre côté, l'a accompli intelligemment et avec le libre usage de sa volonté." 5 vol. 266. Hence, an action will not lie for a damage resulting from a lawful act. It is termed in law, *damnum absque injuriâ*. Indeed, every defendant against whom an action is unsuccessfully brought, must inevitably experience some injury or inconvenience for which he receives no adequate compensation. Yet in such cases, however great may be the hardship, it is clear that the party injured is left without any remedy. The maxim, *ubi jus ibi remedium*, is therefore not universal in its application.

In the case at bar, the power of the corporation to make the appropriation of the plaintiffs' property for the purpose mentioned, does not appear to have been questioned. It is not alleged, neither is it pretended, that the local authorities, in the exercise of that power, acted maliciously or without a due regard for the rights of the plaintiff. It is true those proceedings were protracted, but it may be attributed, according to the evidence, to causes which were unavoidable and imputable, not more to the one than to the other of the parties. The case of *McLaughlin*, 5 Ann. 504, on which the appellant relies, we do not think is analogous to the present. There, it appeared that the proceedings had been twice commenced, and at each time abandoned. But in the case against the plaintiff, there was no such abandonment. On the contrary, the litigation appears to have been terminated by the voluntary transfer of the property in question to the city, for an adequate price. The plaintiff may have, in the forum of conscience, strong claims to indemnity, as was intimated by our predecessors, but it is clear, in point of law, that his action cannot be maintained.

It is therefore ordered and decreed, that the judgment of the court below be affirmed, with costs.

CAROLINE E. DUNBAR, Administratrix, v. ROBERT MURPHY et al.

An expert sued the plaintiffs in the suit in which he had been appointed, for compensation for his services; no citation having been made on one of said plaintiffs, it was objected by the other that the liability of co-plaintiffs for costs being joint, both should have been cited: *Held*, that the objection should have been pleaded as an exception, *in limine litis*.

A liability for judicial costs is solidary. By Art. 2082 it was not contemplated that a distinction should be drawn between the liability of plaintiffs and of defendants for costs.

Art. 3503, C. C., refers exclusively to the fees of Parish Judges, Sheriffs, Clerks and Attorneys—compensation due to experts is not included.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

W. H. Hunt, for plaintiffs. *Budd & Lambert* and *Murphy*, for defendants and appellants.

LEA, J. The defendant *Murphy* is appellant from a judgment condemning him to pay the costs of a survey made by the late *George T. Dunbar*, in virtue of an order of court rendered in a certain suit (not yet decided) in which *Robert Murphy* and *Casimir Gardanne* are plaintiffs and *N. N. Destrehan* is defendant. *Murphy* denies that said *Dunbar* was ever appointed by him, or that he was ever appointed by the court at his request, or on his application; and further, pleads prescription. We think it is manifest, from an examination of the record of the case in which *Dunbar* was appointed to act as an expert, that there existed a necessity for making such an appointment; and, even assuming that there was some irregularity in the manner of making the appointment, it appears that the defendant acquiesced in and assented to it.

The value of the services rendered has been established by evidence, to which no counter or rebutting testimony has been offered.

Under these circumstances the defense is confined to three points.

1st. That the litigation, in the prosecution of which the services were rendered, was instituted jointly by *R. Murphy* and *Casimir Gardanne*, that their liability for costs as plaintiffs is a joint obligation, and that, therefore, *Gardanne* should have been made a party to the suit.

2d. That the obligation being joint each plaintiff is bound only for his virile share of the costs, and then only in the event of his being cast in the suit in which such costs were incurred.

3d. That the action is prescribed.

The first objection, even conceding its validity, should have been pleaded as an exception, *in limine litis*.

2d. We consider a liability for costs to be solidary. By the Article 2082 of the Code, it was not contemplated that a distinction should be drawn between the character of the liability of plaintiffs and defendants for judicial costs. No reference is made to the liability of plaintiffs as they are always liable for costs.

3d. We think the plaintiffs' claim is not barred by prescription. Art. 3503 of the Civil Code refers exclusively to the fees of Parish Judges, Sheriffs, Clerks and Attorneys. Compensation due to experts is not included.

Judgment affirmed.

THOMAS J. MAY *v.* MARY P. NORTON.

The answers of two witnesses to interrogatories propounded to them, were written down by the commissioner as one deposition, which was signed by both witnesses—*Held:* that the whole of the answers must be taken as testimony given by both the witnesses.

APPEAL from the Third District Court of the parish of Jefferson, *Burthe*, J.

Waples & Waples, for plaintiff. *Chilton & Perkins*, for defendant and appellant.

BUCHANAN, J. This is a suit upon a building contract, and for extra work.

The defence is that the work was badly executed, and that defendant was obliged to employ other workmen to do portions of the work over again, for which damages are claimed in reconvention.

It is in proof that defendant put the plaintiff *in mora* before employing other workmen to repair the defects in the building.

There are three bills of exception taken by plaintiff: 1st. To the admission of the depositions of two witnesses, taken under commission, under interrogatories in writing. The commissioner wrote down the answers of the two witnesses as one deposition, and both witnesses signed. It is contended that the answers should have been separately written down for each witness. This would have been more regular, but we do not think that the form adopted by the commissioner invalidates the evidence. Both witnesses have undoubtedly signed and sworn to every thing that has been written down as answers to the several questions propounded. The whole of those answers must, therefore, be taken as testimony given by both the witnesses in the cause.

The other two bills of exception relate to an assumed discrepancy in the date of the notice given by the defendant to plaintiff, as stated in the answer, and as given in evidence. We have not been able to detect this discrepancy in the transcript. The copy of the notice therein contained has no date. And if it had, the date would be immaterial. The date of delivery of notice is proved by two witnesses, and corresponds with the date mentioned in the answer.

Upon the merits, the conclusions of the District Judge appear justified by the evidence.

Judgment affirmed, with costs.

ANTOINE LAFOREST *v.* HIS CREDITORS.

The whole of the property surrendered by the plaintiff having been sold and distributed among his creditors, he, *as syndic*, took a rule on the creditors to show cause why certain judicial mortgages should not be erased, on the ground that they fell by the surrender and final settlement of the insolvent's estate: *Held*, that the rule was properly discharged, the syndic being *functus officio* and therefore incapable of standing in judgment.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J.

M. & H. H. Taylor, for appellant. *Denis*, for *Aicard*. *Pilot*, for Recorder of Mortgages. *Augustin, curator ad hoc*, for *Mrs. Snowden*.

VOORHIES, J. The whole of the property surrendered by the plaintiff in this case was sold and the proceeds distributed among his creditors according to the tableau, which also embraced all the other assets of his estate.

The conventional mortgages existing on the property were erased by the syndic, who was the insolvent himself.

The estate was then entirely settled and the functions of the syndic consequently at an end.

The syndic, however, took a rule upon the creditors placed on the schedule to show cause why the judicial mortgages then existing should not be erased, on the ground that they necessarily fell by the surrender and the final settlement of the insolvent estate.

The rule was discharged and the syndic appealed.

We do not think the Judge *a quo* erred in discharging the rule. The syndic was *functus officio*, and therefore incapable of standing in judgment. Besides, the object of the rule was not to effect the erasure of mortgages existing on property derived from the estate, but upon property which might thereafter be acquired by the insolvent.

It is contended by the appellant, and it may be true, that those mortgages have no existence whatever with respect to new property, which, by law, is placed entirely beyond the reach of the old creditors, except by a new surrender invoked by them. But we do not think we can express any opinion on this question, as it does not properly arise in this case.

It is, therefore, ordered that the judgment of the court below be affirmed, with costs.

Re-hearing refused.

JUDSON & CO. v. LEWIS HERTZ, Tutor, &c.

A mortgage on the property of a minor was attacked on the ground that the under tutor was not called to the family meeting which consented to the mortgage. The following acknowledgment, signed by the under tutor, witnesses and notary, was written at the foot of the *proces verbal* of the family meeting, to wit: "and S. N., the under tutor of said minor children, having waived due notice to attend, and having taken full cognizance of the foregoing proceedings, declared that he approved the same in every respect." *Held:* that it cannot reasonably be inferred from this acknowledgment that the under tutor was absent from said family meeting. The law makes it the duty of the under tutor to oppose the homologation of the family meeting when he is of opinion that it is injurious to the interest of the minors. Its requirements to attain that object were substantially complied with in this case.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

H. D. Ogden, for plaintiffs. *Preaux & Derbes*, for defendant and appellant.

VOORHIES, J. On the 17th of December, 1849, *Ester Peixotto* obtained a judgment against her husband *Louis Hertz* for a separation of property and a dissolution of the community of acquets or gains which existed between them, and also for the sum of $2000, as her paraphernal funds. A slave and lot of ground were seized and sold on the 2d of February, 1850, under a writ of *fieri facias* issued on her judgment, the nett proceeds of which were credited on the writ, leaving a balance in her favor of $1321 80. The writ was not returned

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by the Sheriff until the 10th of October, 1851. Nothing shows that any attempt on her part, was ever made to enforce the payment of that balance. From the inception of her suit to the time of her death, which took place in September, 1853, her husband was represented to be insolvent. In September, 1851, and March, May and September, 1852, she acquired by purchase a slave and several lots of ground, according to the conveyances of which the price paid in cash amounted in the aggregate to $3159, and that on terms of credit to upwards of $500. It is also in evidence that expenditures were made during her lifetime for valuable improvements on some of the lots thus purchased by her, one of which, for extra buildings, &c., amounted to the sum of $950. On the 30th of September, 1852, she obtained a loan of $2400 from the plaintiffs, for which she gave them her eight promissory notes of $300 each, secured by mortgage, four of which remaining unpaid form a part of the plaintiffs' demand. On the 20th of June, 1853, she obtained a further loan of $2000, for which she gave the plaintiffs her promissory note, which constitutes the other part of their demand, and the only subject-matter in litigation. After her death, in order to obtain a prolongation of the payment of this note, deemed advantageous to her minor children, a family meeting was convoked at the instance of this natural tutor, *Louis Hertz*, to authorize him to give the plaintiffs a mortgage on the property of her succession. The determination of the family meeting advising the mortgage was homologated and the mortgage accordingly given.

The validity of the mortgage thus given, and which is sought to be enforced by the plaintiffs, is attacked by the under tutor, intervenor in the prosecution, on two grounds: 1st, "That he was not called to the family meeting, who consented to the mortgage in favor of *Judson & Co.* against the minors *Hertz*; and, 2d, that the debt for which the mortgage was granted was not a debt of the wife, but a debt for *Hertz* himself."

We consider both grounds untenable. The following acknowledgment signed by the under tutor, witnesses and notary, is written at the foot of the act of family meeting, viz: "And *Samuel Nathan* the under tutor of said minor children having waived due notice to attend, and having taken full cognizance of the foregoing proceedings, declared that he approved of the same in every respect. In faith whereof he hereunto signs his name with the said notary and above named witnesses." We do not think it can be reasonably inferred from this that the under tutor was absent from the meeting. The law makes it the duty of the under tutor to oppose the homologation of the family meeting when he is of opinion that it is injurious to the interest of the minors. Its requirements to attain that object were, in our opinion, substantially complied with in the present case. The cases on which the appellant relies do not appear to us to be analogous in point of fact to the present. In *Commaux* v. *Burbin*, 6 N. S. 455, it appeared that the under tutor was not present at the meeting; and it was likewise the case in *Stafford* v. *Villain*, 10 L. 328. In neither of those cases it did not appear that the under tutor had taken any part in the proceedings of the family meeting.

On the other point, the evidence satisfies us, as it did the Judge *a quo*, that the money was received by the wife and used upon her property, and consequently enured to her benefit.

It is, therefore, ordered that the judgment of the court below be affirmed, with costs.

C. Roman and C. A. Kernion *v.* L. E. and F. J. Forstall.

A third person, not bound for a debt, who pays it in discharge of the debtor, and receives at the time from the creditor a subrogation to his rights, can receive from the debtor only the amount so paid to the creditor. *Aliter*, if the transfers from the creditor were made in virtue of a sale or donation.

C. C. 2178.

APPEAL from the Fifth District Court of New Orleans, *Augustin*, J. *Roselius* and *Fitz*, for plaintiffs. *E. A. Bradford* and *L. Hunton*, for defendants and appellants.

Buchanan, J. Defendants and appellants complain of the following charge of the District Judge to the jury: "That, according to law, (C. C. 2130,) *Edmond J. Forstall*, having acted for the benefit of the firm, (of *Roman, Forstall & Co.*) was only subrogated for what he paid."

There was no error to the prejudice of the defendants in this charge.

The notarial act of the 28th February, 1846, was a compromise of debts due by various parties to the Citizens' Bank. The parties to the act were the Bank, through its President, and *Edmond J. Forstall*. It sets forth, that *Edmond J. Forstall*, "desiring, by means of a compromise, to arrive at a *final settlement* of the balance of the debts due to the Citizens' Bank by the late *Madame Widow Poeyfarré*, *Messrs. Forstall Brothers* and *Messrs. Forstall, Roman & Co.*, which debts amount, in capital, interest and costs, to $31,854 20," according to a detailed statement which follows, "has proposed to the said Citizens' Bank, in order to obtain *the full and entire discharge*, in favor of the succession of *Madam Widow Poeyfarré*, of *Messrs. Forstall Brothers*, and of *Messrs. Forstall, Roman & Co.*, and of the other parties to the notes and drafts above described, with the exception of *Lancaster, Derby & Co.*, (acceptors of the drafts of *Forstall, Roman & Co.*) against whom (*L., D. & Co.*) the Bank reserves all its rights, of all the rights, titles and claims which the said Bank might exercise against the parties to the stock notes, notes or drafts above described, to give to the Bank, in payment of the said sum of $31,854 20, four lots of ground, situated in the faubourg Delord, of the Second Municipality of New Orleans," of which lots the description follows. "That the Bank accepts the proposition" for reasons stated. "Consequently the said *Edmond J. Forstall*, as a *dation en paiement* of said sum of $31,854 20, gives, cedes, transfers and abandons to said Bank, with all legal warranties, four lots of ground," as described.

The act proceeds: "This *dation en paiement* is made by the said *Edmond J. Forstall*, to the effect of obtaining from the Citizens' Bank of Louisiana, *the full and entire discharge*, in favor of the succession of the late *Widow Poeyfarre*, of *Messrs. Forstall Brothers*, and of *Messrs. Forstall, Roman & Co.*, and of the other parties to the notes and drafts above described, (except *Lancaster, Derby & Co.*, the acceptors of the said drafts, against whom the Bank preserves all its rights,) of all the rights, &c., which the Bank could exercise against those parties, and to liberate them, towards the said Bank, from the said sum of $31,854 20. Consequently the said *H. B. Cenas*, in his quality of President of the Bank, consents to *a full and entire discharge*, (repeating the words of the preceding clause,) and liberates them (the succession of *Widow*

Poeyfarré, Forstall Brothers, and *Forstall, Roman & Co.*,) *entirely and finally* from the sum of $31,854 20, balance due by them as drawers or endorsers upon the notes and drafts above described; only reserving a recourse for payment of the two drafts of *Forstall, Roman & Co.* against *Lancaster, Derby & Co.*, of Richmond, the acceptors of the said two drafts."

"And in consideration of the aforesaid *dation en paiement*, the said *Cenas*, in his capacity of the President of the Bank, subrogates the said *Edmond J. Forstall*, but without any warranty whatever on the part of the Bank, to all the rights, titles and claims, such as they are, which the Bank has or might exercise against the parties to the said notes and stock notes."

"The said *Cenas*, in his quality aforesaid, now delivers to the said *Edmond J. Forstall*, who acknowledges it, the stock notes and notes above described. And the undersigned notary, after having made mention, at the request of the said *Forstall*, upon the face of the said two drafts, of the discharge consented to by the Citizens' Bank, in favor of *Forstall, Roman & Co.* as drawers, and of the succession of *Widow Poeyfarré* as endorser, of the said two drafts, has delivered the said two drafts to the said *Cenas*, in his quality of President, who acknowledges it."

It is to be observed that *Edmond J. Forstall* does not appear to have been personally bound for any of the debts included in this compromise.

It is further to be observed that several of those debts due by the *Widow Poeyfarré*, and by *Forstall Brothers*, were secured by mortgages.

It is proved that the four lots of ground thus transferred by *Edmond J. Forstall* to the Bank, realized to that institution a sum of ten thousand dollars; and the defendants have been credited in settlement of partnership with plaintiffs, by the auditors and by the special jury of merchants, who passed upon this case in the District Court, with the sum of $3464, as a proportion of said sum of $10,000, equivalent to the obligations of *Forstall, Roman & Co.* included in the act of compromise with the Citizens' Bank. Those obligations are stated by the auditors to amount to $12,994, composed of the following items:

1st. A note of *F. R. & Co.*, endorsed by *Widow Poeyfarré*.....	$6,784
2d. A note of *G. A. Durell*, endorsed by *F. R. & Co*.....	6,210
	$12,994

We turn to the consideration of the argument, as presented to us by the learned counsel, on the legal effect of the act of compromise of 28th February, 1846.

The argument assumes that $12,994 was the amount of *Forstall, Roman & Co.'s* indebtedness to the Citizens' Bank, settled by that compromise; and it is contended, on behalf of the defendants and appellants, that they are entitled to a credit, in settlement of the partnership, for the whole of that amount as transferrees of the rights of *Edmond J. Forstall* under the notarial act in question.

Taking for granted, *argumente gratiâ*, that defendants are such transferrees, (although there is no proof of any transfer of *E. J. Forstall's* rights to them,) the position of defendants appears identical, in all its essential features, with that of the plaintiff in a suit decided by the Court of Cassation in the year 1810, and reported at length by Merlin in the Questions du Droit, *verbo* Subrogation de Personne, paragraph 1.

In that case a third party (*Bellanger*) paid a debt, consisting of the capital and arrears of interest of an annuity secured by first mortgage upon a property, on which *Bellanger* held a second mortgage. The creditor and first mortgagee, by the terms of a notarial act, in consideration of said payment by *Bellanger*, consented in favor of his debtor a full acquittance and discharge of the debt, and subrogated *Bellanger* to all his rights, actions, privileges and mortgages against the debtor. The payment was made in depreciated government paper, (*assignats nationaux*,) which the creditor received from *Bellanger* at par. Several years afterwards *Bellanger* sued the debtor for the total amount of interest of the annuity, calculated to the date of the institution of suit, claiming to be the holder and owner of the annuity, in virtue of the subrogation which he had received from the creditor and first mortgagee. But the debtor tendered in court, in full satisfaction of plaintiff's legal rights against him, the amount really paid by *Bellanger* to his creditor, being the actual cash value at the time of payment of the *assignats* with which that payment had been made. And the Court of Cassation decided, in affirmance of the judgments both of the court of the first instance and of the court of appeal, that the real tender was good and sufficient; that *Bellanger* was only entitled to a reimbursement of the amount by him actually paid, and that the effect of the clause of subrogation in his act was not to revive for his benefit a debt extinguished by the very terms of the act, but only to substitute the subrogee in all the mortgages and privileges held by the original creditor for the reimbursement of the sum paid to the discharge of the debtor.

The doctrine of this *arrêt* of the Court of Cassation is that of the Roman and French law and of all the commentators. The contrary doctrine, which is that of the defendants in this cause, arises from a confusion of *subrogation* with *cession* or *transfer*. But all the authorities agree that these legal terms are not synonimous. See Merlin, Repertoire de Jurisp., *verbo* Subrogation, and the authorities collected by the same author in his Questions de droit, *loco citato*, and by Zachariæ, Droit Civil Français, 2d vol., par. 321.

Payment is a mode of extinguishing a debt. Subrogation is a fiction of law, originating in the 26th law of the Roman Digest, title "*de fidijussoribus et mandatoribus*," by which the creditor who grants the subrogation to another who pays, "*non in solutum accipit, sed quodammodo debitoris nomen vendidit*," whence the maxim of the civilians, "*subragatus magis omissi nomen, quàm solvisi videtur.*"

"La subrogation," says Marcadé, vol. 4, § 708, "n'étant point un achat de la créance, puisqu'elle suppose, au contraire, que cette créance est payée, et par conséquent éteinte, il s'ensuit que si cette subrogation avait été consentie pour une somme moindre que le montant de la créance, le subrogé, au lieu de pouvoir réclamer au debiteur le montant intégral de la créance, comme le pourrait un cessionnaire, ne pourrait lui demander que la somme qu'il aurait déboursée. En effet, quand j'achète une créance, c'est cette même créance qui m'appartient, quelque soit d'ailleurs le prix pour lequel je l'ai achetée, et c'est cette même créance que j'ai à recevoir contre le débiteur. Il en serait de même, si la créance m'avait été cédée gratuitement, puisqu'alors j'ai bien la créance qu'avait le précédent créancier. Mais quand, au contraire, j'ai fait un paiement avec subrogation, le paiement ayant éteint la précédente créance, ce n'est plus elle qui m'appartient, c'est une créance nouvelle, résultant de ce que j'ai fait un déboursé pour le profit du débiteur. Je ne

puis donc réclamer que ce déboursé, et non pas une ancienne créance, qui n'existe plus. Si pourtant," continues Marcadé, "dans le cas d'un déboursé moindre que le montant de la créance, il résultait clairement, soit des termes de l'acte, soit des circonstances, que l'intention du créancier et du tiers, a vraiment été que ce dernier eût la créance entière, il faudrait bien respecter cette volonté des parties; mais on ne pourrait le faire, qu'en reconnaissant que les parties, nonobstant les termes inexacts dont elles ont pu se servir, ont fait une véritable cession, et non un paiement avec subrogation."

The excepted case, supposed by Marcadé, certainly is not found in this record. The terms of the act, so far from expressing a transfer of the whole credit by the Citizens' Bank to *Forstall*, express, with studied precision, in no less than three distinct places, the full and entire acquittance and discharge of the debtors, *Forstall, Roman & Co.* And as to the circumstances surrounding the transaction, we find it asserted in the notarial act itself, as well as in the resolution of the Board of Directors of the Bank which authorized the President to accept the terms of compromise offered, that the personal securities of the debts thus discharged are null, either because the debtors have failed or because they are entirely unable to pay their debts, ("dans l'impossibilité de s'acquitter de leurs engagemens." Even were the terms of the notarial act, discharging *Forstall, Roman & Co.*, less clear than they are, it could not be supposed, in the face of the clause just copied from the act, that the respectable parties to this notarial act contemplated a speculation upon two of the four partners of this insolvent concern, for the benefit of the other two partners, by a cession of the whole credit for one-third of its face, to two out of the four solidary co-debtors, through a person interposed. We are persuaded that we truly construe the intention of those parties, in deciding that they meant what they have said, a full, final and entire discharge of *Forstall, Roman & Co.*, and of each of the partners of that firm, in consideration of the property transferred to the Bank by *Mr. Edmond Forstall.* The copy of the minutes of the Bank was properly admitted in evidence, at least to elucidate the intention of the Bank, and after the call made by plaintiffs for the production of *Mr. E. J. Forstall's* letter to the Bank, it was also good as secondary evidence of the contents of that letter.

From the facts and circumstances of the case, as well as from the expressions of the notarial act of the 28th February, 1846, it clearly appears that *Edmond J. Forstall* acted, in the words of the charge to the jury, *for the benefit of the firm of Forstall, Roman & Co.*, or in the words of Article 1130 of the Code, *for the discharge of the debtor.* From the payment thus made, and the discharge of *Forstall, Roman & Co.'s* previous engagements to the Citizens' Bank, has arisen a new engagement towards *Edmond J. Forstall*, or to those who may be in his rights. That engagement imposes upon *Forstall, Roman & Co.* the obligation of reimbursing to *E. J. Forstall* or his assigns, all that he has paid for them. And this obligation flows, not from a contract, because contracts are only formed by the agreement or convention to which *Forstall, Roman & Co.* were parties. But it takes its course in equity, which forbids one to enrich himself to the prejudice of another, or that services rendered should be onerous to those who have rendered them. There has then intervened here a *quasi contract*, from which have resulted mutual rights and actions, which the Roman law calls *negotiorum gestorum. Mr. Edmond J. Forstall* has been in this transaction a *negotiorum gestor*, since, without a mandate, he has

managed the business of *Forstall, Roman & Co.* All that he (or his assigns,) can ask, then, is to be indemnified for all the useful and necessary expenses which he has incurred. C. C. 2278, Inst. Just. § 1, de obl. quæ quasi ce contractu; Dig. de Negitûs gestis; Merlin Qu. de Dr., vol. 14, p. 389.

We find no error in the allowance made by the auditors and by the jury of account upon the notes of defendant running from one to ten years, given to the Consolidated Association by the contract of 19th November, 1846, in exchange for the endorsement of *Forstall, Roman & Co.*, past due and protested.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

THOMAS MCLELLAN et al. v. THOMAS WILLIAMS.

A disease, to be the basis of a redhibitory action, must be such as would have baffled the efforts of regular medical aid promptly administered.

When it was not ascertained of what disease the slave died, or what was the cause of his death, and he received no medical treatment, it is impossible to say that he died of an incurable disease.

The vendor does not take the risk of the service in which the slave may be employed. He does not warrant that the slave will not be attacked by disease within the time limited, nor that the slave will resist the disease without the aid of medicine or of medical art. He does warrant against the existence of any incurable disease, but until a sufficient test of incurability is supplied by the vendee, his warranty is not broken.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Koontz, for plaintiffs and appellants. *Bonford*, for defendant.

LEA, J. This is an action to recover the price of a slave who it is alleged died of a redhibitory complaint existing at the time of the sale.

The slave was purchased on the 15th day of November, 1849, and died suddenly on the 22d day of the same month.

We concur with the District Judge in the opinion that, as it was not ascertained of what disease the slave died, or what was the cause of his death, and as he received no medical treatment, it is impossible to say that he died of an incurable disease. The fact that medical assistance could not be obtained relieves the plaintiffs from the charge of neglect, but does not supply the defect in the proof, which, in the absence of other evidence, is essential to a recovery. A disease, to be the basis of a redhibitory action "in a case where death ensues, must be such as would have baffled the efforts of regular medical aid promptly administered." See 9 La. 63.

As was correctly rendered by the District Judge: "The vendor does not take the risk of the service in which the slave may be employed. He does not warrant that the slave will not be attacked by disease within the time limited, nor that he will resist the disease without the aid of medicine or of medical art. He does warrant against the existence of any incurable disease, but until a sufficient test of incurability is suppled by the vendee his warranty is not broken."

Judgment affirmed.

The State *v.* Harrison, a Slave.

The Act of 15th of March, 1855, entitled "an Act relative to slaves and free colored persons," is unconstitutional, because its title expresses two distinct objects, to wit, slaves and free colored persons, and because many of the sections of the Act embrace objects not expressed in the title.

Slaves and free colored persons embrace two classes, which it is impossible to confound in legal parlance; for in the eye of the Louisiana law there is, with the exception of political rights, social privileges, and the obligations of jury and militia service, all the difference between a free man of color and a slave, that there is between a white man and a slave

This court cannot say, that one of the objects comprised in the title of the Act in question, was more in the contemplation of the Legisluture than the other, nor select between the two objects expressed, and to sustain those portions of the statutes which are applicable to the object they selected, to the exclusion of the other expressed object, not to speak of the other and widely various objects embraced in the numerous sections of the statute. The whole act is liable to the same objection, and the whole is void for unconstitutionality.

The doctrine of all American courts is, that a Legislative Act should not be declared void, unless its incompatibility with the paramount law be clear beyond a reasonable doubt. Spofford, J., (with whom concurred Lea, J.) dissenting.

The argument that slaves are one object, and free colored persons another, overlooks the fact that both compose a single, homogeneous class of beings, distinguished from all others by nature, custom and law, and never confounded with citizens of the State. No white person can be a slave; no colored person can be a citizen. A slight change of phraseology without any change of substance, will show that there is unity in the object of the law in question, as indicated by its title; it is an act *relative to persons of color whether bond or free.* The division of this class of persons into bond and free, does not duplicate the object of the law which was intended to regulate the entire class. Spofford, J. (with whom concurred Lea, J.) dissenting.

The design of a title is merely to indicate the general subject of the law, and not to furnish a detailed exposition of its provisions. If the latter were the case, it would lead us to the absurd conclusion that the title should be as long as the act, unless indeed the act abounded in tautology and surplusage. What good sense would dictate is what the Constitution exacts, namely, that by some general but concise expression at the head of the law, the attention of both legislator and citizen should be fixed upon the main subject-matter to which all the details in the body of the statute are auxilliary. Spofford, J. (with whom concurred Lea, J.) dissenting.

APPEAL from a special tribunal organized for the trial of a slave, parish of East Feliciana. *Kernan*, District Attorney, for the State. *McVea*, for appellant.

Buchanan, J. *Harrison* was tried by a tribunal composed of two Justices of the Peace and ten owners of slaves, in the parish of East Feliciana, for killing another slave, on the 2d July, 1855. He was found guilty as charged, and sentenced to imprisonment at hard labor for life. The case is presented to us by his counsel, entirely on the ground of the unconstitutionality of the Act of the Legislature under which the tribunal was organized for the trial of the prisoner; being the Act approved 15th March, 1855, entitled "an Act relative to slaves and free colored persons."

It is contended, that this Act is in violation of the Article 115 of the Constitution, which reads as follows: "Every law enacted by the Legislature, shall embrace but one object, and that shall be expressed in the title." This Article of our present State Constitution, is copied word for word from the 118th Article of the Constitution of 1845. Chief Justice Eustis, who was a prominent member of the Convention which formed the Constitution of 1845, has given us (in the case of *Walker* v. *Caldwell*, 4 Ann. 297) the following reasons for the enactment of the Article under consideration: "The condition of our statute law was such, at the time of the formation of the Constitution,

as to impose on the Convention the necessity of providing in the Constitution itself for the forms of legislation. The title of a law often afforded no clue to its contents; important general provisions were found placed in Acts private or local in their operation; provisions concerning matters of practice or judicial proceedings were, sometimes, in the same statute with matters entirely foreign to them." It was to prevent such anomalies, that the Constitution requires the Legislature to confine each Act to a single object, and to indicate distinctly that object in the title of the Act. Does the Act of 15th of March, 1855, "relative to slaves and free colored persons," fulfil those conditions of legislative form?

In answering that question, we are first to observe, that the title of the Act expresses two distinct objects, to wit: slaves and free colored persons. Again, the Act contains one hundred sections, many of which embrace other objects than those expressed in the title. Thus, sections 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 66, 67, 68, 69, 89, 90 and 91, treat of offences committed by any free person, white or colored. Section 33 enacts a lien or privilege on vessels. Section 61, and several other sections, restrict the control of masters, of whatever color, over their slave property. Section 70 introduced a new redhibitory action. Section 74 relates to fees of district attorneys.

Of the other sections of this Act, the following have slaves for their object: Sections 1, 2, 3, 4, 7, 9, 10, 11, 13, 14, 16, 17, prescribe the penalties for crimes and offences committed by slaves. Sections 39 to 51 inclusive, and 54 to 60 inclusive, determine the mode of proceeding for the trial, and of punishment in case of conviction, of slaves accused of crimes. Sections 52 and 53 provides a compensation to owners of slaves condemned to death or perpetual imprisonment. Sections 62 to 65 inclusive, relate to the police of slaves. Sections 71 to 73 prescribes a new mode of procedure for the emancipation of slaves. Section 75 lays down a rule of evidence in relation to claims for freedom made by slaves. Sections 75 to 87 inclusive, relate to runaway slaves, to depots for their reception, and the costs of their imprisonment. Section 99 prohibits slaves from being witnesses against free colored persons either in civil or criminal matters, with certain exceptions.

The following sections relate entirely to free colored persons: 88, 92, 93, 94, 95, 96, 97, 98.

We perceive, by this analysis of the statute, that its objects are multifarious and that its title expresses two of those objects. It remains to be seen how much of this statute can be considered as valid, under the provisions of Article 115 of the Constitution.

In two cases which immdiately follow each other in 5 Ann., *The State* v. *Hackett*, and *Duverges* v. *Salter & Marcy*, our predecessors, through Chief Justice Eustis, passed upon the construction of Article 115, (or 118 of the Constitution then existing,) as applicable to the avoidance of statutes inconsistent in form with its provisions. In the case of *Hackett*, the title of the statute was, "an Act to regulate and define the fees to be paid for the arrest and confinement of slaves." But besides fixing the fees for such purposes, the statute went on to provide a new place of confinement in the parish of Orleans for runaway slaves, in the place of that fixed by previous laws. The court held the latter portion or the statute to be in violation of the Article of the Constitution and void; and added: "In deciding that the portion of the law under

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which the Sheriff claims is unconstitutional, we are not to be considered as saying that those portions of the statute which are covered by the title, are unconstitutional; the decision of the latter point not being necessary."

In the case of *Duverge's Heirs* v. *Salter & Marcy*, the majority of the court declared the whole of an Act of 1848, "to give jurisdiction to the District Courts of New Orleans over causes arising under the Act of 1819, respecting landlords and tenants," to be unconstitutional, because the statute went further than barely to give the jurisdiction expressed in the title, and prescribed certain rules of procedure; while Judge Slidell, dissenting, was in favor of separating that portion of the law, the object of which was embraced in its title, from that portion which was foreign to its title.

But in each of those cases reported in the 5th Annual, the title of the statute, at least, was regular. It expressed but one object, and there might therefore possibly be some portion of the statute which could be held to be valid, to wit, that portion which embraced the single object expressed in the title. Whereas, in the Statute of 1855, now under consideration, there are two objects expressed in the title—the slave, and the free colored person—two classes which it is impossible to confound in legal parlance; for in the eye of the Louisiana law, there is, (with the exception of political rights, of certain social privileges, and of the obligations of jury and militia service,) all the difference between a free man of color and a slave, that there is between a white man and a slave.

The free man of color is capable of contracting. He can acquire by inheritance and transmit property by will. He is a competent witness in all civil suits. If he commits an offence against the laws, he is to be tried with the same formalities, and by the same tribunal, as the white man.

The slave, on the contrary, is the object of contracts, not a legal party to contracts. He may be sold or mortgaged, but he cannot sell or mortgage. He can neither inherit, nor make a will, because he can possess nothing as owner. He is inadmissible as a witness in any civil suit whatever. And if accused of crime, he is tried by a special tribunal, to which the safeguards of the common law are unknown.

It has been suggested, that we may consider the objects expressed in the the title of this Act of the Legislature as one, by reading the title thus: "an Act relative to colored persons, whether bond or free."

The first answer to this suggestion is, that it changes the idea of the legislator, by condensing into one class what *he* has said should constitute two classes. And, in truth, the proposed condensation is more specious than real. For if we say, "colored persons, whether bond or free," do we not in substance say, "slaves and free colored persons"? In both forms of locution we make a distinction; and in making a distinction, we recognize a difference.

It is evidently impossible for the court to say, that one of the objects comprised in the title of the Act in question, was more in the contemplation of the Legislature than the other. *We* cannot undertake to select between the two objects expressed in the title, and to sustain those portions of the statute which are applicable to the object thus selected, to the exclusion of the other expressed object, not to speak of the various other and widely different objects embraced in the numerous sections of the statute. The whole act is liable to the same objection, and the whole must consequently be declared void for unconstitutionality.

In coming to this conclusion, we have the satisfaction of knowing, that we have left no hiatus in the legislation of the State; as each and every one of the ninety-nine enacting sections of this Act is copied, with trifling verbal alterations, from preëxisting statutes, with the exception of sections 71, 72 and 73, which treat of the mode of proceeding for the emancipation of slaves.

As to its effect upon this cause, the conclusion at which we have arrived in relation to the constitutionality of the Act of 1855, will not relieve the prisoner *Harrison* from the sentence, which is the foundation of this appeal. For those sections of that Act, which relate to the organization of tribunals for the trial of slaves accused of crimes, are copied from an Act of June 1st, 1846, entitled "an Act relative to trials of slaves." Session Acts, page 114. The proceedings in the case at bar, were regular under that statute, which, in our view, is still in force. By the 14th section of that Act, no proceeding in accordance therewith, shall be annulled or impeded by any error of form.

The judgment appealed from, is therefore affirmed, with costs.

SPOFFORD, J., (with whom concurred LEA, J.) dissenting. The doctrine of all American courts is, that a legislative act should not be declared void, unless its incompatibility with the paramount law be clear beyond a reasonable doubt.

It is contended that there is a twofold defect in the Statute of 15th March, 1855, "relative to slaves and free colored persons." (Session Acts, p. 377.) First, that it embraces two or more objects; and, secondly, that it does not express its object in its title. The statute is therefore said to be doubly unconstitutional.

The argument that slaves are one object, and free colored persons another, overlooks the fact, that both compose a single, homogeneous class of beings, distinguished from all others by nature, custom and law, and never confounded with citizens of the State. No white person can be a slave; no colored person can be a citizen. A slight change of phraseology, without any change of substance, will show that that there is unity in the object of the law in question, as indicated by its title; it is an Act *relative to persons of color, whether bond or free.* The division of this class of persons into bond and free, does not duplicate the object of the law which was intended to regulate the entire class. Every "object" is infinitely divisible. Slaves are subdivided into *statu liberi* and slaves for life. Could it be successfully urged that an Act "relative to slaves for life and *statu liberi*" was unconstitutional and void, for duplicity in its title and object? The case before us seems to be a parallel one.

Dismissing then the first objection, let us proceed to inquire whether the title of this law is not expressive of its object, in that reasonable sense in which the Article 1115 of the Constitution has hitherto been interpreted. The design of a title is merely to indicate the general subject of the law, and not to furnish a detailed exposition of its provisions. If the latter were the case, it would lead us to the absurd conclusion, that the title should be as long as the Act, unless indeed the Act abounded in tautology and surplusage. What good sense would dictate is what the Constitution exacts, namely, that by some general but concise expression at the head of the law, the attention of both legislator and citizen should be fixed on the main subject-matter to which all the details in the body of the statute are auxiliary. What have we here? "An Act relative to slaves and free colored persons." What simpler or more comprehensive title could have been selected? What better fitted to strike the

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eye and call the attention of a person seeking for information upon any one of the subordinate topics which fill up the one hundred sections of this Act, so various in their details, but yet so subservient to the one great purpose of the Act itself, which is to regulate and keep in order all people of color. Their crimes and offences, as well as the crimes and offences of others against them or in relation to them, their police, the emancipation of slaves, or their conversion into free people of color, and their trial and punishment for crime, are subdivisions of the single object from which the statute never wanders. Although, for instance, section 74 fixes a fee for the District Attorney, still it is a fee for defending a suit instituted by the master for the purpose of emancipating his slave, and is therefore strictly incidental to the object of the Act. And the same is true of every other section; they are all germain to the subject indicated by the title.

The Constitution of Louisiana is not singular or original in respect of the provision under discussion. An analogous provision is to be found in the Constitutions of many of our sister States. I think, in its origin, it was intended as a guard against legislative coalitions for the purpose of carrying measures in combination, neither of which could be carried singly. Indeed, such was declared to be its object in the State of New York, by the highest authority. Mr. Chief Justice Ruggles, in *Conner* v. *Mayor*, *&c.*, 1 Selden, 272, remarked: "The design of the constitutional provision was to prevent the uniting of various objects having *no necessary or natural connection with each other*, in one bill, for the purpose of combining various pecuniary interests in support of the whole, which could not be combined in favor of either by itself."

It is obvious that no such vice infects the law before us. Nor does this law appear to be pregnant with any of the mischiefs sought to be prevented by the 115th Article of our Constitution, as expounded by Mr. Chief Justice Eustis, in the case of *Walker* v. *Caldwell*, 4 Ann. 297, for its title affords a ready clue to its contents; it is not an Act private and local in its operation, containing important general provisions beyond its ostensible scope; nor does it conjoin provisions touching matters of practice or judicial proceedings with matters entirely foreign to them.

No portion of the statute could operate a surprise either upon legislator or student, as neither could be misled by the title.

On the contrary, the Act is truly an attempt to simplify and expedite the task of searching after the law, by grouping in one general statute, under a title which challenges attention, all those legislative provisions relative to people of color, which would really be less accessible to the public if they were dispersed through a multitude of statutes, although dissected and arranged with scholastic skill.

Being, therefore, of opinion that the law under which the prisoner was tried and convicted, violates no provision of the Constitution, I think the judgment appealed from should be affirmed.

N. C. Folger v. Mandeville Marigny et als.—James Robb & Co., Garnishees.

Money deposited by a Sheriff in his official capacity is not liable to seizure in execution at the suit of his individual creditors.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Ogden & Leovy, for plaintiff and appellant. *Whitaker*, for defendant.

Lea, J. The plaintiff having obtained a judgment against *Mandeville Marigny* levied an execution upon a sum of money standing to his credit, as Sheriff of the parish of Orleans, on the books of *James Robb & Co.*, bankers. The only question to be determined is, whether the moneys deposited by *Marigny* in his official capacity as Sheriff, are liable to seizure in execution at the suit of his individual creditors. A statement of the case would seem to involve its solution. It is contended, however, that the Sheriff is not a depositary, and, even if he were such, that the identity of the several sums received by him was destroyed by their deposit as a common fund in the hands of *James Robb & Co.*; that *Marigny* became the debtor of the several litigants whose funds he held, and that *Robb & Co.* in turn became his debtors for the balance to his credit as Sheriff; and we have been referred to the decisions in the cases of *Stetson et als. v. Gurney*, 17th La. 162 and *Longbottom* v. *Babcock*, 9th La., p. 50, as sustaining the plaintiff's position.

We do not consider those decisions as applicable to the issue presented in this case. In both the cases quoted, moneys had been placed in the hands of agents *to be disbursed*; to use the language of the court: "The money was not destined to be kept and restored, but to be employed." All that was expected from the agents by their respective principals was an account of the disbursments. In the case of *Stetson* v. *Avery*, (particularly relied upon,) the money was placed in *Gurney's* hands by *Robertson*, to be employed in the purchase of cotton. This money, or a portion of it, was deposited by *Gurney to his own credit* in the Canal Bank. The court held that money confided to an agent could not be followed and reclaimed in the hands of third persons *without notice*. To make the case analogous to that under consideration, let us suppose that *Gurney* had received money not from *Robertson*, but from a third person to be transmitted to him, and that having so received the money he had deposited it to *Robertson's* credit in bank, or to his own credit as agent of *Robertson*. We think that, under such circumstances, the fund would have been protected from any seizure at the suit of the individual creditors of *Gurney*.

Now, the Sheriff for certain purposes is constituted by law a public agent of the litigants in the several courts of which he is the executive officer. It is his duty to safely keep, as a public trustee, funds collected or otherwise received by him for the account of such litigants. It was not necessary that he should open a separate account in favor of each individual for whom he had collected money. In many cases this would be impracticable, as for instance: where the funds so held by him were in dispute. It is sufficient that he kept a separate account, as a public officer, for the benefit of the several suitors whom, in his official capacity, he represented. It is shown affirmatively by the Sheriff that the whole of

the fund deposited with *Robb & Co.* consisted of moneys received for account of the several suitors in the courts of justice in which he exercised his functions, and that no portion of the funds thus deposited belonged to him individually. See 11th Annual, page 76, *J. C. Beatty* v. *McLoed, tutor.*

Judgment affirmed.

THE STATE OF LOUISIANA *v.* THE JUDGE OF THE FIFTH DISTRICT COURT OF NEW ORLEANS.

The jurisdiction of the Supreme Court in cases of appeal attaches on the filing of the bond of appeal, and the inferior court thereafter has no authority to take any steps in such cases, except such as are necessary to transmit the record. An order by the inferior court granting an extension of time to prosecute the appeal, is a mere nullity.

APPLICATION for a Mandamus.

Bodin, for plaintiff.

VOORHIES, J. The application for a writ of mandamus in this case is based on the following grounds set forth in the petition:

The Fifth District Court of New Orleans having rendered a judgment in favor of *J. Domingon*, as curator of the estate of the late *Louise Gérard*, against *Pierre Candau*, the latter obtained an order granting him an appeal therefrom, returnable to this court. The testimony of the witnesses was not taken on the trial of the cause in the inferior court. The relator, as the defendant's attorney called on the plaintiff's attorney to draw up jointly with him a statement of facts in the cause; but, in consequence of the departure of the latter a few days after for Europe, it was not effected. Subsequently, the relator being prevented by sickness, or unavoidable causes, to meet the opposite counsel for that purpose, obtained an order, *ex parte*, from the court below, granting him an extension of time to prosecute his appeal. On the production of the certificate of the clerk of this court, showing that the record had not been brought up, the order granting the extension of time was set aside by the court below, and the judgment ordered to be executed. A writ of *fieri facias* accordingly issued. The defendant thereupon moved the court for an order arresting the execution of the writ, and for a rule on the plaintiff's attorney to show cause why a statement of facts should not be made out in pursuance of Articles 602 and 603 of the Code of Practice.

We do not think the Judge erred in refusing to entertain the motion. On the filing of the bond of appeal the jurisdiction of this court attached, and the inferior court no longer had any authority to take any steps in the case, except such as were necessary to transmit the record to this court. The order granting the extension of time was therefore a mere nullity, this court alone having such power. C. P. 883, 7 L. 448.

It is, therefore, ordered that the application be dismissed at the relator's costs.

WALKER REYNOLDS *v.* WILLIAM N. BATSON.—SAME *v.* JAMES BRENFORD.

In a suit, instituted by a citizen of another State, to recover slaves from a citizen of this State, which he alleges are fugitives from his service, the slaves have, in the eye of the law, no interest in the result of the suit. The 2d section of Art. 4th of the Constitution of the United States does not contemplate a case of this kind. Were the Constitution construed otherwise, it would apply to all questions of ownership in slaves, between citizens of different States.

The maxim *contra non valentem agere non currit prescriptio*, does not apply to relieve the plaintiff in a case where the plea of prescription was set up by the defendants, *acquirendi causa*. It has been applied to prescriptions, *liberandi causa*, in three classes of cases:

1st. Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action. A class of cases recognized by the Roman law, as proper for the allowance of the *utile tempus*. The cases of *Querry's Ex.* v. *Toussier's Ex.*, 4. M. R. 609; *Ayraud* v. *Babin's Heirs*, 7 N. S. 481, and *Smith* v. *Taylor*, 10 R. R 133, are of this kind.

2d. Where there was some condition or matter coupled with the contract or connected with the proceedings, which prevented the creditor from suing or acting. See cases of *Landry* v. *D'Eglise*, 8 L. R. 219; *Flint* v. *Curry*, 6 L. R. 69.

3d. Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action. The following are cases of this class: *Boyle* v. *Mann*, 4 An. 170, and *Martin* v. *Jennings*, 10 An. 558.

Art. 3444 C. C. and the Act of 1848, p. 60, declare that property in slaves is acquired by the prescription of five years, whether the parties reside in the State or any of them reside out of it. Prescriptions run against all persons unless included in some exception established by law. C. C. Art. 3457.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Elmore & King*, for plaintiff and appellant. *Cohen*, for defendant. *Spring*, *Larue* and *H. D. Ogden*, for warrantor and other parties.

MERRICK, C. J. These two actions are brought to recover three slaves, two in the possession of the defendant *Batson*, and one in the possession of *Brenford*.

The slave in the possession of *Brenford* disappeared from the plantation of the plaintiff, his then owner, residing in the State of Alabama, in the spring or beginning of summer, 1845, and the other two slaves disappeared in August of that year. Plaintiff, supposing his slave had run away, resorted to the usual means for their recovery, without effect. With all of his inquiries, it does not appear that he was able to hear of the slaves until he discovered them in possession of the defendants immediately before bringing his suits.

The defendant *Batson* bought the two slaves in his possession at public auction, at the Arcade, in this city, on the 16th day of September, 1845, and title was made by a person representing himself to be *Richard Teral*, of Marshall county, Alabama, and the act of sale was passed before *J. B. Marks*, Notary Public. The slaves, since that time, it is shown, have been in the public possession of the defendants, who has employed them on the levee and as stevedores.

The slave *George* was sold by *John M. Bach*, on the 21st day of September, 1846, to *S. Gardere*, the act reciting that *Bach* had purchased the slave from *Richard Teral*, on the 16th day of September, 1845, the same day that *Batson* purchased. *Gardere* sold on the 27th day of August, 1849, to the defendant *Brenford*. The suits were commenced on the 20th January, 1856. The good faith of these parties, the defendants, has not been questioned.

The plea of prescription of five years was interposed by the defendants and sustained by the lower court.

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The plaintiff, having appealed, urges upon this court that prescription does not run against him, because the slaves were fugitives, and his possession is protected by the Constitution of the United States, and because, notwithstanding all his diligence, he has been, until the commencement of the suit, unable to discover his slaves, and therefore the maxim "*contra non valentem agere non currit prescriptio*" shields him from the operation of the general rule established by the Code.

On the first of these grounds it is sufficient to remark that, in the case before us, there is no proof that the slaves were fugitives, and had escaped from service or labor. On the contrary, their first appearance here was as slaves subject to service, under the control of one apparently their master, who sold them as slaves to purchasers in good faith. The controversy between these parties is one of property, in which the negroes owing service to one or the other of the contestants have, in the eye of the law, no interest in the result of the suit. There is no reason to suppose that a case of this kind was contemplated by the second section of the fourth Article of the Constitution of the United States. Were it to be construed otherwise, the Constitution would apply to all questions of ownership in slaves between the citizens of different States.

On the second ground. The suspension of prescription in order to allow for the *utile tempus* has generally been held by the civilians to occur only in the short prescriptions. The long prescriptions, and those by which property was acquired, with the exception of the one hundred days and the year given by the prætor, in which to claim the *possessio bonorum*, were reckoned continuously. See 4 vol. Savigny, p. 421, et seq., Berlin ed.

We do not think there can be found any case in our Reports, where the maxim "*contra non valentem agere non currit prescriptio*," has yet been applied to relieve the plaintiff in a case where the plea of prescription was set up by the defendants *acquirendi causa*. It has been applied to prescriptions *liberandi causa* in three classes of cases:

1st. Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action; a class of cases recognized by the Roman law as proper for the allowance of the *utile tempus*. See Digest, lex. 1, lib. 44, t. 3; Ibid, § 7, 8 and 9, lex. 1, lib. 49, t. 4.

The cases of *Querry's Ex.* v. *Toussier's Ex.*, 4 M. R. 609; *Ayraud* v. *Babin's Heirs*, 7 N. S. 481, and *Smith* v. *Taylor*, 10 R. R. 133, are of this kind.

2d. The second class of cases are those where there was some condition or matter coupled with the contract or connected with the proceeding which prevented the creditor from suing or acting. See cases of *Landry* v. *L'Eglise*, 3 L. R. 219; *Flint* v. *Curry*, 6 L. R. 69.

3d. The third class of cases is where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action. The following are cases of this class: *Boyle* v. *Mann*, 4 An. 170, and *Martin* v. *Jennings*, 10 An. 553.

Cases may arise to which it may be proper to apply the maxim, but we do not think the present a case of this kind. Certain it is, it is not embraced within the principles governing the classes of cases enumerated. Our courts were always open to the plaintiff, and he was prevented by no agreement with nor acts of the defendants from suing. He can be in no better situation before the courts of the State than our own citizens. The question among these

innocent persons is, on whom shall the loss fall? It is answered by Art. 3444 of the Civil Code and the Act of 1848, p. 60, which together declare that property in slaves is acquired by five years, whether the parties reside in the State or any of them reside out of it.

Article 3487 of the Code provides that prescription runs against all persons unless included in some exception established by law. The plaintiff has not brought to our notice any such exception in his favor, nor do we think he has presented a case of a character evidently intended by the Legislature to be excepted from the operation of the general rule of law which it has prescribed.

The judgment of the lower court is, therefore, affirmed.

Same Case on a Re-hearing.

Merrick, C. J. In refusing the re-hearing, we take occasion to observe that we consider our reasoning equally applicable to the case, if it be conceded that the slaves were stolen, as upon the supposition that they first absconded from the plaintiff's plantation, and were afterwards found in *Teral's* possession as ostensible owner.

Re-hearing refused.

Jean Junek, Testamentary Executrix, *v.* L. F. Hezeau.

A judgment was rendered by the Supreme Court, wherein it was ordered "that the heirs of *Jean Junek* be recognized as entitled to one-half interest in the partnership established between their late father and *L. F. Hezeau;* that it be decreed that said partnership has continued since the death of their father, and still exists between the said *Hezeau* and the said heirs of *Junek*, and that said heirs are entitled, through their tutrix, to exercise all their rights, incident to their capacity as partners, for the protection and management of their interest in said partnership," &c. The mandate of this court having been filed in the court *a quo*, plaintiff obtained a writ of possession, by which the Sheriff was ordered to put her in possession of the premises, without reserve or exception, together with superintendence, &c., of the same. The defendant obtained a rule on plaintiff, to show cause why said writ should not be set aside. *Held:* Where a matter of defence is set up against the execution of a writ regularly issued, it is, perhaps, irregular to proceed by rule, but where the issue has reference to the regularity of the writ itself, the proceeding, being a mere incident to the judgment, may be disposed of summarily.

The judgment of this court did not decree that plaintiff was entitled to the exclusive possession of the entire establishment appertaining to the partnership, nor that she should divest defendant of his possession nor (so far as the partnership articles allowed it) his control over the business for which the partnership was established. Judgment affirmed, making the rule absolute.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Tissot and *Filleul*, for plaintiff and appellant. *Eyma* and *Whitaker*, for defendant.

Lea, J. This case, as presented, involves the construction of a former judgment of this court, rendered upon the issue presented by the same parties in the litigation of which this proceeding is an incident. On the 28th of April, 1856, this court affirmed a judgment rendered by the Second District Court of New Orleans, which is in the following words, viz: "It is ordered that the heirs of *Jean Junek*, viz: *Jean Junek*, *Joseph Andre Junek* and *Antoine Junek*, be

and the same are hereby recognized as entitled to one half interest in the partnership established between their late father, *Jean Junek*, and *L. F. Hezeau* on the 8th May, 1844. That in accordance with the prayer of the petition it be decreed that said partnership has continued since the death of their father, and still exists between the said *Hezeau* and the said heirs of *Junek*, and that said heirs are entitled, through their tutrix until they become of age, and and after that individually, to exercise all the rights incident to their capacity as partners, for the protection and management of their interest in said partnership. It is further ordered, that the defendant *Louis François Hezeau*, do file in court, on or before the first day of December, 1854, a full and complete account of his receipts and disbursements, as manager and administrator of the cemetery of St. Vincent de Paul, and of his acts and doings as the surviving partner of the partnership of *Junek & Hezeau*, established on the 8th May, 1844. It is further ordered, that the defendant *Hezeau* do pay the costs of this suit, and that the reconventional demand made by the defendant be rejected."

The mandate of this court having been registered in the District Court, the plaintiff applied for and obtained a writ of possession, in virtue of which the Sheriff was ordered to put her in possession of the premises, without any reserve or exception, together with the superintendence, administration, &c., of said cemetery, with all the utensils, articles and instruments necessary for the carrying on the business of said cemetery, &c. On the 9th May a rule was taken on behalf of the defendant upon the plaintiff to show cause why the writ should not be set aside, on several grounds, only one of which it is necessary to examine, to wit: that the judgment rendered did not entitle the plaintiff to such a writ as was issued, and under which the Sheriff was proceeding to act. Exceptions were taken to this rule, on the ground that the plaintiff could not be held to answer to a proceeding by rule for the purpose of setting aside a writ of possession, and that the rule presented issues which had been determined by the final decree of the Supreme Court.

Where a matter of defence is set up against the execution of a writ regularly issued, it is, perhaps, irregular to proceed by rule; but where the issue has reference only to the regularity of the writ itself, as not being authorized by the judgment, the proceeding is a mere incident to the judgment, and may be examined and disposed of summarily. In this case the question was whether the judgment authorized a writ of possession.

It was competent, we think, for the Judge to entertain this inquiry as relating to one of the incidents of the judgment which it was his duty to see properly enforced.

Upon the merits, we find no error in the decree of the District Judge making the rule absolute. The judgment did not decree that the plaintiff was entitled to the exclusive possession of the entire establishment appertaining to the cemetery; it was not the intention of the court that she should divest the defendant of his possession and (so far as the partnership articles allowed it) of his control over the business for which the partnership was established. The decree recognized the right of the heirs of *Junek* to an interest in the partnership, and ordered that an account should be filed by *Hezeau* based upon this recognized right. The decree also recognized the right of the plaintiff in her representative capacity, to exercise all the rights incident to the capacity of her pupils, *as partners*, for the protection and management of their interest in said partnership. The manner in which these rights were to be exercised

were not passed upon by the decree, but were left to be carried out by the District Judge according to the necessity of the case, in conformity with the spirit and meaning of the contract, as interpreted by the final decree of the Supreme Court. We think the District Judge did not err in making the rule absolute. Judgment affirmed. RUSSELL.

CITY OF NEW ORLEANS v. MASCARO.

The 59th section of an ordinance of the Common Council of New Orleans, approved December 29th, 1855, which declares, that "*every manufacturer of cordials or syrups,*" shall be taxed "*seventy-five dollars,*" is null and void, being in violation of a prohibitory law of the State. The Act of April 25th, 1853, p. 135, reënacted in the revisory statute of March 15th, 1855, sec. 3d, p. 326, having declared "that it shall not be lawful, hereafter, for any municipal corporation within this State, to levy any tax on persons engaged in selling articles of their own manufacture, manufactured within this State."

This statutory prohibition is not repealed, so far as the city of New Orleans is concerned, by the Act of 20th of March, 1856, entitled "an Act to consolidate the city of New Orleans," &c. p. 136, and even were it so, the repeal could not give vitality to an ordinance which was void *ab initio*.

The exemptions specified in the Act of 1856, as exclusive, are confined to taxes upon property; sec. 38. The subject of exemption from taxation upon particular callings, is left where it stood before.

The repealing clause in the Act of 20th of March, 1856, leaves the 3d section of the Act of March 15th, 1855, "relative to municipal corporations," in full force.

APPEAL from a judgment of the Fourth Justice of New Orleans.

Laville, for plaintiff. *M. Grivot*, for defendant and appellant.

STOFFORD, J. The defendant has appealed from a judgment of the Fourth Justice of the Peace for the parish of Orleans, condemning him to pay to the plaintiff $78 75, as "a tax on the profession he exercises in manufacturing cordials and syrups within the city of New Orleans." The appeal is taken directly to this court, under the 17th section of the Act of March 15th, 1855, "relative to the Justices of the Peace for the parish of Orleans."

In his brief, the plaintiff's counsel insists that the appeal should be dismissed; but there is no motion filed to that effect. We cannot dismiss the case of our own motion, for it appears that the legality of the city ordinance under which the tax was assessed, is distinctly put at issue on the record. The sum claimed being under $300, our inquiry must be limited to that issue alone.

The tax was levied under the 59th section of an ordinance of the common council, approved December 29th, 1855. It declares that from and after the 1st day of January, 1856, the taxes and licenses for professions, callings, and other business throughout the city and parish, shall be fixed, assessed and collected, at the rates and sums specially set forth in the following sections:

"Section 59. Every manufacturer of cordials or syrups, seventy-five dollars."

Now the legislative Act of April 25th, 1853 (Sess. Acts, p. 135), reënacted in the revisory statute of March 15th, 1855, sec. 3 (Sess. Acts, p. 326), declared, that "it shall not be lawful, hereafter, for any municipal corporation within this State, to lay any tax on persons engaged in selling articles of their own manufacture, manufactured within this State."

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The 59th section of the ordinance thus passed in violation of a prohibitory law of the State, is therefore null and void.

But the appellee contends that this statutory prohibition was repealed, so far as the city of New Orleans is concerned, by the Act of March 20th, 1856, amendatory of an Act entitled "an Act to consolidate the city of New Orleans," &c. Sess. Acts, p. 136.

If it were so, we do not perceive how the repeal could give vitality to an ordinance which was void *ab initio;* but we find no repeal of the former prohibition in the latter Act. All its clauses can be made to harmonize with the previous exemption accorded to persons engaged in domestic manufactures.

The exemptions specified in the Act of 1856, as exclusive, are confined to taxes upon property alone (sec. 36). The subject of exemption from taxation upon particular callings or occupations is left where it stood before. There is no new "or inconsistent provision" upon this subject-matter, and the repealing clause in the Act of March 20th, 1856, leaves the 3d section of the Act of March 15th, 1855, "relative to municipal corporations," in full force and virtue.

It is therefore ordered, that the judgment of the Fourth Justice of the Peace in this case, be avoided and reversed; and it is further ordered and decreed, that there be judgment for the defendant, with costs in both courts.

MARANTHE, GENIE et al. *v.* CHARLES G. HUNTER et al.

Colored persons, until they are recognized as free, or until they are emancipated, cannot maintain a suit for wages. It would be otherwise in the case of a free person illegally reduced to a condition of slavery.

Decision in the case of the *State* v. *Harrison*, a slave, 11th Ann., respecting the constitutionality of the Act of 1855, relative to slaves and free colored persons, affirmed.

An obligation to emancipate a slave twenty-five years hence, and to take all legal steps, and to incur all necessary charges incident to such emancipation, has reference, not to such legislation as was in force at the date of the contract, but to such as might be in force when the contract is to be carried into execution.

APPEAL from the District Court of the parish of Point Coupée, *Cooley*, J. *David*, for plaintiffs and appellants. *W. H. Cooley*, for defendant.

LEA, J. The plaintiffs allege that they were the slaves of the late *Julien Poydras*, who died in the year 1825; that by the terms of the last will and testament of said *Poydras* they were entitled to their freedom, after having rendered faithful service as slaves for the period of twenty-five years subsequent to the death of said testator; that they have faithfully complied with the conditions of said will; that they are natives of the State, and have attained the legal age to be emancipated; that they were purchased by the defendants with the express stipulation on their part, that said slaves should be emancipated by and at the expense of the purchasers; that the period fixed for their continuance in slavery has long since elapsed, and that the defendants nevertheless refuse to cause them to be emancipated, as in law they are bound to do. Wherefore, they pray that they may be declared free. They further claim remuneration for their services from the date of citation, and pray for general relief.

To the demand, thus set forth in the petition and supplemental petitions, the defendants have excepted, on the following grounds:

1st. That under the allegations of the plaintiffs' petition, they can maintain an action only for their freedom.

2d. That by the Act of the Legislature of the 15th of March, 1855, all previous laws on the subject of emancipation were absolutely repealed, and that by the terms of said Act, all suits for the emancipation of slaves must be prosecuted by citation directed to the State of Louisiana, as represented by its proper officers, and that consequently the plaintiffs cannot prosecute this action against these defendants.

3d. That said Act of March 15th, 1855, so far as said defendants are concerned, is null and void, as imposing charges and burdens upon said defendants, not assumed by them in their original contract to emancipate said slaves.

For the purpose of determining the merits of the exceptions filed, it must be assumed that the facts set forth in the petition and supplemental petitions, are true; that the defendants did assume at the expiration of twenty-five years from the death of *Julien Poydras* to cause the plaintiffs to be emancipated, and to pay all necessary and legal charges incident to said emancipation.

We think the first exception above referred to is well taken. The plaintiffs' action must be restricted to a claim for freedom, or under the prayer for general relief to a demand that the defendants be ordered to take all the proper steps to cause them to be emancipated. See *Delphine* v. *Guillet*, 11 Ann. page —. Upon the face of the petition it is apparent that the plaintiffs are not free, and can only claim to be emancipated. Until they are recognized as free, or until they have been emancipated, they cannot maintain a suit for wages. It would be otherwise in the case of a free person who had been illegally reduced to a condition of slavery.

Upon the second ground urged by the defendants we think the defense is untenable. Even on the assumption that the legislation of 1855 repeals absolutely all previous legislation on the subject of the emancipation of slaves, it would not follow that plaintiff's action cannot be maintained. If the allegations of the petition are true, the defendants have assumed the obligation of procuring the emancipation of the plaintiffs in accordance with the laws of the State, whatever those laws may be. If the Act of 1855 were the only one in force, then it would be the duty of the defendants to proceed in accordance with its provisions.

But by the recent decision of this court, in the case of the *State* v. *Harrison*, the statute of 1855, "relative to slaves and free colored persons," has been declared null and void, as being unconstitutional. The exception, therefore, that the plaintiffs should have instituted a direct action against the State, is without foundation.

This brings us to the consideration of the third exception, to wit: that by the Act of 1855 additional burthens and charges are imposed upon those wishing to emancipate their slaves, beyond those required by previous statutes, and beyond those assumed by the contract of the defendants, that they are not bound to incur such additional charges and obligations as are imposed by this statute, and as all other statutes on the same subject have been repealed, that they are not bound to emancipate them at all.

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The learned Judge of the District Court, in an opinion which evinces both ability and research, has maintained the affirmative of both of these propositions. Undoubtedly, no mere act of legislation can change a contract, or impair its obligation. But the question in this case is, what was the contract? An obligation to emancipate a slave twenty-five years hence, and to take all legal steps, and to incur all necessary charges incident to such emancipation, has reference, we think, not to such legislation as was in force at the date of the contract, but to such as might be in force when the contract is to be carried into execution. We cannot suppose that it was contemplated by the parties, that a change in the form, or even the legal charges incident to an emancipation, might deprive the plaintiffs of their ultimate right to freedom. Whether the statute of 1855 be considered as constitutional or not, or as regulating exclusively, or concurrently with other statutes, the emancipation of slaves, it would impose no new obligation upon the defendants, nor would it relieve them, as they suppose, from those which they have already assumed.

As, however, a majority of the court have concurred in the opinion, and have decreed that the whole of the statute of 1855 was unconstitutional, it becomes unnecessary to consider the effect of the repealing clause.

It is ordered, that the judgment appealed from be reversed; that the exceptions filed be maintained, so far only as relates to the claim of the plaintiffs for wages; that upon said claim for wages, there be judgment as in case of nonsuit, and that in other respects the exceptions be overruled. It is further ordered, that the case be remanded for further proceedings to be had herein according to law; and that the defendants and appellees pay the costs of this appeal.

STATE OF LOUISIANA *v.* ADELINE, a Slave.

The confessions of the accused, being entirely voluntary, made to the officers who went to arrest her, are admissable.

The jury found the prisoner guilty of manslaughter, and condemned her to the penitentiary for twenty-five years. *Held:* That there was no error in the period of time fixed for the imprisonment of the accused. The Act of 6th April, 1856, page 114, did not repeal the 7th section of the Act of 1843, page 92.

APPEAL from a special tribunal organized for the trial of a slave, parish of Orleans. *Tappan*, District Attorney. *Clack*, for defendant and appellant.

MERRICK, C. J. The accused was tried by a special jury, organized under the Act "to provide for the trial of slaves accused of capital crimes in the parish of Orleans, approved 9th March, 1855, (Acts, p. 37,) for the murder of one *John Blakely*. The jury found the accused guilty of manslaughter, and condemned her to the penitentiary for twenty-five years.

The motions for a new trial, and in arrest of judgment, proving unavailing, the accused has appealed.

Her counsel urge in her behalf that the judgment of the lower court is erroneous:

1st. Because the court erred in allowing the confessions of the accused to go to the jury.

2d. Because the tribunal which tried the slave was without jurisdiction.

3d. Because the jury could not, after finding the accused guilty of manslaughter, extend the punishment beyond the longest period affixed by law to that crime.

4th. Inasmuch as the court did not convict or acquit the accused of a crime punishable with death, they could not inflict any other than corporeal punishment.

I. From the statement of the Judge, appended to the bill of exceptions, it appears that the confessions of the accused were entirely voluntary, and made to the officers who went to arrest her. Without being interrogated, or even called, she went to the officers and told them that she knew what they had come for; that it was to take her to the calaboose; that she knew very well what she had done, and if she had it to do over, she would do it again. Then in answer to a question, she said she had killed the deceased with a sword-cane, which she described, and said she had thrown it into the well. Her confessions do not appear to have been given under fear, or to have been drawn out by promises, and we see no error in the ruling of the Judge *a quo* in regard to them. We may add that it appears, by the bill of exceptions, that her confessions were corroborated by the discovery of a sword corresponding with the one described by her on searching the well.

II. The Act relative to slaves and free colored persons, approved May 15th, 1855, having been held unconstitutional, it removes any question which counsel might feel disposed to raise whether the subsequent statute repealed the former. See case of *The State* v. *Harrison*, 11 An.

III. The longest period affixed by law for the punishment of the crime of manslaughter, coupled with a discretionary fine of $2000, in the case of free persons, is twenty years. But in the case of slaves, a less restricted discretion is conferred upon the tribunal organized for the trial of slaves. By the 7th section of the Act of 6th of April, 1843, it is provided that "In all cases where capital punishment or imprisonment at hard labor for life is inflicted for any crime committed by a slave, the jury trying the same shall in its discretion pronounce sentence of death, imprisonment at hard labor for life, or for a shorter term, in prison or in irons in the service of his master, or order that corporeal punishment be inflicted." See Acts of 1843, p. 92. It has been held that this statute has not been repealed by the statute approved June 1st, 1846. See p. 114 of Acts of 1846, and cases of *State* v. *Slave Lewis*, 3 An. 398; *State* v. *Jackson, a slave*, 6 An. 595, and *State* v. *Slave Dick*, 10 An. 461. There does not, therefore, appear to be any error in the period of time fixed by the court *a quo* for the imprisonment of the accused.

IV. It has just been shown that the 9th section of the Act of 1846 had not the effect of repealing the seventh section of the Act of 1843. The jury were therefore not limited to the two kinds of punishment mentioned in the fourth objection urged by the counsel for the accused. It is urged in substance, that the policy of the Act of 1855, (and in consequence the Act of 1846, which was reënacted by it,) was to make two kinds of punishment, viz: capital, including imprisonment for life, and corporeal punishment. In the one case the State makes a partial indemnity to the owner of the slave for its loss, in the other

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he is not deprived of its services. And it may be added, if imprisonment for a long period of years is resorted to as a punishment, the owner is deprived of his slave for the most valuable period of its life without any indemnity.

As the punishment of imprisonment is more merciful, perhaps, than any corporeal punishment which the jury could inflict commensurate with the offence committed, the argument appears to be more in the interest of the master than the accused, and one which could be addressed to the Legislature with more hopes of success than to this tribunal.

Judgment affirmed.

E. M. GAIENNIÉ et als. *v.* SECOND MUNICIPALITY OF NEW ORLEANS.

Question of prescription—Decision in the case of *Remy* v. *The City of New Orleans*, 11 ANNUAL, affirmed.

APPEAL from the Third District Court of New Orleans, *Kennedy*, J.

Bonford, for plaintiffs. *Roselius* and *Livingston*, for defendant and appellant.

LEA, J. The plaintiffs claim a portion of the batture in this city, under a sale from *Jean Gravier*, dated in May, 1799. The act of transfer purported to convey (up to the river line) the whole of the lot which is the basis of the riparian rights claimed in this case.

The defendant relies upon the act of donation and compromise between the Mayor, Aldermen and inhabitants of New Orleans, *Edward Livingston*, and the supposed front proprietors of that portion of the city within which the property in dispute is situated. The testamentary executor of the succession of the late *Manette St. Amand*, has intervened in the suit, and joining the defendant, avers that after the death of *Pierre Labatut*, viz, in 1812, the original lot alleged by the plaintiff to have belonged to him, the batture of which forms the object of their claim, was sold at public sale, and bought by the vendors of his testator, and was sold in such a manner as to transfer all further rights of accretion with the lot itself. The original title of the plaintiff, viz: the sale from *Jean Gravier*, is recognized in the act of compromise, and indeed forms a part of the title under which the defendant claims; and any outstanding title to the property in dispute in the succession of *St. Amand* is disposed of by the decree of the court, dismissing the intervention of the representative of *St. Amand's* succession, from which judgment no appeal has been taken. We have searched the record in vain for any act of sale divesting the succession of *Pierre Labatut* of its title to the original lot, which is the basis of the riparian rights set up by the plaintiffs in this case.

The only issue, therefore, for solution is, whether the plea of prescription is available or not, and this question, we think, is controled by the recent decision in the case of *Remy* v. *The City of New Orleans*. The possession of the property in dispute by the city, was not of that character which can constitute a proper basis for the plea of prescription.

The judgment appealed from, however, decrees that the property in dispute shall be delivered to the plaintiffs and possession given thereof. There

is no evidence showing that the property in dispute is not required for the uses of commerce. The plaintiffs' right of property should be recognized, but their right to be put in possession, should be restricted to such portion of the same as may be shown not to be requisite for the purposes of commerce.

Judgment amended.

It is ordered, adjudged and decreed, that the judgment of the court below be amended, and that there be judgment in favor of the plaintiffs and against the defendant, the city of New Orleans, decreeing that said plaintiffs be recognized to be the true and lawful owners of the property claimed by them in their petition, viz, the batture, alluvion, or increase formed in front of a lot of ground purchased by *Pierre Labatut* from *Jean Gravier*, on the 4th day of May, 1799, and of all the future increase in front of said piece or parcel of ground; said lot of ground being situated in the faubourg St. Mary, lately part of the Second Municipality of the city of New Orleans, having 60 feet front on the river, by a depth of 160 feet between parallel lines, the exact position of said property being more particularly fixed by the plan annexed to the petition of the plaintiffs herein, and included in the space designated by the letters A. B. C. and D. on said plan, reserving to the city of New Orleans the possession, for the purposes of administration, of such portion of the property in dispute as may be subject to the servitude established by existing laws on land fronting on the Mississippi river, within the limits of the city of New Orleans. It is further ordered, that the petition of intervention of *E. J. Bernard*, testamentary executor of *Manette St. Amand*, herein filed, be dismissed, and that the defendant pay the costs in the District Court, and the plaintiffs the costs of this appeal.

The Police Jury of the Parish of Orleans, Right Bank of the Mississippi River, *v.* Pierre Nougues.

The Police Jury aforesaid, by an ordinance adopted 29th December, 1855, imposed a yearly tax "on each and every person keeping a dairy, within the limits comprised within the upper line of this parish and Verret Avenue, a yearly tax of two dollars for each and every cow, &c." Under the Act of March 15th, 1855, p. 395, the said Police Jury may impose a tax "on all persons pursuing any occupation, trade, or profession," and, therefore, may impose a tax on dairymen. But, the tax must be levied on *all* dairymen. The ordinance in question, while professing to tax the occupation, really imposes a tax upon cows kept by dairymen within certain limits. Considered in that light it is equally inconsistent with a just interpretation of the statute which conferred the power of taxation on said plaintiffs. It is not a tax on personal property to be preceded by an assessment, nor even on all cows within their jurisdiction. This is not only repugnant to the principles of equality which govern the exercise of the taxing power by the State, but was, evidently, not within the scope of the authority conferred by legislation on the said Police Jury.

The 5th section of the general Act "relative to Police Juries," approved 9th April, 1847, (see Sess. Acts, p. 83,) was not repealed *quoad* said Police Jury by the aforesaid Act of 1855.

APPEAL from a judgment of the Sixth Justice of the Peace of the parish of Orleans, right bank of the Mississippi River. *Durant & Horner*, for plaintiff. *Collins* for defendant and appellant.

SPOFFORD, J. The defendant and appellant contests the legality and constitutionality of an ordinance of the Police Jury of the parish of Orleans on the

POLICE JURY v. NOCQUET.

right bank of the river Mississippi, under which he has been condemned to pay fifteen dollars as a semi-annual instalment of the price of a license for keeping a dairy with fifteen cows.

The ordinance in question was adopted on the 29th December, 1855, and the provisions material to the present case are these:

"Resolved, that the rate of taxes for licenses on professions and occupations, for the year 1856 be as follows:

"On each and every person keeping a dairy within the limits comprised between the upper line of this parish and Verret Avenue, a yearly tax of two dollars for each and every cow, payable semi-annually and in advance $2 per cow."

The legality of this ordinance depends primarily upon the proper interpretation of the Act "relative to the Police Jury of the parish of Orleans on the right bank of the Mississippi river," approved March 15th, 1855, (Sess. Acts, p. 395.) The special powers conferred upon the Police Jury of the right bank, relative to taxation, are enumerated in the seventh clause of the 9th section of this Act, in the following terms:

"To levy a tax on real and personal property and slaves, upon ships, vessels steamboats or other water craft, landing there for more than five days, except the ferry during the term of the privilege, upon all wood yards, carpenter's yards, dry-docks, livery stables, bakeries, slaughter houses, taverns, billiard tables, and upon all other objects liable to taxation."

The "objects liable to taxation" include "all persons pursuing any occupation, trade, or profession." Const. Art. 123.

Dairymen may, therefore, under the Act of March 15th, 1855, be taxed by the Police Jury of the right bank of the parish of Orleans. But, the tax must be levied upon *all* dairymen. Now the ordinance under examination, while professing to tax the occupation, really imposes a tax upon cows kept by dairymen within certain limits on the right bank of the river in the parish of Orleans. The tax is two dollars per cow. Indeed, this is admitted by the counsel of the appellees, who has defended the legality of the tax on the ground that it is a tax on property, not a tax on persons pursuing an occupation.

Considering it in that light, it is equally inconsistent with a just interpretation of the statute which conferred the power of taxation upon the plaintiffs. It is not a tax upon personal property to be preceded by an assessment, nor even on all cows within their jurisdiction, but upon the cows kept by certain individuals, whilst other individuals may keep cows without taxation. This is not only repugnant to the fundamental principles of equality which governs the exercise of the taxing power by the State, but was evidently not within the scope of the authority attempted to be conferred by the legislature upon the Police Jury of the right bank.

It must be observed that this is a *tax* in its strict sense, intended to aid in filling the general treasury of the jurisdiction within which it was levied, and to defray the general expenses of that jurisdiction—not an assessment upon certain property, to be spent in improving the value of that property, or rendering its use more convenient to the proprietor. In such cases the same principle of equality and uniformity which natural justice dictates, which pervades all our modern legislation upon this class of subjects, and which has been embodied and consecrated in Article 123 of the Constitution, would seem that the particular properties which are to reap the benefit should bear the burden. The opening and paving of streets in towns, the building and repairing of levees, and the

draining of marshes, are special objects for which we have sometimes held that special assessment may be made upon the property to be benefited thereby. *New Orleans Draining Co.*, 11 An. p. 338. *Yeatman* v. *Crandall*, do.

The object of the Police Jury in this case could only have been attained in a lawful manner, by enforcing a uniform tax upon all persons pursuing an occupation in the same class, or by taxing personal property in the ordinary manner, or by an income tax.

This would probably have been our construction of the section already quoted from the Act of March 15th, 1855, even if it stood alone. But the 7th section of the same Act declared that the Police Jury of the right bank should "enjoy the same powers and be subject to the same duties as the Police Juries of the other parishes of the State."

Now, the 5th section of the general Act "relative to Police Juries," approved 9th April, 1847, (Sess. Acts, p. 82,) declared "that a vote of a majority of all the members elect of Police Juries shall be required to levy any parish tax, or to make any appropriations; *provided*, that in levying parish taxes they shall levy a uniform per centum on every species of property, trade, or profession on which the State assesses a tax."

We are of the opinion that the repealing clause at the end of the Act of March 15th, 1855, did not repeal the provision *quoad* the Police Jury of the parish of Orleans on the right bank of the river Mississippi, who, by the terms of the latter Act, were subjected to the same duties and invested with the same power as other Police Juries.

The law is decisive of the case.

It is, therefore, ordered that the judgment appealed from be reversed, and that ours be for the defendant, with costs in both courts.

P. N. FAISANS *v.* SAMUEL MOORE.

Plaintiff sued for the specific performance of a contract, by which defendant agreed to buy of him certain land *free from incumbrances: Held*, that plaintiff, in order to maintain his action, should have done all required of him by law to put the defendant *in mora*; C. C. 1907, 1908. Besides executing an act of sale of the land to defendant he should have procured the receipt of the Tax Collector and the certificate of the Recorder of Mortgages, showing that the property was free from incumbrances.

APPEAL from the Fifth District Court of New Orleans.

St. Paul & Bouny, for plaintiff. *Griffon*, for defendant and appellant.

MERRICK, C. J. The plaintiff having in the month of July, 1853, contracted to sell to the defendant three lots of ground, within the district drained by the draining company, for the sum of $1600, brings this action to compel a specific performance of the contract.

He alleges that the price was to be paid in cash, that the defendant paid four hundred and twenty dollars, and the residue was to be paid at the signing of the title; that although the plaintiff has offered to perform the contract on his part, and demanded a compliance on the part of the defendant, yet the defendant refuses to make payment.

The defendant in his answer admits the contract for the property clear of incumbrances and the payment of $420, but denies generally the other allegations of the petitioner, and avers that there is a judicial mortgage on the property in favor of the draining company, and avers his willingness to receive the title as soon as the mortgage in favor of the draining company is satisfied.

The case appears to have been tried in the absence of defendant's counsel.

The judgment of the lower court decreed the defendant, upon the plaintiff's satisfying the claim of the New Orleans Draining Company and all charges incident thereto upon the lots, to pay to the plaintiff the sum of $1180 and interest, with a proviso that the judgment should only take effect after the plaintiff shall have filed in court a full disclaimer of all the title to the said property. This judgment was signed on the 25th April, 1855. On the 30th day of May this further order was entered on the minutes "on motion of *St. Paul & Bouny*, of counsel for plaintiff, and on filing in court a duly certified copy of a deed of sale from said plaintiff to *Samuel Moore*, defendant, made in conformity with the judgment herein. It is ordered that said judgment be declared specifically performed so far as plaintiff is concerned."

The defendant appealed from the judgment rendered the 25th day of April, 1855.

He contends that he has not been put in default, the property being incumbered with taxes and the mortgage in favor of the draining company. Conceding that the indorsement upon the titles of Nov. 29, 1853, by which *LeBlanc* and *Ross* certify that they delivered the letter to the defendant, was sufficient proof of such delivery; still, we do not think the defendant has been put in default.

The only proof of the contract is the admission in the answer that the defendant agreed to buy the property free of incumbrances, and his parol declarations to the same effect, and his refusal to take the property on account of the privilege of the draining company.

This being the evidence on which plaintiff must rely to prove his demand, it makes it incumbent upon him to show that the mortgage of the draining company has been extinguished.

Moreover, to put the defendant *in mora*, the plaintiff should have done all that was required by law of him on his part; C. C. 1907, 1908. Besides signing the act, the thing to be done on his part was to procure the receipts of the Tax Collector and a certificate from the Recorder of Mortgages showing that the property was free from incumbrances. Acts 1848, p. 79, Sec. 1; C. C. 3328.

It is, therefore, ordered, adjudged and decreed by the court that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendant, as in case of a non-suit, and that the plaintiff pay the costs of both courts.

Board of Health of Louisiana v. Pooley, Nicol & Co.

This suit was brought to recover the amount of certain drafts, drawn by the captains of certain schooners, for the inspection, at sundry times, of said vessels at the Rigolets, the Atchafalaya and the Mississippi river, during the time the quarantine regulations were inforced in the year 1855. The defence rests on the ground that the Act of March, 1855, p. 47, did not contemplate the payment of fees for the inspection of vessels at the Rigolets and the Atchafalaya river; that the Board of Health were only authorized by the statute to claim fees for the inspection of vessels in the Mississippi river, and that only one of said vessels was inspected in the Mississippi river, and for that defendants had deposited the money in court.

By the court: There is not drawn in question the *constitutionality* or *legality* of any tax, toll or impost whatsoever, or of any fine, forfeiture or penalty imposed by a municipal corporation, and the amount in controversy is under $300. The case is, therefore, not within the provisions of Art. 62 of the Constitution of 1852, which confers on this court its jurisdiction.

Conceding that the fee imposed by the Act of the Legislature is a tax, toll or impost, upon which no opinion is expressed, the only question this court can consider is the constitutionality of the laws or ordinances under which the tax, fine, toll or impost is levied, and not its application to the facts or the construction of such law by the inferior court.

The "fee" exacted of vessels undergoing inspection in time of quarantine, under the Act of 1855, is a tax. The question in this case is purely one of law, touching the legality of a tax, toll or impost, and as such this court is compelled to take jurisdiction of it, and to construe this law for the parties. Spofford, J., dissenting.

The tax, toll or impost levied upon the defendants' vessels was a legal exaction. Spofford, J., dissenting.

The "fees" claimed by plaintiff are sanctioned by law, and the law imposing them is constitutional. Lea, J., dissenting.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

H. D. Ogden, for plaintiffs. *Mott & Frazer*, for defendants and appellants.

Merrick, C. J. This suit is brought to recover of the defendants one hundred and five dollars, alleged to be due for certain drafts drawn by the captains of the schooners Southern, West Florida and Emma De Russy, for the inspection, at sundry times, of said vessels at the Rigolets, the Atchafalaya and the Mississippi river, during the time the quarantine regulations were inforced in the year 1855.

The defendants, by their answer, deny that they owe the plaintiffs anything except $15, which they aver they deposited in court. They deny that the Board of Health had any right to claim any fees or charges of defendants' vessel, and aver that the Act of the Legislature and the regulations of the Board of Health under which said claim is made are unconstitutional and illegal.

The defendants in this court rest the defence to the action on the ground that the Act of the Legislature of the 15th of March, 1855, did not contemplate the payment of fees for the inspection of vessels at the Rigolets and the Atchafalaya river; that the Board of Health were only authorized by the statute to claim fees for inspection in the Mississippi river, and that only one of their vessels was inspected in the Mississippi river, and for that inspection they have deposited the money in court.

We have no jurisdiction of this case. If the lower court has erred at all, it is in applying a law constitutional in itself to a case to which it was not applicable. Here, then, there is not drawn in question the *constitutionality* or

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legality of any tax, toll or impost whatsoever, or of any fine, forfeiture or penalty *imposed* by a municipal corporation, and the amount in controversy is under $300. The case is, therefore, not within the provisions of Article 63 of the Constitution of 1852, which confers on this court its jurisdiction. Conceding that the fee imposed by the Act of the Legislature is a tax, toll or impost, (upon which we express no opinion,) it has been settled by this court that the only question which the court can consider is the constitutionality of the law or ordinance under which the tax, fine, toll or impost is levied, and not the application to the facts or construction of such law by the inferior court. In the case of the *Third Municipality* v. *Blanc*, 1 An. 386, it is said:

"The concluding part of this Article of the Constitution limits the jurisdiction of this court in criminal cases to questions of law, and the conclusion, that in the case of a petty fine, a greater privilege should be held to be secured the citizen than in a prosecution involving liberty or life, must rest on something more definite than a mere implication.

"Another conclusive reason against adopting the interpretation of the clause of the Article contended for by the counsel for the defendant is, that the determinations of questions of fact which occur of this kind would be impossible under the present organization of the court."

In the case of the *Second Municipality* v. *Corning*, 4 An. 407, the question raised was the *construction* of an ordinance, precisely what is sought to be done in the present case in regard to an Act of the Legislature. The court said:

"The tax we find to be lawful. *Corning* has been condemned to pay a tax which he did not owe; not that the tax itself was illegally imposed, but because *it did not apply to him.* The amount is not sufficient to enable this court to take cognizance of the appeal; the only decree we can make is to dismiss it."

These decisions were rendered prior to the adoption of the Constitution of 1852, and as the Constitution of 1852 adopts substantially the provisions of the Article No. 63 of the Constitution of 1845, we must suppose it was the intention of the framers of the Constitution to adopt, with the Article in question, its judicial construction.

Again, if we have jurisdiction of the question of fact by which this law is applied to the inspection of vessels at the Rigolets, we have jurisdiction of every other fact and our jurisdiction is no longer confined in this class of cases to the constitutionality or legality of the law or ordinance levying the tax, toll or impost, but extends to every question of fact which may be raised in the cause to which the statute may be applied.

It is, therefore, ordered, adjudged and decreed by the court, that the appeal in this case be dismissed, and that the appellant pay the costs of the appeal.

LEA, J., dissenting. I think the fees claimed by the plaintiff are such as are sanctioned by law, and that the law imposing them is constitutional. I am of the opinion, therefore, that the judgment should be affirmed.

SPOFFORD, J., dissenting. Lord Coke's definition of a tax has been accepted in this court on several occasions: "a burthen, charge, or imposition set on persons or property for public uses; exactions to fill the public coffers for the payment of the debt, and the promotion of the general welfare of the country."

The "fees" exacted from vessels undergoing inspection in the time of quarantine, under the Act of March 15th, 1855 (p. 471), seem to come within the terms of Lord Coke's definition; they are an imposition set on persons or property for public uses; for observe, they do not go to the resident physician as a compensation for his work; in effect, they go to the State; the State established the quarantine not for the benefit of the quarantined vessels themselves, but for the benefit of the State at large, by guarding it against the importation of pestilence by the vessels. The officers employed receive fixed salaries from the State. The fees, through the machinery of the Board of Health, are expended for the public benefit under the supervision of the State, because they are required to be deposited in bank, and the statement thereof approved by the Auditor of Public Accounts. I see no analogy between such an imposition as this and the fees paid to notaries, &c., which are a compensation for services done to the party paying them, and go directly into the pocket of the party who renders the services.

The jurisdiction of this court extends to "ALL cases in which the constitutionality or *legality* of any *tax, toll, or impost, whatsoever*, shall be in contestation." Constitution, Art. 62.

The sole question presented by the appellant in this case is, the legality or or illegality of the fees exacted from vessels arriving at the Rigolets and Atchafalaya quarantine stations, and there inspected under the provisions of the Act of March 15th, 1855, entitled "an Act to establish Quarantine for the protection of the State." Sess. Acts, p. 471. It is conceded by the argument, that the law is constitutional.

The appellant contends, that this Act does not authorize the Board of Health to charge fees for the inspection of vessels quarantined at those two stations, but only upon such vessels as are inspected at the quarantine ground on the Mississippi river.

This is, to my mind, purely a question of law touching the legality of a tax, toll, or impost; and as such, I think, we are compelled to take jurisdiction of it, and to construe this law for the parties, irrespective of the amount in dispute between them.

By the seventh section of the Act in question, the quarantine stations of the Rigolets and the Atchafalaya, were established; but it was declared that the provisions of this Act should apply to the station at the Rigolets, only from the day of the issuing of the Governor's proclamation, as provided by section thirteen, and should continue in force there until suspended by a vote of two-thirds of the members of the Board of Health; and further, that the provisions of the Act should apply to and be enforced at the quarantine station on the Atchafalaya river, from the first of May to the first of November of each year, and also when the Governor shall have issued his proclamation as provided by the thirteenth section, and in such case should remain in full force until suspended by a resolution voted for by two-thirds of the members of the Board of Health.

I understand these provisions to extend the rule as to fees of inspection at the quarantine ground on the Mississippi river to the two stations at the Regolets and the Atchafalaya, whenever a quarantine is kept up there in pursuance of the Act. I therefore think the tax, toll or impost, levied upon the defendants' vessels, was a legal exaction, and that the judgment appealed from should be affirmed.

H. Gilly *v.* F. Roumieu.

Where an agent, whose authority having been revoked, rendered his account, showing certain assets in his hands belonging to and a balance of money due his principal, and having offered to pay the same on being released from all his liabilities on account of his agency, which was refused—instituted suit against the principal, to compel the homologation of his account and his discharge from all his responsibilities as agent, on delivering the assets and money, due according thereto: *Held*, that the principal was entitled to a judgment on a rule taken by him, for the money admitted to be due him.

It is no objection to the judgment on the rule that a part of the case was left open for trial.

While the mandatary is compelled to render his account, he has the right to retain *only a sufficient amount* out of the property of the principal in his hands, to satisfy his *expenses* and *costs* and he may even retain, by way of set off, what the principal owes him, provided the debt be liquidated. C. C. 2978, 2992.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J. *Filleul*, for plaintiff. *Hunt & Denegre*, for defendant and appellant.

Merrick, C. J. The plaintiff in this action transacted the business of the defendant for some time, as his general mandatary in this city. He was in the habit of making remittances to his principal at Bordeaux, France, by the purchase of cotton. His accounts show that he usually had from three to five thousand dollars balance in his hands to the credit of his principal.

Shortly before the commencement of this suit the principal revoked his power of attorney, and appointed *Messrs. Gratiaa, Commagère & Co.*, a firm in this city, as agents.

They called upon the plaintiff for an account and for the assets in his hands, consisting of evidences of debts, bank stock and cash, &c.

The plaintiff rendered the account, tendered the balance in his hands with the notes and obligations belonging to his principal to the new agents, and demanded a receipt and discharge, and also notified them that he would cause an account to be made out according to law, and have the same homologated by the District Court.

Gratiaa, Commagère & Co., obtained from the plaintiff his account and vouchers, promising to settle the account after examining the same, and grant a discharge to the plaintiff, but they returned the account to plaintiff saying that they wished the account to be homologated by the court.

The plaintiff detailed the foregoing facts in his petition, (from which, for the purpose of this trial they are taken,) and annexed an account thereto, showing the assets in his hands and a balance in money of $3737 62, after deducting his commissions and $150, the fee of his counsel for preparing the account and suing for its homologation.

Plaintiff concludes his petition by praying that his account be decreed regular, exact and correct, that it be homologated, that he be discharged from all responsibilities on his delivering up the balance, $3637 62 cash, together with the titles, notes, accounts, bank stock, &c., and that said defendant be decreed to pay petitioner $150 for his trouble and expense incurred in obtaining a judicial settlement, and to pay the costs.

The answer admits the agency, and the removal of the plaintiff therefrom; it admits the receipt of defendant's funds, but avers that plaintiff refuses to deliver the same, and unjustly withholds them from defendant. It admits that

plaintiff owes the $3637 62, together with the titles, notes, &c., and avers that he has always been anxious and ready to receive the same and give a full acquittance therefor through his said agents, but said plaintiff refuses to deliver the same, and has instituted these proceedings with a view to withhold the said property and money still longer. The defendant further denies that the account is a correct account of the administration of said agent, and that he is precluded by the same from a further demand against said plaintiff, and that the court has no power to homologate the account and discharge the plaintiff, as prayed for, and reserves the right of demanding any property or sum of money belonging to him which may be now or hereafter in the hands of the plaintiff. Defendant prays that the plaintiff's demand for $150 be dismissed, and that there be judgment in defendant's favor, for the sum of money, titles and notes which plaintiff admits he owes the defendant.

After filing the answer the defendant took a rule upon the plaintiff to show cause why there should not be judgment in the defendant's favor, for the $3637 62, and notes and titles, &c., admitted by the plaintiff to be due the defendant.

The plaintiff excepted to the rule, on the ground that the court could not try a part of a case, and that the trial could not take place on any other day than that fixed by the court when the case is called in its turn.

The rule was tried and made absolute, and judgment was rendered against the plaintiff for $3637 62, and the notes, titles, bills, &c., admitted by the plaintiff in his petition and account to belong to the defendant.

The plaintiff has appealed from this judgment.

He contends that he has a privilege for advances and a right of detention upon the effects in his hands; that the contract of mandate is synallagmatic, and produces mutual obligations which are to be performed at the same time or the one after the other; that the mandator is bound to warrant and indemnify the mandatary, and to give him a release and discharge when the mandatary renders the account.

That in this case the defendant was not authorized to require of plaintiff the funds and assets in his hands, until he should tender the receipt and discharge on his part.

We see no error in the judgment of the lower court. The plaintiff, in the account which he has rendered, admits that he has in his hands $3637 62, cash, after retaining his commissions, one hundred and fifty dollars to pay his lawyer for making out the account, and one hundred dollars to pay costs. The law does not contemplate that the mandatary or agent shall, on account of a dispute about a single item, retain in his hands the balance due his principal, however large the same may be. Were this the case, it would be a premium offered to the agent to raise difficulties with his principal in order to retain the funds. The code is sufficiently explicit on this subject. While it compels the mandatary to render an account, (No. 2973,) it gives him the right to retain only a *sufficient amount* out of the property of the principal in his hands to satisfy *his expenses and costs*, and he may even retain by way of offset what the principal owes him, provided the debt be liquidated; C. C. 2992. Here the plaintiff has in his hands his expenses, his commissions, and two hundred and fifty dollars to pay his lawyer's fees and costs of suit, and it is only for the balance after these deductions have been made for which judgment was taken against him on his judicial admissions.

It is no objection to this judgment that a part of the case was left open for trial. *Municipality No.* 2 v. *Corning*, 4 An. 407.

The question, whether the agent can tax his principal, with the cost of making out his account, and whether the word "costs" used in Article 2992 of the Code means costs in the rendition of account, are questions which have not been decided by the lower court, and are not before us for examination under our appellate jurisdiction. The only question we have considered is that raised as to the correctness of the judgment appealed from.

Judgment affirmed.

PETER MARCY et al. *v.* THE SUN MUTUAL INSURANCE COMPANY.

Plaintiff sued on a policy of insurance, upon a floating dock, containing the clause: "Insurance was against all risks." *Held:* That testimony, offered to prove that the terms "harbor risks" and "river risks," included the only risks covered by said policy of insurance, and that they have a definitive and settled meaning in the law of insurance, and comprehended only risks from fire, from collision, from extraordinary losses arising from extraordinary perils of the winds and waters, from external accidents only, and not from defects in the thing insured, is inadmissible. In the absence of a custom in regard to "floating docks," by which the terms used in the policy have acquired a particular signification, the construction is one of law, for the courts, upon the instrument itself. The opinion of witnesses upon the evidence, as it did not appear that they were shipwrights, or had any experience in building docks, was properly excluded.

That the terms "all risks" includes all river risks and harbor risks, so far as these risks were applicable to floating docks.

That there was a warranty on the part of the insured that the dock was seaworthy, well built, staunch, and capable of the business in which it was employed, and fitted with machinery and well protected against accidents arising from the ordinary effects of the elements in which it was employed.

That where a loss occurs without any known or apparent cause, the presumption is that such loss was occasioned by the unseaworthiness of the dock; yet this presumption may be rebutted by sufficient positive proof, by disinterested witnesses, of its seaworthiness.

APPEAL from the Sixth District Court of New Orleans, *Cotton*, J.

Gilmore, *Bonford* and *Roselius*, for plaintiffs. *Maybin* and *R. Hunt*, for defendant and appellant.

MERRICK, C. J. The defendant, through its agent in this city, on the 23d day of August, 1854, renewed a policy of insurance upon a floating dock called the "Old Dry Dock."

The policy was for one year. The premium paid was 1½ per centum, and the amount of interest insured was $4500.

The policy was a printed marine policy, with such blanks filled as were proper to be filled, and with a clause in writing that "insurance was against all risks."

In March, 1855, the ship Boynton was received within the dock, when it was attempted to raise the ship by throwing off the water by the pump attached to the engine of the dock. Either from the defects in the dock itself, a sudden leak, the breaking of one of the pumps, or some obstruction to the valves from drift wood, the machinery became insufficient to raise the dock. The ship was removed; nevertheless, with all the exertions of those in charge of the dock, it gradually sunk, put out the fires in the furnace, and, going under, became a total loss.

The defendant resisted the payment of the sum insured, on the ground that the dock was not seaworthy, and had not a capacity sufficient for the Boynton, and that the loss was occasioned without any apparent external cause, and by a risk not insured against.

The case was tried by a jury, who found for the plaintiff, and the defendant appealed.

There are two bills of exception in the record which require our notice. The defendant offered to prove, by *Capt. Pollock* and other witnesses, that, according to the well established usage in New Orleans on the terms "harbor risks" and "river risks," the perils by which the plaintiffs allege they suffered the loss, and for which they seek to recover in this case, were not included in such risks, which were the only risks covered by the policy offered in evidence: that those are well known terms, and though ambiguous in themselves, have a definitive and settled meaning in the law of insurance, and comprehend only risks from fire, from collision, from extraordinary losses arising from extraordinary perils of the winds and waters; from external accidents only, and not from defects in the thing insured.

The court refused to admit the testimony, and the defendant excepted.

The court did not err. The covenant in the present policy is "against all risks." It is not pretended that any custom has been established in New Orleans in regard to insurances upon floating docks, by which the terms used have acquired a particular signification. In the absence of such custom, the construction is one of law for the courts upon the instrument itself.

On the second branch of the bill of exception, we observe that it does not appear that *Captain Swain* and *Robertson* were shipwrights, or had any experience in building docks. Their opinion upon the evidence was properly excluded. Indeed, in the conflict of testimony in this case, a decision of the question by the experts, whether or not the loss was occasioned by the defects in the dock insured would have been, if credited by the jury, a decision of the case itself.

The court was also requested to instruct the jury that the written words, "all risks," in the policy, must, on account of the nature and employment of the dry dock, be considered by the jury as meaning all river risks and harbor risks. This instruction the court refused, on the ground that it was in the province of the jury to say what was the intention of the parties, and what effect was to be given to the terms of the policy.

We think the court ought to have instructed the jury that the insurance did include the risks named, viz: so far as applicable to the object insured; that the dock was not intended to run from one point on the river to another, or to carry freight, but to be moored to the wharf; that the manner of its use required it to be partially submerged to raise the vessel entering the dock; that as the sinking and raising the dock occasioned its greatest risk, the policy covered all risks from external injuries while in action or use, as well as when entirely afloat.

That the jury ought to have been informed that, although the policy protected the insured against losses from such risks; nevertheless there was a warranty on the part of the insured that the dock was seaworthy or well built, staunch and capable of the business in which it was employed, and fitted with efficient machinery and well protected against accidents arising from the ordinary effects of the element in which it was employed; that if the jury believed

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that the accident was occasioned by the inherent defects in the dock, such as weakness or rottenness of the timbers and works, or the insufficiency of the machinery, or the defective construction of the valves, &c., the insured are not liable; that if, on the contrary, the jury should be of the opinion that the dock and its machinery were in all respects staunch and well fitted for the business in which it was employed, and not used in this instance beyond its capacity, and that the accident was occasioned by the unusual and extraordinary effect of the drift wood forced by the current into the valves, by which their action was prevented, they having been properly made and secured, or if the loss was occasioned by any other unusual action of the winds, waves or currents of the river, that the plaintiffs would be entitled to recover under the policy, and not otherwise.

The defendant further requested the court to charge the jury that the plaintiffs were not entitled to recover unless they showed the cause of the sinking of the dock, and if no cause be shown to the satisfaction of the jury, they are bound to presume the dry dock unseaworthy; the court charged that, although the principle is true, it is not altogether applicable to this case.

We think the charge should have been given with the qualification that, although where a loss is occasioned without any known or apparent cause, the presumption is that such loss was occasioned by the unseaworthiness of the dock, yet that this presumption may be rebutted by sufficient positive proof, by disinterested witnesses, of the seaworthiness of the dock. *Snether* v. *Memphis Insurance Company*, 3 An. 474; 7 An. 279.

In the conflict of testimony in this case it is impossible to ascertain what principles of law governed the jury in their conclusions. We think it, therefore, our duty to remand the case for a new trial.

Judgment reversed, and a new trial ordered, with instructions to the lower court to be governed by the views herein expressed, and otherwise to proceed according to law; appellees to pay costs of appeal.

WILLIAM H. NIXON *v.* W. B. BOZEMAN et al.

Plaintiff sued for the rescission of the sale of a slave, and for restitution of the price paid the defendant, on the ground that the slave was afflicted with a redhibitory disease, to wit, fits. The slave was tendered to the defendants, and disappeared the following morning, and could not be found. *Held:* The rule embodied in Art. 2511 C. C. is but the embodiment in the Code of the maxim *res perit domino*. Until the thing is shown to have perished, the presumption exists that it may be recovered, and that there is still a property in the thing which may be divested by the rescission. There is no force in the objection, that because plaintiff has alledged one ground of redhibition, he shall not be permitted to show his inability to deliver the slave to the defendant, on account of defects, in the nature of a second ground of redhibition. By the force of the judgment rescinding the sale, the property in the slave, wheresoever he may be, is in the defendant.

APPEAL from the Second District Court of New Orleans, *Lea*, J.

Semmes & Edwards, for plaintiff and appellant. *Elmore & King*, for defendant. *Hunton & Bradford*, for warrantor.

MERRICK, C. J. (SPOFFORD, J., absent.) This suit is brought to recover back the price paid by the plaintiff to the defendants for a slave, and for the

rescission of the sale and the recovery of damages. As the basis of the action, it is alleged that the slave "was afflicted with a redhibitory disease, to wit, fits, which has rendered his use so inconvenient and imperfect, and has so much impaired his value, that had petitioner known of the existence of the disease, he never would have purchased him." The demand was against the defendants as bound *in solido*, it being alleged that they were partners in buying and selling slaves. The answer admits the partnership. The defendants called in warranty *Macmurdo*, their immediate vendor.

The case was tried by a jury, who rendered a verdict in favor of plaintiff rescinding the sale, and awarding plaintiff $950, the price of the slave, and $250 damages, and the return of a note of $25. The jury also dismissed the demand in warranty.

The plaintiff having remitted $25 of the verdict, judgment was entered thereon accordingly. The defendants have appealed.

Since the case has been pending in this court, the plaintiff having died, and the defendant, *Matilda Kendig Bushy*, having gone into insolvency, *C. De Choiseul*, as curator of the vacant estate of the one, and *John M. Bell*, as syndic of the creditors of the other, have been made parties in their respective capacities to this suit.

No motion was made in the lower court to obtain a new trial.

The appellants urge as grounds of reversal in this court, that the judgment is erroneous:

1st. Because it is a judgment *in solido*.

2d. Because there is no proof that the plaintiff sustained damages to the extent of $250.

3d. Because the judgment does not order the plaintiff to restore the boy to the possession of the defendants.

I. On the first point, the petition charges that the defendants are bound *in solido*, and alleges that they were partners in buying and selling slaves. The defendants, in their answer, "admit the partnership alleged." The act of sale was made by the defendant *Bozeman* alone to the plaintiff, without any allusion to the fact, that he had a partner interested in the sale with him, although their immediate vendor had made conveyance to *Mrs. Bushy* only and not to *Bozeman*. As no application was made to the lower court to set aside the verdict of the jury, we do not think we are called upon to revise the verdict in this particular, there having been evidence before them from which they might infer the solidarity of the obligation of defendants. 2 Ann. 876.

II. The observation we have just made, applies with equal force to alleged excessive damages allowed by the jury.

III. It appears that the slave was tendered the defendants on the 2d day of March, 1853, and he disappeared on the following morning. It is further shown, that notwithstanding every reasonable exertion was used to recover the slave, he has not yet been found, although there were rumors of his presence in New Orleans after the tender. On this third point it is urged, that "the boy has been lost to the plaintiff, and cannot be returned to the defendant in consequence of—*not the vice alleged in the petition or complained of—but of something else, his disappearing.* That the Civil Code, Art. 2510 declares, if the thing affected with vices has perished through the badness of its quality, the sellers must sustain the loss. Art. 2511. If it has perished by a fortui-

tous event, *before the purchaser has instituted his redhibitory action*, the loss must be borne by him."

We do not think the law cited applicable to this case. The rule embodied in Article No. 2511, is but the embodiment in the code and limitations of the maxim, *res perit domino*. Until the thing is shown to have perished, the presumption exists that it may yet be recovered; that there is still a property in the thing which may be divested by the rescission. Moreover, there is not much force in the objection, that because the plaintiff has alleged but one ground of rehibibition, he shall not be permitted to show his inability to deliver the slave to the defendants on account of defects in the nature of a second or third ground of redhibition. The judgment rescinds the sale of the slave, and by the force of the judgment, the property in the slave, wherever he may be, is in the defendants.

So far as it respects the defendant in warranty, it is shown that it, the title from *Macmurdo* to *Mrs. Bushy*, warrants the title only. It is further shown, that *Macmurdo* expressly refused fully to guarantee the slave, and he gave as his reasons that he suspected that the slave had stolen money, and that he pretended to be sickly, which he, *Macmurdo*, did not believe to be the case. The jury, by their verdict, must have found that it does not appear that *Macmurdo* knew that the slave was subject to fits, nor that his statement that he did not believe the slave was sickly, was untrue; and they have further found that it does not appear that *Macmurdo* was guilty of fraud in making the sale to *Mrs. Bushy*. C. C. 2523, 2526. We are not prepared to say that the jury erred in their conclusion on this branch of the case.

We do not think this a case in which damages should be allowed as in case of a frivolous appeal.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be affirmed in favor of *C. De Choiseul*, the curator of the succession of *William H. Nixon*, deceased, and the warrantor, *John P. Macmurdo*, and against the said *Bozeman* and the sydic of the creditors of said *Matilda Kendig Bushy*; and that the said defendants and appellants pay the costs.

R. J. DAVIS *v.* WILLIAM ROBERTSON.—SAME *v.* SAME.

Under the statutes of Mississippi, the trustees of insolvent banks are not restricted to the collection of such assets as are necessary to pay the debts of the corporation, but they have the right to collect all the assets and, after payment of debts, distribute the surplus among the stockholders.

In ordinary cases the decisions of the State courts, upon the construction of State laws, not involving questions under the Constitution of the United States, are authoritative. But in a case like this, where there is difference of opinion between the Supreme Court of the United States and the Court of Errors of Mississippi, it is a good reason for following the former, that it is more in harmony with the jurisprudence of Louisiana.

APPEAL from the Fourth District Court of New Orleans, *Reynolds*, J.

Clarke & Bayne, for plaintiff. *Mott & Fraser*, for defendant and intervenor, appellant.

MERRICK, C. J. On the first day of March, 1845, the Commercial Bank of Natchez commenced suit, in the Circuit Court of Madison county, Mississippi, against *R. J. Davis* and his sureties, upon a promissory note for $2647 44, due on the 1st day of March, 1839, with eight per cent. interest.

On the twelfth day of June of the same year, 1845, the charter of the Commercial Bank was declared forfeited, and the defendant, *William Robertson*, appointed trustee. In April, 1847, *Robertson*, suggesting the dissolution of the corporation, obtained an order reviving the suit in his name as trustee, and obtained, at the same time, a judgment of default against the defendants.

This judgment by default was set aside, and on the motion of the defendants, and the production of a writ of injunction, showing that, at and previous to the institution of the action, the Commercial Bank had been injoined from the collection of its debts, the suit was dismissed. In February, 1850, *Robertson*, as trustee of the Commercial Bank, sued out his writ of errors upon this decree to the High Court of Errors and Appeals of the State of Mississippi.

From August, 1850, to June, 1852, the writ of error still pending, the parties were treating for a compromise on a proposition of *Davis* and his sureties.

In the month of June the compromise was agreed upon. One of the sureties of the defendant was to give, in discharge of the debt, his two drafts, payable the first day of October, 1852, for the amount of the face of the original note sued on, without interest, and pay the attorneys fees and costs. The drafts were given accordingly, payable in this city, and the writ of error was dismissed on the 6th day of December, 1852.

Before the maturity of the drafts, *Davis* informed the attorney of the trustee, at Canton, Mississippi, that the payment of the drafts would be stopped, and that he wished him to proceed as before in the prosecution of the suit.

On the fourth day of October, the maturity of the drafts, the present suit was commenced by attachment to arrest the collection of the drafts by *Robertson*, but failing in this, the plaintiff was afterwards enabled to perfect his process by personal service. Judgment was rendered against *Robertson* in the District Court, and the defendant has appealed.

The charter of the Commercial Bank of Natchez was declared forfeited under an Act of the Legislature of Mississippi, approved 26th of July, 1843. This Act provided for the liquidation of the affairs of the banks whose charters should be declared forfeited, by the appointment of a trustee, who was required to give bond and empowered to collect the debts due to the defunct corporation, and distribute the proceeds according to law, to the payment of the debts of the corporation.

By a subsequent Act, approved February 28th, 1846, it was made the duty of trustees, appointed or to be appointed, to distribute the funds to the creditors of the bank in the order therein laid down, and the surplus, if any, ratably among the stockholders.

The High Court of Errors and Appeals of Mississippi, shortly after the maturity of the drafts, decided that the trustee had no authority to collect of the debtor of the bank any more funds than were sufficient to pay the debts. It being admitted that the trustee had already contributed more than sufficient to pay the debts, as a necessary consequence he was, under that decision, incompetent to collect, on their original contracts, anything further from the debtors of the bank. Since the decision, by the High Court of Errors and Appeals, of the case of *Coulter and Richard's Executors* v. *W.*

Robertson, Trustee, the question has been considered by the Supreme Court of the United States, in the case of *Bacon et al.* v. *Robertson et al.*, 18 Howard's U. S. Reports, 480, wherein the latter court hold directly the reverse of the former.

In ordinary cases we are accustomed to consider the decision of the State tribunals, upon the construction of their own laws, not involving constitutional questions arising under the Constitution of the United States, as the most authoritative exposition of them, and decisive of the meaning of such statutes.

But there are two reasons which induce us to adopt the decision of the Supreme Court of the United States as controlling our conclusions in this case.

1st. The first is, that the decision of the Supreme Court of the United States is more in accordance with what we conceive to be the settled jurisprudence of Louisiana. Under our legislation we believe that the debtor of a corporation has never been considered discharged from his obligation by the forfeiture of the charter of such institution. Indeed our courts have, under their equitable powers, appointed (when necessary) a receiver to collect the debts due to such defunct corporation, for the purpose of paying the debts due by it.

2d. From the principles announced by the Supreme Court of the United States, we infer that the courts of the United States have taken, or will take, jurisdiction (at least of the funds in the hands of the trustee) in a suit brought, or to be brought, by the non-resident stockholders against those residing in Mississippi and the trustee. And as a legitimate consequence of the reasoning of the Supreme Court of the United States, we have reason to suppose that the sum of money now in controversy, being in the hands of the trustee, will be subject to distribution, to be ordered by that or the Circuit Court.

Moreover, equity does not require that the stockholders who now appear to have possesion of that fund by their agent and trustee, and who, in their corporate capacities, furnished the consideration of the original note, the subject of the compromise, should be compelled to return to the plaintiff their money, which he has held for so many years without paying interest.

In conclusion, we observe that it is by no means certain that, under the law as settled by the courts of Mississippi, the plaintiff would be entitled to recover. It is very questionable whether the plaintiff is not estopped by the compromise from contesting the plaintiff's capacity to receive or retain the money. For a compromise at common law appears to us to be as conclusive upon the parties and somewhat more comprehensive in what it embraces than the transaction under our own Code. Error of law is not a ground for its rescission, and it can only be set aside where there has been fraud or misrepresentation. 1st Bouvier Inst. 309; *Bellée* v. *Lumly*, 2 East. Rep. 469; 1st Comyn on Contracts, 35, (38); C. C. 1824, 3046, 3047.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed, and that there be judgment against the demand of the plaintiff and in favor of the defendant, and that the plaintiff pay the costs of both courts.

F. P. Boutté et al. v. Dubois & Mish.

Construction of the following clause in a contract of lease:

"3d. The State and municipal taxes, over and above the amount now paid by the lessors, shall be chargeable to and reimbursed by the lessees to the lessors."

Held: That the lessor was entitled to annual reimbursements of whatever sums he paid for taxes, above the amount fixed in said clause. No reference was made in the contract to a final adjustment in 1861; no estimation was given of an intent to keep up a debtor and creditor account of excess and deficiency each year through the term of lease. No account was to be taken of the deficiency, what was "over and above" was provided for. The deficiency was not to benefit the lessees in any case; the excess was to be chargeable to them and was therefore exigible as soon as paid by the lessors.

APPEAL from the Second District Court of New Orleans, *Morgan*, J.

Martin and *Forstall*, for plaintiff. *Upton* and *Roselius*, for defendant and appellant.

Slidell, J. In 1851 the defendants, by notarial act, leased certain premises in New Orleans to the plaintiffs for eight years to be computed from and after the 6th July, 1853, to end with the 5th July, 1861.

The following are the first three clauses of the agreement as articulated by the notary:

1st. The said *Dubois & Mish*, for them, their heirs and assigns, bind themselves to pay regularly at the end of each and every month of said lease, on first presentation of the simple receipts of said lessors or their agent, the monthly rent of three hundred dollars. The first payment thereof to become due and to be effected on the 6th day of August, 1853, the second on the 6th of September next ensuing, and so on from month to month, during the continuance of said lease.

2d. All costs, charges and expenses whatsoever for repairing and keeping in good condition said premises, remain now and until the expiration of said lease, to the exclusive charge and account of the lessees.

3d. The State and municipal taxes, over and above the amount now paid by the lessors, shall be chargeable to and reimbursed by the lessees to the lessors.

The present controversy involves the construction to be given to the third of the foregoing clauses. The amount of State and municipal taxes paid on the property by the lessors, for the year 1851, (the year the contract was made,) is admitted to have been $552 50. These taxes for the year 1852 having exceeded that sum by $251 50, and for 1853 by $302 20, this suit was brought in 1854 by the lessors against the lessees, under the third clause of the contract for the reimbursement of these two sums, amounting together to $553 70, for which they recovered judgment against the lessees, who have appealed.

The appellants contend that, by the clause in question, no reimbursement could be called for until the expiration of the whole period of the lease, in July, 1861, and then only in case the average amount of State and municipal taxation upon this property for that term should exceed $552 50 per year.

The appellees, on the contrary, insist that as soon as they are compelled to pay for any one year's taxes upon this property to the state and city, exceeding in amount the sum of $552 50, they have an action against the lessees for the reimbursement of this surplus; and that the surplus they may be compelled to

pay one year is not to be offset by the deficiency of another year, should it ever happen that the taxes fall below the sum stated.

It was well known to the parties that taxes were annually imposed. When they referred to the taxes "now paid," it is conceded they meant the taxes for the current year. If the sum paid the next year should exceed that paid for the current year, it was agreed that such sum should be "chargeable to the lessees." As soon as the lessors had paid in excess of the stipulated sum for the yearly taxes, they had a charge against the lessees. And as the subject, in the minds of the contracting parties, was an annual tax, we may suppose they contemplated an annual reimbursement for excessive payments. For no reference was made in the contract to a final adjustment of the matter in 1861; no intimation was given of an intent to keep up a debtor and creditor account of excess and deficiency each year, through the term of the lease. Indeed, no account whatever was to be taken of the deficiency. What is "over and above" is provided for; what is below is not provided for. The State and city might remit the taxes altogether, and yet the lessees were not to have the use of the leased property on less onerous terms. The deficiency was not to benefit them in any case; the excess was to be chargeable to them, and was therefore exigible as soon as paid by the lessors.

It is thus we read the contract, conceiving it to be the most natural construction of the terms used by the parties, the most congruous to the subject matter of the particular clause in question, and the most consistent with the general tenor of the instrument in which it is found.

As we concur in the views of the District Judge, upon this point, his judgment is affirmed with costs.

APPENDIX.

The following cases were accidentally omitted from the Monroe decisions.

M. S. Carson *v.* M. Johnson, Sheriff.

Simulated sale.

APPEAL from the District Court of the parish of Jackson, *Richardson*, J. *Defreese, Gray & Thompson*, for plaintiff and appellant. *Rives* and *Stubbs*, for defendant.

Stofford, J. (Merrick, C. J., dissenting.) In May, 1855, *Tennent, Denickson & Co.* had a suit pending in the District Court of Ouachita parish against *R. A. Carson*, for about $1900. *R. A. Carson* had formerly been a merchant in the town of Vernon, parish of Jackson, but had been unsuccessful, and in the month of May aforesaid was, by his own acknowledgments, insolvent. It does not appear that he had then any other visible property, except four town lots and an undivided half of about twenty-five acres of land in the parish of Jackson.

On the 11th May, 1855, about two weeks before the final judgment against him, in favor of *Tennent, Denickson & Co.*, was signed, *R. A. Carson* made a notarial conveyance of all the landed property just mentioned to the plaintiff, his brother, a young man who had but recently attained the age of majority, then living in Union parish. The conveyance professes to be a sale for the consideration of $550, "cash in hand paid," and was recorded in the Recorder's office of Jackson parish, on the 14th May, 1855.

Tennent, Denickson & Co. afterwards directed the Sheriff to seize the lots and land aforesaid, under their judgment against *R. A. Carson*. *M. S. Carson* sued out the present injunction against the Sheriff to restrain the sale, on the allegations that he was the true owner of the land, having bought it for $550 in cash.

Tennent, Denickson & Co. came in and denied the reality of the sale from their debtor *R. A. Carson* to *M. S. Carson*, averred the same to be a fraudulent simulation, and prayed for a dissolution of the injunction, with damages in their favor. After a hearing upon the merits, the District Judge dissolved the injunction with damages, and the plaintiff has appealed.

It cannot be pretended that there was any truth in the averment of the plaintiff's petition, that he bought the land in question for $550, cash in hand paid. No cash was paid. The contract sought to be proved by the plaintiff is not a sale, but a remunerative donation from his brother for services rendered him as clerk three or four years before, when he was able to pay his debts. The only proof that there was an actual debt for such services is made by a third brother, who testifies that sometime in the month of May, 1855, (the time of the pre-

tended sale,) "he heard *R. A. Carson* admit that he was indebted to plaintiff, *M. S. Carson*, in the sum of $550, for services as clerk in the town of Vernon."

Now, it is shown that all the services that were rendered dated back to the years 1850 and 1851, when the plaintiff was a lad of seventeen or eighteen years of age, inexperienced in business. Nor does it seem that the plaintiff ever claimed or his brother *R. A. Carson* ever acknowledged the existence of such a debt until the month when this conveyance was made, and it was thought necessary to fix upon a consideration for a conveyance made on the eve of insolvency. In fact, the evidence leads to the conclusion that the idea of compensation was an after-thought which never occurred to the parties till a claim for wages was prescribed, and the pretended debtor found himself in insolvent circumstances, with a large suit impending over him. One of the plaintiff's witnesses, a fellow clerk, says that *Moses Carson*, in reply to his enquiry what was he getting as clerk, said he did not know what he was getting.

One of the defendant's witnesses, a man who bought out *R. A. Carson*, in January, 1852, when the plaintiff's services terminated, testified, without objection on the part of plaintiff, that *R. A. Carson* told him he had written on to his brother to come out here, and that he was not giving him anything for clerking the first year. This was in 1850. When the witness bought out *R. A. Carson*, the latter desired him to retain his brother as clerk, and said that he had been attentive, that he had got nothing for his services, and that he would not ask much; witness retained him for three months at ten dollars a month. Does not think there was any contract between plaintiff and his brother about wages; his brother supported him. This witness further states that in the spring of 1855, he sold some horses to *R. A. Carson*, and he asked for a receipt in his wife's name, stating that he did not own any property.

The land would seem to have been worth more than the pretended price. One witness swears that *Carson's* interest in it was worth between $800 and $1000. A witness introduced by the plaintiff puts it lower, but still estimates it at $650.

It is not pretended that there was any actual possession by the plaintiff, a constructive possession by simulated notarial title is nothing. The record seems to support the views of the District Judge, who said that "the facts and circumstances of this case are irreconcilable with the reality of the transfer, while they are consistent with the hypothesis that it is a mere paper title."

It is, therefore, ordered that the judgment be affirmed, with costs

MERRICK, C. J., dissenting. I do not concur in the conclusions of the majority of the court in this case. There is no better settled rule of law than that the declarations of third parties cannot prejudice another.

The declarations of *R. A. Carson*, out of the presence of his brother, cannot prejudice the plaintiff, although in the revocatory action they may be evidence for the purpose of showing the sale was fraudulent on his part. To bind the plaintiff, his own admissions alone could be offered against him.

The testimony of *J. C. Jones*, himself also a clerk and apparently not related to the plaintiff, proves the indebtedness of *R. A. Carson* to the plaintiff. He says: That the plaintiff "was clerk for *R. A. Carson;* commenced in the fall of 1849, and continued as his clerk to January, 1852, and about that time *Carson* sold and I (*Jones*) was also one of his clerks, and left January, 1851. In 1850, my salary was $300, and in 1851, $350, and an interest in the pro-

fice of the post office. *Moses Carson's* services during the years 1850 and 1851 were worth $250 per year." It is true that the plaintiff told him he did not know how much he was to receive. But the want of a contract would not prevent the plaintiff rocovering the value of his services. I know of no law which refuses to a minor his wages. Were there any reason to doubt the testimony of *James H. Carson*, the brother of the plaintiff, it is fully corroborated by the preceding testimony of *Jones*. Now, conceding that *R. M. Carson* was embarrassed, (and that would account for the delay in paying plaintiffs as well as defendants,) or even insolvent, and it does not follow that the sale made in this case was not intended as a *real sale*. If the intention of the parties was to give the plaintiff a preference over the other creditors, or to let him have the property at an inadequate price, or even if it was intended that he should hold the property for his own use, although in fraud of creditors, in all these cases, the sale is a real one, and the party attacking it is driven to his revocatory action. C. C. 1973, 1974, 1976. It is only in those cases where no title was intended to pass for the benefit of the transferee, or where it is but a mere cloak or mask, that it may be treated as a nullity, and the property seized in the first instance. 1 Ann. 299. Even in these cases the burden of proof on the injunction appears to be upon the seizing creditor to show the simulation. 10 A. R. 691.

Under our law the consideration specified in a deed is not conclusive. The cash specified in plaintiff's deed, being the precise amount of the acknowledged indebtedness of *R. A. Carson* to him, may, under the proof in the record, be considered, without violating ordinary language, as identical with such indebtedness. The law declares that the immovable was delivered to the plaintiff by the notarial act of sale. C. C. 2455. There has been no attempt to rebut this legal presumption. On the contrary, the proof shows that *R. A. Carson* resided in the parish of Ouachita, where defendant's judgment was rendered against him, whilst the plaintiff resides in the parish of Union, where the notarial act was passed, and where the land lies, the ownership of which the plaintiff claims. I think, therefore, in the absence of all proof to the contrary, that the land must be held to be in the possession of the plaintiff.

As it respects the pleadings, I think the allegation of the plaintiff, that he is the owner and that the Sheriff has illegally seized his property, is a sufficient affirmance that the plaintiff had possession under his title, which was disturbed by such seizure. Now, as the presumption of possession has not been rebutted by the defendants, the burden of proof is upon them to show that the sale was simulated, and not upon the plaintiff to show that it is *bona fide*. C. C. 1915, 2456. No principle of law is better settled than that fraud and simulation must be clearly established by proof. They are not to be presumed. I cannot see any other safe rule of proceeding, than to follow these positive requirements of the Code. They are the only sound basis upon which titles to real estate can rest with any security. If bad faith in the transfers of real estate, were to be presumed instead of good faith, few would be secure in their possessions. For there are but few who would be able to prove all the circumstances of the payments for their slaves and immovables.

I think, therefore, that the judgment of the lower court ought to be reversed, and that the seizing creditors should be left to their revocatory action.

WINIFRED WOOD *v.* WILLIAM HARDY.

As owner of one-half and usufructuary under the will of the other half of the note sued on, the plaintiff had the right to maintain an action to enforce payment.

APPEAL from the District Court of the parish of Claiborne, *Land*, J.

McGuire & Ray, for plaintiff. *Watkins*, for defendant and appellant.

BUCHANAN, J. There are two questions presented in this case:

1st. The right of the plaintiff, as holder of the note sued upon.

2d. A plea of compensation.

The note is dated Minden, 1st May, 1851, signed by defendant, and payable to *Robert Baldwin*, or bearer, twelve months after date. It appears to have been the property of *Martin Wood*, who died in 1851. The plaintiff is the widow of *Martin Wood*, who left a will, made in 1849, which has been probated, and contains the following clauses:

"I give and bequeath unto my wife, *Winifred Wood*, the plantation and all the land belonging to the Home Farm, some nine hundred acres or more, whereon I now reside, with all the negroes and their increase, say about fifty negroes in number, and the stock of horses, mules, cattle, wagons, and all the household and kitchen furniture belonging to the place, during her natural life; then, if it can be done by my executors, all of the negroes to be set free, and carried to the near part of Mexico, beyond the river Rio Grande. I also set aside the sum of three thousand dollars to accomplish the same. The balance of my money and debts I give to my wife, *Winifred Wood*, during her life. I give and bequeath to *Nancy Doles* a tract of land called the Thompson Place, and all the improvements thereon, containing eight hundred and eighty acres, more or less, also one hundred dollars to purchase her a horse. This I give her in consideration of the number of years she has resided in the house with us, and during said time she became a cripple for life. It is my wish that my Red River land, called Goshen, lying part in Caddo and part in Bossier parish, be sold as my executors may deem to the interest of the legatees of my estate; said tract of land contains some nine hundred acres more or less. After the decease of my beloved wife, *Winifred Wood*, it is my desire that the remaining surplus of my property be sold by my executors, and equal division made between my nieces and nephews [naming them]. I do hereby appoint my friends, *William Hardy* and *James M. Morrow*, both of Minden, my executors, to carry out this my last will and testament."

The note now sued upon is to be reckoned among the debts mentioned in this will, and of which the usufruct is given to plaintiff by its terms. The debt evidenced by that note was property of the community of acquets, and belonged, for one-half, to plaintiff at the dissolution of the community. As owner of one-half, and usufructuary under the will of the other half, the plaintiff has an undoubted right to maintain an action for the recovery of this debt.

There is no seizin in the warranty under the will, at least during plaintiff's lifetime, of anything but the Goshen tract of land.

A partial payment of the note, and credited on the same, in the year following *Martin Wood's* death, is inconsistent with defendant's present pretensions.

The claim of three thousand dollars, in his capacity of executor, if defendant could urge it at all during plaintiff's lifetime, (which is more than doubtful,) can clearly not be pleaded as an offset against a debt due by him personally.

The prayer of appellee for damages for a frivolous appeal is entitled to favorable consideration.

Judgment of District Court affirmed, with seventy-two dollars damages for a frivolous appeal, and costs.

Spofford, J., recused himself.

E. Williams *v* James Clark.

A judgment, based upon a defective citation, and an attachment that was set aside, is an absolute nullity, which may be urged as matter of defence by any one having an interest.

A purchaser at a Sheriff's sale, made without a previous seizure, acquires nothing, at least as against a third party in possession.

Appeal from the District Court of the parish of Jackson, *Richardson*, J.

Rives, *Rankin* and *Thompson*, for plaintiff and appellant. *McGuire & Ray*, for defendant.

Lea, J. The plaintiff in this case claims a tract of land in virtue of an adjudication made on the 5th July, 1851, at a Sheriff's sale, under an execution issued in the case of the present plaintiff against *John W. Rountree*. The petition sets forth that, on the 15th October, 1850, *Avarida Ansley*, wife of *John W. Rountree*, acting for herself, and pretending to act as attorney in fact for her said husband, transferred to the defendant the land in controversy, which sale, the petitioner avers, is fraudulent, and made without authority.

The plaintiff avers that the defendant, *Clark*, took possession of said property on the 15th October, 1850, and that he, the plaintiff, is entitled to rent at the rate of $150 per annum from the date of his purchase. He also claims $150 as damages for counsel fees. We deem it unnecessary to refer to the suit instituted on the 8th April, 1850, by the plaintiff for the annulment of the judgment obtained by *Mrs. Rountree* against her husband for a separation of property, as we do not consider that it has any necessary connection with the legal questions involved in the issue between the parties.

The defendant avers that judgment, on the execution of which the land was sold, is a nullity, having been brought against an absentee who was never cited, and having no other basis for the jurisdiction of the court than an attachment, which was dissolved; that neither the person nor the property of the defendant was before the court, and that all proceedings based upon the judgment are null and void. The defendant further alleges that no actual seizure was made of the property sold; that there was no legal notice of seizure to *Rountree*, or notice to appoint appraisers, nor was there any appraisement.

The case was submitted to a jury, who found a verdict for the defendant.

The position assumed by the plaintiff's counsel, that the defendant cannot, as against the plaintiff, avail himself of irregularities in the proceedings anterior to the judgment, nor indeed after judgment, is correct, so far as it relates to the omission of formalities which are intended for the protection of the judgment debtor, in which a third party is without interest; but the rule cannot be held

WILLIAMS v. CLARK.

to extend to such omissions as are the basis of absolute nullities. In this case it is urged:

1st. That the judgment is a nullity for the want of a citation or a valid attachment.

2d. That the plaintiff acquired no title under the adjudication under which he claims, there having been no seizure of the property sold.

It appears from the record, and from the allegations of the petition that, at the time the suit against *Rountree* was filed, he had "permanently left the State of Louisiana." A negro boy was seized by virtue of a writ of attachment, but as this writ was set aside, the seizure conferred no jurisdiction on the court; no curator *ad hoc* was appointed to represent the defendant, and had such appointment been made, the curator would have been without authority to represent the defendant after the attachment was dissolved. The citation issued in the case could not be served personally upon the defendant, but, as appears from the Sheriff's return, it was served upon one *Gilbert D. Ansley*, "living in the house with the defendant," said house being situated in the parish of Jackson. It does not appear at what place the service was made upon *Ansley*, and he could not at the time have been living with a person who had permanently absconded from the State, and who had not then, nor, so far as we are informed, at at any time since, returned. The judgment, therefore, being based upon a defective citation and an invalid attachment, which was set aside, was an absolute nullity, which nullity might be urged as matter of defence by any one having an interest to call in question the validity of the judgment.

It is clear, also, that no valid seizure was made of the property adjudicated. The defendant, at the date of the constructive seizure, and ever since, has been in actual possession of the property; no attempt was made to dispossess him. The defendant cannot be held to a constructive notice of an invalid seizure. A purchaser at a Sheriff's sale, made without a previous seizure, acquires nothing, at least as against a third party in possession. See *Stockton* v. *Downey*, 6 An.; *Gaines* v. *Merchants' Bank*, 4 An. 371.

Entertaining these views with reference to the foregoing points, it is unnecessary to enter into any discussion of the other questions presented in the pleadings.

Judgment affirmed.

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ACTION.

1. The defendant has no right to complain of the mode in which this suit is brought, [by plaintiff for the use of W. & H.,] for it gives him the opportunity of pleading any defences he may have against either the nominal or the real plaintiff. *Williams* v. *Hood*, 118.

2. Action to recover back money paid on an altered bill of exchange. *Bullitt* v. *Hewitt*, 327.

3. The object of the possessory action is to enable the person clothed with possession to maintain that possession, and compel his adversary to exhibit and recover on his title. *Brack* v. *Wood*, 512.

4. The rule in Article 44 C. P., that plaintiff must recover on strength of his own and not the weakness of his adversary's title, applied. *Ibid.*

5. The plaintiff to a petitory action must not only make his case probable but legally certain. *In pari casu potior est conditio possidentis.* *Ibid.*

6. An action will not lie against third parties in possession of lands derived by regular conveyance from plaintiff's ancestor, without first impeaching, by direct action, the conveyance made by such ancestor. *Calvit* v. *Mulhollan*, 681.

7. The whole of the property surrendered by the plaintiff having been sold and distributed among the creditors, he, *as syndic*, took a rule on the creditors to show cause why certain judicial mortgages should not be erased, on the ground that they fell by the surrender and final settlement of the insolvent's estate: *Held:* that the rule was properly discharged, the syndic being *functus officio*, and therefore incapable of standing in judgment. *Laforest* v. *His Creditors*, 714.

AFFIDAVIT.

See PRINCIPAL AND AGENT—*Schneider* v. *Vercker*, 274.

AGENT AND AGENCY.

See PRINCIPAL AND AGENT.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

APPEALS.

1. A record was offered in evidence, but not filed, and therefore not copied by the clerk in making up the transcript for the Supreme Court. The transcript was brought up by the appellee, who moved to dismiss the appeal. *By the Court:* It was the duty of the appellant to present her case in such a shape that this court could pass upon the correctness of the judgment appealed from. It is true the appellee has brought up the appeal, on the failure of the appellant to do so. But the deficiency of the record is plainly the fault of the appellant, which should not prejudice appellee. Appeal dismissed. *Murray* v. *Walker*, 72.

2. Motion to dismiss appeal, on the ground that W. & H. had not joined in the appeal bond. *By the Court:* The order of appeal is in favor of the plaintiff generally, and it was not necessary that the appeal bond should be signed by W. & H. The signature of the surety is sufficient. *Williams* v. *Hood*, 113.

3. The fact that the tutrix of P.'s children made herself a party to the suit is no evidence that W. & H. have abandoned the appeal. The tutrix is a proper party, for the legal title to the bill sued on is in the succession of P. *Ibid.*

4. It is not necessary that there should be a technical *contestatio litis*, in order to give the Supreme Court jurisdiction. *Succession of Clarke*, 124.

5. A judgment rendered on the 22d December, and not signed until the 12th of January, may be treated as rendered at the term at which it was perfected by the signature of the Judge, and an appeal, by motion, may be made at that term. *Sacket* v. *Attaway*, 181.

6. Appeal dismissed for want of proper parties. *Robert* v. *Ride*, 409.

7. The practice of the Supreme Court is to notice *ex officio*, and without any motion to dismiss having been made, the want of proper parties for a final decree. *Ibid.*

8. A curator *ad hoc*, whose appointment is superseded before trial, has no capacity to take an appeal, and the subsequent filing of an appeal bond by the proper agents of the party in interest, without a petition and citation, or motion for an appeal, will not constitute a valid appeal. *Spencer* v. *McDonogh*, 420.

9. Articles 880 and 890 C. P. contemplate an amendment of the judgment in favor of the appellee, under an answer, only as against the appellant, and not as between one appellee and his co-appellees. If either of the appellees is dissatisfied with the judgment, he should appeal against his co-appellee. *Fields* v. *His Creditors*, 545.

10. The appellee is entitled to three judicial days in which to move a dismissal of the appeal, unless he waives the right by some action on his part. Filing an answer to the merits, without tendering a motion to dismiss, would import such a waiver, but the act of the court, *ex proprio motu*, setting down the cause for a trial, could not deprive the party of a legal right. *Barham* v. *Livingston*, 604.

APPEALS (*Continued.*)

11. The Clerk's certificate, which states that the record contains a full transcript of all the documents filed, all the proceedings had, and all the evidence adduced on the trial, as on file and of record in his office, is insufficient. *Ibid.*

12. It is imperative on this court to grant to the appellant who claims it, an order to postpone the trial, that the Clerk may have an opportunity to amend his certificate, if he can truthfully do so. *Ibid.*

13. An appeal was filed on the 11th July, 1855, the court being then in session, and the cause was continued on the 20th July, 1855. A motion made by the appellees, on the 16th July, 1856, to dismiss the appeal for irregularities in the transcript, namely, the want of an order of appeal, comes too late. *Temple* v. *Marshall*, 613.

14. Where no term of the court was held at Monroe in October, 1855, though the record of an appeal was returnable at that term, it was held to be a sufficient compliance with the law to file the record at the subsequent term. *State* v. *Evans*, 626.

15. The certificate of the Clerk stated that the "foregoing pages contain a full, true and complete transcript of all the proceedings had and documents filed on the trial in the case of P. v. P., as on file in my office. *Held:* that this does not answer the requirement of Art. 896 C. P. It is not certified that the transcript contains all the evidence adduced on the trial. Appeal dismissed. *Pargoud* v. *Pace*, 644.

16. Where a party whose interest is affected by the judgment is not made one of the obligees in the appeal bond, the appeal will be dismissed on motion. *Hamilton* v. *Phillips*, 675.

17. It is unnecessary for the Judge to fix the amount of a suspensive appeal bond, nor is it necessary for the appellant to execute bond in favor of a party who has no interest in maintaining the judgment so far as appealed from. *Rachel* v. *Rachel*, 687.

See SEIZURE AND SALE—*Mathe* v. *McCrystal*, 4.
See CONSTITUTION—*Kathman* v. *New Orleans*, 145.
See EXECUTOR AND ADMINISTRATOR—*Succession of Pettis*, 177.

ATTACHMENT.

1. The validity of an attachment cannot be drawn in question collaterally, except in cases where there is an entire want of citation. *Goodman* v. *Allen*, 246.

2. An affidavit alleging that the defendant attempted to depart permanently from the State, that he concealed himself to avoid being cited, and that he is about to remove his property out of the State, is insufficient for an attachment. The allegations refer indefinitely to the past, make no allusion to the present or future, and are too vague to form the legal foundation of an attachment. *New Orleans* v. *Garland*, 438.

3. An attachment will issue in favor of a vendee against the property of a non-resident vendor, to secure a claim in warranty. *Bach* v. *Lakin*, 489.

ATTACHMENT (*Continued.*)

4. The Code of Practice, in prescribing the conditions upon which an attachment may issue, requires an oath of the existence of the debt in a form to exclude the exceptions of payment, compensation, &c., and a compliance with its requirements is equivalent to an averment that the debt has not been so extinguished. *Elam* v. *Heirs of Barr*, 692.

5. Writs of attachment are to be satisfied out of the proceeds of the property attached, according to the order of date in which the respective seizures thereof are made. Seizure secures a lien.

Edson v. *Freret*, 710.

See HUSBAND AND WIFE—*Henry* v. *Bryce*, 691.
See PRINCIPAL AND SURETY—*Doane* v. *Telegraph Co.* 504.

ASSESSMENT.

See TAXES.

ATTORNEYS AT LAW.

1. The five per cent. allowed by statute to the Assistant City Attorney on the amount of all fines and penalties collected, in full compensation for his services, has reference to his services anterior to the collection, and to the general understanding of the profession, that an attorney has earned his fee when he has prosecuted or defended a case to judgment; so that the Assistant City Attorney who obtains the judgment, is entitled to the commission, although the actual collection of the debt may be made by his successor. *Hiestand* v. *Labatt*, 30.

2. Where the counsel for plaintiff and defendant have an agreement to take testimony without a commission, and submit the cause—and this with the knowledge of plaintiff, who made no objection—and afterward plaintiff, without discharging his counsel, set his cause for trial, in the absence and without the knowledge of the opposite party or either counsel, it was held that a judgment obtained under such circumstances might be annulled under Article 607 of the Code of Practice.

Lacoste v. *Robert*, 33.

3. Such an agreement is within the discretion of counsel. *Ibid.*

4. The instances of "ill practices," mentioned in Art. 607 of the C. P., are given *exempli gratia*, and are not to be viewed as excluding other cases.

Ibid.

5. Under Article 172 of the Code of Practice, the signature of the advocate or of the party may be affixed to the petition through the agency of another. *Martin* v. *Moore*, 121.

6. Counsel who made a certain admission on the minutes of the court, not permitted to lessen its effect by his own testimony, showing that it was not authorized by his client, and that he made it from the statement of a witness whom he believed, and by whose affidavit, produced, it appeared that the witness did not state quite so much as was covered by the admission. *Perkins* v. *Douglass*, 471.

See USURY—*Race & Foster* v. *Bruen*, 34.
See INSOLVENT PROCEEDINGS—*Matthews & Finley* v. *Their Creditors*, 81.
See JUDGMENT—*Brooks* v. *Cavanaugh*, 188.
See INJUNCTION—*Grey* v. *Love*, 391.

ARREST.

1. Article C. P. 223 relates to an arrest for debt simply, where there is an apprehension that the debtor will leave the State or the jurisdiction of the court. The arrest of an applicant for the benefit of the insolvent laws is provided for by the Act "relative to the voluntary surrender of property and mode of proceeding," approved March 15th, 1855.
Figuiere v. *His Creditors*, 557.

2. There is no authority in that Act which authorizes a change in the order of arrest, by requiring a bond to be given with other conditions than those imposed by the District Court. *Ibid.*

AUCTIONEER.

See SALE—*Bodin* v. *McCasky*, 36.

BAILMENT.

1. Gratuitous bailees are not liable except for fraud or gross negligence.
Boyd v. *Estis*, 704.

BANKRUPT ACT.

1. A debtor of the bankrupt, garnisheed by the bankrupt's creditor, cannot, under the Bankrupt Act, plead the bankrupt's discharge—nor assert the rights of the assignee—nor dispute the creditor's right, on the ground that the creditor has proved his claim under the fifth section.
Frasier v. *Banks*, 31.

BANKS AND BANKING.

1. Sale of mortgage stock of the bank, bought by the bank. Sale sought to be set aside on the ground that the stock could not be sold apart from the real estate upon which it was secured. *By the Court:* We can see no good reason why the bank might not seize and sell any property of their debtor for the satisfaction of their debt. Certainly the objection is one which cannot be raised by the debtors, whose acts in the premises gave a sanction to the proceedings, and who are without interest in the enforcement of the supposed prohibition which they invoke. *Bermudez* v. *Union Bank*, 64.

2. The bank had a right to make purchases of this character under the provisions of the Act of 1843. *Ibid.*

3. The general banking law, approved April 30th, 1853, in regard to the privileges and immunities granted under it, is as much a contract with the individual corporations formed under the Act, as would be a special Act of incorporation containing the like provisions.
New Orleans v. *Southern Bank*, 41.

4. The 35th section of the general banking law is a guarantee to the capitalist that, if he invests in the stock of the banks created under this law, his stock shall not be taxed in any other manner than other personal property; and thus far is an obligation binding on the State and all municipal or other corporations deriving their authority from the State. *Ibid.*

5. The provision of the 1st section of the Act of 1842, which authorizes the city of New Orleans to fix the rate of licenses for "*all other callings, professions or business*," not enumerated therein, includes corporations as well as natural persons. VOORHIES, J. (with whom concurred BUCHANAN, J.), dissenting. *Ibid.*

6. The 35th section of the Free Banking Law, which provides, "that bankers and banking companies doing business under this Act, shall be

BANKS AND BANKING (*Continued.*)

taxed upon their capital stock at the same rate as other personal property under the laws of this State," is applicable only to the capital stock, and not to the calling or business of those institutions. VOORHIES, J. (with whom concurred BUCHANAN, J.), dissenting. *Ibid.*

7. Under the statutes of Mississippi, the trustees of insolvent banks are not restricted to the collection of such assets as are necessary to pay the debts of the corporation, but they have the right to collect all the assets and, after payment of debts, distribute the surplus among the stockholders. *Davis* v. *Robertson*, 752.

See INSOLVENCY—*Davis* v. *Robertson*, 752.

BATTURE.

1. The several Acts of the Legislature giving to the city police powers over the batture, were never intended to disturb the rights of property, and had such been the object of the statutes, they would to that extent have been nullities. *Remy* v. *Municipality No.* 2, 148.

2. On the 10th of September, 1820, M. & G. entered into an act of compromise, by which G. conveyed to M., with a warranty against his own act, all his right in a portion of the batture, in the faubourg St. Mary. By the terms of the act, the batture conveyed extended to the water's edge. On the 20th of September, 1820, G. made an act of donation to the city of New Orleans, by which the batture previously conveyed to M. was created *locus publicus*. Under the facts of the case, it was held, that for the purpose of the donation, G. was to be regarded as the *negotiorum gestor* of M., who was bound by the act granting the batture to the public. In 1851, the act of donation of September 20th, 1820, was, by agreement, rescinded. This action was brought by the heirs of M. against the heirs of G. to recover the proceeds of the batture sold by G. to M. in 1820, which proceeds were received by the heirs of G. under the Act of 1851, rescinding the donation of 1820. *Held:* The contract of 20th of September, 1820, so long as it endured, seemed to have been viewed by M. and by his heirs, as binding upon them; but when that donation was rescinded in 1851, and the *locus publicus* created by the contract of 1820 was again made the subject of private ownership, the warranty contained against their own acts in the conveyance of the 16th of September, 1820, unquestionably forbade the heirs of G. to put into their own pocket the proceeds of the land embraced in that conveyance to M. *Michon* v. *Gravier*, 596.

3. The course of the side lines of property, in front of which alluvion is formed, is of no consequence in the division of the alluvion formed subsequently to the conveyance or grant. The line of such division must be drawn in such manner, as that each of the contiguous riparian proprietors shall have such proportion of the alluvial soil as the total extent of his front line bears to the total quantity of the alluvial soil to be divided. C. C. 508. *Heirs of Delord* v. *New Orleans*, 699.

4. The mere omission to figure on the plan of the Delord estate the alluvion that may have existed in front of it, and to divide it among the heirs, cannot be construed into an abandonment of the ownership in favor of the public. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Notary certified that notice to the defendant, endorser, was given through the post-office, by letter directed to "the parish of St. Charles, opposite the Red Church." There was no post-office at that place, but it was proved that a letter addressed to defendant, and directed as above, would have been sent to Taylor's post-office, some eight or ten miles from the Red Church, and seven miles from defendant's house, where most letters directed like this were sent. *Held*: That the notice was sufficient. *Barker* v. *Fullerton*, 25.

2. Demand of payment at the place where note is payable is sufficient. *Ibid.*

3. The certificate of the Notary did not show in what post-office the notice to the endorser was placed, but the protest being dated at New Orleans, it was held that the only reasonable inference was that the notice was placed in the post-office at New Orleans. *Ibid.*

4. Demand of payment of a check made in business hours, on the day succeeding that on which the check is dated, is a sufficient presentment. *Ocean Tow Boat Co.* v. *Ship Ophelia*, 28.

5. Plaintiffs were directed to apply to the agents of defendants for payment. The agents gave plaintiff's a check which was dishonored. *Held:* That the defendants were not discharged. *Ibid.*

6. The court will not presume that a note not dated, and bearing ten per cent. interest on its face, was executed on or before the day when the rate of interest was limited by law to 8 per cent. *Gautreau* v. *Verret*, 78.

7. Objection by drawer of a bill of exchange of insufficient demand of the acceptor. The notary went to the place of business of the acceptors, (*Wm. Laughlin & Co.*,) and finding it shut, made protest for non-payment, without making inquiry for the residence of the acceptors. *By the Court:* We consider the demand, within the usual business hours, at the commercial domicil of a partnership, for the payment of a note or bill due by the firm, a sufficient presentment. It was not necessary to make a further demand at the private residence of the individual partners. The place of business is the domicil of the firm, and it is their duty to have suitable persons there to receive and answer all business demands. We express no opinion as to the degree of diligence requisite, where the obligation is that of one doing business alone, and where the debtor has both a domicil and place of business, the latter being closed at the time of the presentment. *Watson* v. *Templeton*, 137.

8. Notice by the notary to the last endorser exclusively, is a strict compliance with commercial usage, especially if he be ignorant of the residence of the other parties. *Ibid.*

9. Where the distance is such as to require the interval of several days for the purpose of communication, then "the day" which each endorser is allowed, within which to give his notice in turn, will commence with that on which he himself receives notice. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

10. The Act of 1827 has not disturbed the well-settled rules of commercial law on the subject of notice of protest. Its object was to provide a new and convenient mode of proof.
Farmers' Bank of Kentucky v. *Stevens*, 189.

11. Nor is the form of notice material where the date, amount and names of the drawer and payee are mentioned. *Ibid.*

12. It is sufficient if the party to whom notice is sent is enabled to ascertain therefrom the nature and extent of the obligation which has become the subject of protest. *Ibid.*

13. As holders and absolute owners of a negotiable bill, the plaintiffs had a right, without qualification, to enforce payment from any of the parties to the instrument. *Ibid.*

14. The rule is well settled that where the maker of a promissory note cannot be found, payment must be demanded at his domicil, if within the State. *Penn* v. *Watts*, 205.

15. No notice of protest is necessary where the drawer of the bill has no funds in the hands of the drawee, and made no provision for its payment, nor had any right to expect that a bill for the amount would be accepted. *Anderson* v. *Folger*, 269.

16. The maker, or endorser, in an action on a note, in the absence of any equity existing against the payee, cannot question the title of the holder.
Ran v. *Latham*, 276.

17. The equities which defendant is entitled to plead, are such as operate in his own favor, not those which belong to a party to whom he is liable.—LEA, J. *Ibid.*

18. Plaintiffs sue to recover back the amount of a bill of exchange, which they had accepted and paid. *By the Court:* Plaintiffs, having paid the bill to defendants, cannot recover, unless they have established their allegation that there was a material alteration in the bill, by which they were defrauded out of their money. A mere alteration is not enough. They must show that it was such a fraudulent alteration in the substance of their contract as, *per se*, to destroy the obligation resulting from it. *Bullit* v. *Hewitt*, 327.

19. Where the notary, having no knowledge of the residence of the drawer, made enquiry on the subject, of the acceptor's factor, (who was also factor of the drawer,) and received for answer, that the drawer lived at F., for which place he mailed notices of the day of the protest, addressed to the drawer; and, a few days after, having received other information in relation to the drawer's residence, dispatched another notice to the place designated. *Held:* That the notary used such reasonable diligence as to excuse the want of notice. *Eager* v. *Brown*, 625.

20. This was an action against the drawer of a draft. It was held that the notice of protest was insufficient to charge him.
Curry & Person v. *Herlong*, 634.

21. Although the drawer may have no funds in the hands of the acceptor, yet, if upon taking up the bill he would be entitled to sue the drawee or

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

any other party on the bill, as if he be an accomodation drawer for the drawee or *payee*, or any subsequent indorsee, then, and in every such case, he is entitled to strict notice of the dishonor. *Ibid.*

22. G. transferred the negotiable note of N. to M. B. & Co., and took from them their written agreement to hold the note as collateral security for the payment of a debt due by G. to them, and G. transferred that agreement to S.—all having been done before the maturity of the note. M. B. & Co. having been paid the debt due them by G.—*Held:* That S., by virtue of the transfer of said agreement, took the note unaffected by any equities, in relation to it, existing between G. and N.

Nott v. *Watson et als.* 664.

28. As owner of one-half and usufructuary under the will of the other half of the note sued on, the plaintiff had the right to maintain an action to enforce payment. *Wood* v. *Hardy*, 760.

See PLEADING—*Langstaff* v. *Lee*, 271.
See SEQUESTRATION—*Horne* v. *Belcher*, 321.

BONDS.

See INJUNCTION—*Whitehead* v. *Tulane*, 302.

BOND TO MAKE TITLE.

1. Bond to make title to a lot of ground on which a church was being erected but in which the dimensions of the lot were not stated, and there being no proof from which it could be inferred what the dimensions were to be. *Held:* Defective as the foundation of title.

Short v. *Methodist Epis. Ch.*, 174.

BOUNDARY.

1. Where there is a discrepancy in the boundary lines, as shown by a public act on the one hand, and a plan attached to the act on the other, if the description be clear and unambiguous in the former, it will prevail.

Michon et als. v. *Gravier et als.* 596.

CASES COMMENTED ON, DOUBTED, AFFIRMED, OVER-RULED, &c.

1. Decision in *Hubgh* v. *The New Orleans and Carrollton Railroad Company*, 6 An., 495, affirmed. *Hermann* v. *Carrollton Railroad Co.* 5.

2. *Walton* v. *Beauregard*, 1 Rob. 301, is of doubtful authority.

Jackson v. *Williams*, 93.

3. Decision in *Purvis* v. *Harmason*, 4 An., 422, and *Thomas* v. *Phillips*, 7 An., 546, affirmed. *Farmer's Heirs* v. *Fletcher*, 142.

4. Decision in *State* v. *Johnson*, ante p. 422, affirmed. *State* v. *Kennedy*, 479.

5. *Cook* v. *Morehouse*, 6 An., affirmed. *Bartels* v. *Their Creditors*, 433.

6. Decision in the case of *Holmes* v. *Wiltz* affirmed.

Guzman v. *Walker*, 692.

7. Decision in *Kennedy* v. *Municipality No.* 2, 10th An.; *Remy* v. *The City*; and *Heirs of Gaiennié* v. *The Same*, 11th An. affirmed.

Heirs of Delord v. *The City of New Orleans*, 699.

CASES COMMENTED ON, DOUBTED, AFFIRMED, OVER-RULED, &c. (*Continued*).

8. Liability of maker of guarantee notes to the Merchants' and Planters' Mutual Insurance Company, fixed according to the principles laid down in the case of *McIntosh* and the same company. *Culbertson* v. *Hall*, 204.

9. Question of prescription—Decision in the case of *Remy* v. *The City of New Orleans*, 11 Annual, affirmed
Gaiennié v. *2d Municipality of New Orleans*, 738.

10. *Lea* v. *Drurmond*, 4 L. *Mathe* v. *McCrytal*, 4.

11. *Walton* v, *Beauregard*, 1 Rob. *Jackson* v. *Williams*, 93.

12. *Saul* v. *His Creditors*, 5 N. S.
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15. *Shaw, syndic*, v. *Newton*, 5 L.
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20. *Meilleur* v. *Coupy*, 8 N. S.
21. *Ned Baker* v. *Tabor*, 7 An.
Eulalie v. *Long & Mabry*, 463.

22. *Janin* v. *His Creditors*, 10 L.
23. *Cazeau* v. *His Creditors*, 6 Rob.
24. *Montouchet* v. *Terrand*, 18 L.
25. *Dreux* v. *His Creditors*, 7 N. S.
Devron v. *His Creditors*, 482.

CITATION.

1. Action to remove administrators, domiciled in Mississippi. Exception—that there had been no citation. *By the Court:* This objection may be considered not only as waived by the other reasons urged for the dismissal of the action, but by the appearance of the appellees, whereby it became unnecessary to make service on the curator *ad hoc*, on whom alone it could be made, as the appellees were domiciled out of the State.
Succession of Penny, 197.

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CLERKS OF COURT.

1. The clerks of the several courts do not continue to hold their offices after a general election until the new Governor enters upon the discharge of his duties. Article 149 of the Constitution only provides the day of their election, and does not fix the period when they shall cease to perform their duties. *Wiltz* v. *Derbes*, 50.

COMMON CARRIERS.

1. Action for non-performance of contract to deliver molasses " at the port of Louisville," etc. The molasses was landed at Portland, whence it was to be carried to Louisville under a contract made by defendants with steamboat Envoy. The molasses remained at Portland some time, and was there much damaged. *By the Court:* As Portland is shown not to be the port of Louisville, we think the obligation of common carriers rested upon the defendants until the goods were delivered at Louisville, and if the Envoy, or any other boat, neglected to take the molasses on board, it was the neglect of their own agents, for so much of the voyage as remained unaccomplished between New Orleans and Louisville. Neither could the plaintiffs be charged with the transportation of their freight through the locks to Louisville. *Watts* v. *Sbt. Saxon*, 43.

2. The common carrier is bound to the most exact diligence as much to avoid danger, which may be reasonably apprehended, as to rescue the property from present and imminent peril. *Ibid.*

3. The measure of the carriers' liability is the value at the port of destination of similar goods, delivered in good order.
Quadras v. *St'r. Daniel Webster*, 203.

4. Where, by the fault of the shipper, there was no bill of lading on board the vessel, so that the ship's agent did not know to whom to deliver the goods, and notice was published in a newspaper (taken by plaintiffs) that the ship was discharging, and subsequently the goods were stored with the ship's agent, where they were destroyed by fire, the ship will not be responsible. *Medley* v. *Hughes*, 211.

5. In an action against a common carrier, alleging non-delivery of goods, the plaintiff must give some evidence in support of the allegation.
Humphreys v. *Switzer*, 320.

6. The measure of the carrier's liability is the market value of the goods at the port of destination. *Grieff* v. *Switzer*, 324.

COMMON CARRIERS (*Continued*).

7. Action to recover damages for injury caused to goods by the bursting of casks containing chloride of lime. *By the Court:* Where the common carrier is unable to make good his defence upon some of the grounds which form exceptions to his liability, it is clear he must pay the loss, although not chargeable with any negligence whatsoever; and in fact, even where he has exercised every possible diligence to prevent the loss. He is also liable for a loss occasioned by an accident arising from any unseen nuisance in the course of his navigation.

Brousseau v. *Ship Hudson*, 427.

8. As the damage in this case was not caused by superior force, (*force majeure,*) or by accident, (*cas-fortuit,*) defendants are liable. *Ibid.*

9. Where hay was shipped, according to the bill of lading, in good order and condition, and on its delivery, at the place of destination, was damaged, it is incumbent on the owners of the vessel to show that the damage was not caused by bad stowage or want of care.

Ship Rappahannock v. *Woodruff*, 698.

10. A package of bank notes was delivered by the agent of plaintiff on board a steamboat for transportation, the amount of which was specified on the face of the package and the attention of the officers called to its value—*Held:* That *gross negligence* is fairly to be inferred, from the fact that the officers of the boat could give no account whatever of its disposition.

Boyd v. *Estis*, 704.

COMMUNITY.

1. Where the community is dissolved by the death of the husband, the surviving wife is presumed to have the intention to accept the community, and her right to renounce is subject to the same rules as govern the beneficiary heir. *Herman* v. *Theurer*, 70.

2. But a different rule prevails where a divorce has been pronounced. Unless the wife accepts the community within the delay allowed by law, and obtains from the Judge a prolongation of that delay, she is supposed to have renounced the community. *Ibid.*

3. The omission to inventory the community property, will not annul or suspend the usufruct established in favor of the surviving spouse, by the Act of 25th March, 1844. *Succession of Viaud*, 297.

4. The community is entitled to the enjoyment of the property and effects belonging to the husband at the time of the marriage, and owes no recompense for the diminution in value of such effects by reason of such enjoyment. *Ibid.*

5. Furniture and other movables brought into marriage, if they still exist in *specie*, may be taken out at the dissolution of the community by the husband who brought them, but he is not entitled to credit for their value at the date of the marriage. If they have perished, the husband must bear the loss. If they have been alienated, upon showing that the proceeds went into the community, the husband can charge the sum to the community. *Ibid.*

COMMUNITY (*Continued*).

6. The legal presumption is that a slave, bought by the plaintiff pending the community of *acquests*, is community property, and the unsupported declaration in the act of sale that the purchase money was given to the plaintiff by her father, cannot conclude creditors who were not parties to the act. *Forbes* v. *Forbes*, 326.

7. When a judgment of separation from bed and board is rendered, the husband ceases to be the head of the community, and one undivided half of the property thereof vests immediately in each of the spouses, who thereby become joint owners; the wife having in this case continued to possess *nomine communi*, is accountable for the fruits of the property. *Dorvin* v. *Wiltz*, 514.

8. A claim, by the wife, for expenditures prior to the dissolution of the community, is inadmissible—it being neither alleged or proved that those expenditures were made with her separate or paraphernal funds. *Ibid.*

9. Where the wife bore all the charges of the support of the family and the education of the children, she is entitled to claim one-half of the amount from the husband, on a settlement of the community. BUCHANAN, J., dissenting. *Ibid.*

10. The income of the separate estate of one of the spouses belongs to the community. C. C. 2371. BUCHANAN, J., dissenting. *Ibid.*

COMPENSATION.

1. Defendant held a sum of money belonging to W., and refused to pay it over, under wholly unfounded pretences, for three years, when he acquired a protested note on which W. was endorser—which he pleaded in compensation of the debt due to W. *By the Court:* The allowance of the plea, under all the facts of the case, would be subversive of that good faith upon which the doctrine of compensation reposes. *Bogert* v. *Egerton*, 73.

CONFLICT OF LAWS.

1. An infant, or minor born out of wedlock, son of a resident of Arkansas, was, by an Act of the Legislature of Arkansas, legitimated, or put upon the same footing, as if his parents had been married at the time of his birth. The question was, whether he could inherit, as a legitimate child, property in Louisiana.—*Held:* The heritable quality of legitimacy which W. E. had received from the Legislature of the State of his residence, accompanied him when he changed his domicil. *Scott* v. *Key*, 232.

2. A general law of the place of domicil, changing the *status* of its citizens according to circumstances, is a personal statute, accompanying the party to every other country; provided the circumstances which operate such change, have occurred before the change of domicil. So, a special law, removing a disability from a particular citizen by name is such a personal statute. *Ibid.*

CONFLICT OF LAWS (*Continued*).

3. The Legislature of Arkansas gave to W. E. the *status* of a Legitimate son of S. E., and this *status* accompanied W. E. into whatever country he might go. *Ibid.*

4. W. E. came hither with his *status*. He inherited, *by our law*, from his father S. E., because he was, to all intents and purposes, a legitimate son, having become so by the law of the domicil of his origin, and not in fraud of our law, nor in violation of its policy. *Ibid.*

5. The statute of Arkansas must have as much effect, and no more, as a general law of that State would have, wherein it should be declared that all natural children born, or resident in the State of Arkansas, should be considered as legitimate and inherit from their fathers the same as if born in wedlock. Were such an Act allowed to have any extra territorial effect, another State would be permitted to provide a new class of heirs for immovables and successions in Louisiana.—MERRICK, C. J., dissenting. *Ibid.*

6. Foreign jurists class statutes in regard to legitimacy or illegitimacy, as personal. But, in principle, such statutes should have effect only where they cure some want of formality in regard to the marriage of persons who have really lived together as husband and wife, and not where at most they create a purely fictitious *status*.—MERRICK, C. J., dissenting. *Ibid.*

7. Conceding the statute of Arkansas to be a personal statute, it is against the policy of our laws to enforce it to the exclusion of the heirs at law, as regulated by the Civil Code.—MERRICK, C. J., dissenting. *Ibid.*

8. There can be no safe rule except to consider those only as legitimate children whose parents have at some time lived together as man and wife. *Hæres et filius est quem nuptiæ demonstrant.* The Civil Code designates what persons shall inherit, and when a person presents himself, who has not the qualities required by our law, except in an absolute fiction created by the statute of another State, the real facts of the case should be looked at, and the inheritance given to those entitled under our own laws.—MERRICK, C. J., dissenting. *Ibid.*

9. In ordinary cases the decisions of the State courts, upon the construction of State laws, not involving questions under the Constitution of the United States, are authoritative. But in a case like this, where there is difference of opinion between the Supreme Court of the United States and the Court of Errors of Mississippi, it is a good reason for following the former, that it is more in harmony with the jurisprudence of Louisiana. *Davis* v. *Robertson*, 752.

See HUSBAND AND WIFE—*Bone* v. *Sparrow*, 185.

CONSTITUTIONAL LAW.

1. The Act of 1853 is entitled "an Act to provide for the removal of certain public records from the Fourth District of New Orleans to the Parish of Jefferson," and the Act of 1854 is entitled an Act amendatory thereof. Each section in both of these Acts has direct reference to the subject matter of its legislation, or its necessary incidents. It certainly was not necessary to meet the requirements of the Constitution, for the

CONSTITUTIONAL LAW (*Continued.*)

Legislature to pass two separate Acts for the purpose of accomplishing one object—the first in order that a thing should be done, and the second to indicate the manner in which the expense should be defrayed.
Arnoult v. *New Orleans*, 54.

2. The title of the amendatory Act not only refers to but includes the title of the first Act. The Constitution does not prohibit any designation of an amendatory Act by a reference to the title of the Act amended.
Ibid.

3. The object of the Constitution was to prevent the amendment or revival of laws *merely* by reference to their title. It was intended that each amendment and each revival should speak for itself and stand independent and apart from the act revived, or section amended. *Ibid.*

4. The license tax imposed on keepers of coffee-houses is imposed upon all persons of the same class, and is therefore constitutional.
New Orleans v. *Staiger*, 68.

5. The reasons for the judgment rendered by the District Court were: "This case having been regularly taken up according to assignment, and after the testimony adduced, and argument of counsel, it is ordered," etc. *By the Court:* This, it is apparent, is as much a reason for rendering a judgment in favor of the defendant as plaintiff, and does not meet the requirements of the Constitution. Article 72, Constitution.
West Baton Rouge v. *Bozman*, 94.

6. The 41st section of the charter of the city, which dispenses the city from furnishing bond and security in all judicial proceedings, "where, by existing laws, bond and security are required of litigants," is not unconstitutional, as being without the terms of the title of "the act to consolidate the city of New Orleans, and provide for the government and administration of its affairs." The 41st section does not revive or amend any law by reference to its title. It refers to laws in general terms without any indication of the title of such laws.
Kathman v. *New Orleans*, 145.

7. Article 127 of the Constitution of 1845, and 123 of the present Constitution, refer to State taxation in its proper sense, for general or State purposes. When it says that taxation shall be equal and uniform *throughout the State*, it points directly to its object, which is to regulate the mode of filling the State Treasury. It does not take away the power of making local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden.
Yeatman v. *Crandall*, 220.

8. The power of the legislative department of the government is supreme, except where restricted by the Constitution.
New Orleans Draining Company praying, &c., 338.

9. The Legislature has the power to drain the swamps in the rear of the city of New Orleans, directly, or by its own agents, and so it has the power to drain them through the intervention of a company created for that purpose. *Ibid.*

CONSTITUTIONAL LAW (*Continued.*)

10. Article 124 of the Constitution, guaranteeing to the city of New Orleans the election of its own officers, was not intended to direct the manner in which contractors for works of public improvement should be selected, nor to abrogate contracts already made. It is the right of appointing the several *public* officers necessary for the administration of the police of the city that is secured to the citizens of New Orleans. The kind of officers intended is shown by the proviso to Article 124. An incorporated company taking a contract for the draining of a swamp cannot be called a public officer necessary for the administration of the police of the city. *Ibid.*

11. It was within the power of the Legislature to require the proprietors of the marshy lands in the rear of the city themselves to drain them. It had the power also for sufficient causes, of which the Legislature alone was the judge, to cause the work to be done and charged to the proprietors respectively, and all this would not be the levying of a tax in the sense of that word as used in the Constitution. The money was not intended to go into the treasury, and become subject to the rules by which alone it could be appropriated annually. *Ibid.*

12. The property drained has been benefited in amount greater than the cost of the assessed work. Were not this the case, the property of each proprietor, to the extent of the difference between the increased value and the cost of the work assessed to him, would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of the provisions of Article 105 of the Constitution. *Ibid.*

13. Under the charter the estimate that the company was required to make of the probable cost of the work, did not limit the lien to the amount of the estimate, should the cost of the work exceed the estimate. *Ibid.*

14. It is in the power of the Legislature to determine in what manner parties are to be brought into court. *Ibid.*

15. If the estimate of the cost of the work was irregular, such irregularity has been cured by a judgment of a competent tribunal, which has not only become final, but has been acquiesced in by the parties, who daily saw the work upon their own land in progress, and who made no objection or remonstrance. *Ibid.*

16. By the charter of the company the cost of drainage was levied, not as a personal tax upon the individual proprietor, but as an assessment against the property benefited by the labor of the company, and to repay the company, not to go into the public coffers. And for the benefit which it was supposed the city would derive in point of salubrity from the improvement, the municipalities were required to keep the draining machinery in perpetual operation, without any extra tax on the lands. SPOFFORD, J. *Ibid.*

17. All the rights of the company were acquired under the Constitution of 1812; these were reserved by the schedules of the Constitutions of 1845 and 1852, so that the clauses in the Constitutions of 1845 and

CONSTITUTIONAL LAW (*Continued.*)

1852, which are not to be found in the Constitution of 1812, touching "vested rights" and the "equality and uniformity of taxation," can have no bearing upon these rights. SPOFFORD, J. *Ibid.*

18. To go behind the Constitution of the State and of the United States, in search of an unwritten bill of rights, which is said to lie at the foundation of every free government, and there to find a principle on which the legislation in question may be declared null and void, would be to prostrate the plainly declared will of a co-ordinate department of the government, not because it contravenes any provision of the organic law, which the court is to expound, and all are to obey, but because it contradicts the notions of justice that the court may entertain. SPOFFORD, J. *Ibid.*

19. Perhaps the court has such a power; like the right of revolution, it is sometimes obscurely hinted at in judicial opinions. Conceding that the court has the power to protect the citizen against encroachments from the legislative power which are not specially, or by necessary implication, inhibited by the Constitution, it is obvious that a flagrant case of wrong and hardship should be made out to justify a judicial tribunal in thwarting the legislative will, without a direct warrant for doing so to be found in the Constitution itself. SPOFFORD, J. *Ibid.*

20. The charter of the New Orleans Draining Company is unconstitutional in this, that it levies a tax only upon the owners of the property drained, for an improvement intended for the benefit of the whole city of New Orleans, and so declared to be in the preamble to the charter. BUCHANAN, J., dissenting. *Ibid.*

21. The power conferred upon the Draining Company by the Act of 1839 is a power of taxation, which it is unconstitutional for the Legislature to delegate to a joint stock company, and is inconsistent with the taxing power vested in the Municipal Corporation by the various acts incorporating the city of New Orleans, which are not repealed. BUCHANAN, J., dissenting. *Ibid.*

22. The inscription of a mortgage and privilege for an undefined amount, in favor of the Draining Company, against each and every proprietor of land embraced within the company's operations, seems to be a divestiture of vested rights, because it must render all property thus situated unsaleable in the interval between the inscription of the decree creating the mortgage and privilege before the work is undertaken, and the homologation of the assessment and tableau of contribution after the work is completed. BUCHANAN, J., dissenting. *Ibid.*

23. The superiority which is given by the Act of 1839 to the mortgage and privilege of the company on the lands embraced in their operations, over all mortgages, conventional, legal, or judicial, is a provision divesting vested rights and impairing the obligation of contracts. BUCHANAN, J., dissenting. *Ibid.*

24. The 4th section of the Act of 12th March, 1838, re-enacted in 1855, which provides that managers and lessees of theatres shall pay $500 per annum for the benefit of the Charity Hospital, is not unconstitu-

CONSTITUTIONAL LAW (*Continued.*)

tional; nor is it repealed by the Act of 1853, taxing managers and lessees of theatres $200. *Charity Hospital* v. *De Bar*, 385.

25. An assessment on property in New Orleans, in front of which paving has been done, of a portion of the cost, is not forbidden by the Act of 4th May, 1847, section 1; such an assessment is not opposed to the letter or spirit of Article 427 of the Constitution of 1855, and Article 123 of the Constitution of 1852. *Surgi* v. *Snetchman*, 397.

26. However specious the argument that the Governor should, if possible, seek to avail himself of the assistance of his constitutional advisers, the Senate, in making appointments to office, and to avoid an independent nomination, which would only have effect until the end of the next session of the Legislature, it is plain that an appointment thus made by anticipation, has no other basis than expediency and convenience, and can only derive its binding force from the supposition that there will be no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office. *Ivy* v. *Lusk*, 486.

27. It is entirely inadmissible to pretend that the Governor and Senate can forestall the action of their own successors in office, upon executive appointments to the offices, of which the term shall expire during their possession of the reins of government. *Ibid.*

28. An Act of the Legislature, directing the sheriff of a parish to assess and levy a tax within a school district of the parish, to pay a judgment against the school directors of such district, is not unconstitutional. *Bassett* v. *Barbin*, 672.

29. The Act of 15th of March, 1855, entitled "an Act relative to slaves and free colored persons," is unconstitutional, because its title expresses two distinct objects, to wit: slaves and free colored persons, and because many of the sections of the Act embrace objects not expressed in the title. *The State* v. *Harrison, a slave*, 722.

30. Slaves and free colored persons embrace two classes, which it is impossible to confound in legal parlance; for in the eye of the Louisiana law there is, with the exception of political rights, social privileges and the obligations of jury and militia service, all the difference between a free man of color and a slave, that there is between a white man and a slave. *Ibid.*

31. This court cannot say, that one of the objects comprised in the title of the Act in question, was more in the contemplation of the Legislature than the other, nor select between the two objects expressed, and to sustain those portions of the statutes which are applicable to the object they selected, to the exclusion of the other expressed object, not to speak of the other and widely various objects embraced in the numerous sections of the statute. The whole Act is liable to the same objection, and the whole is void for unconstitutionality. *Ibid.*

32. The doctrine of all American courts is, that a Legislative Act should not be declared void, unless its incompatibility with the paramount law be

CONSTITUTIONAL LAW (*Continued.*)

clear beyond a reasonable doubt. SPOFFORD, J., (with whom concurred LEA, J.,) dissenting. *Ibid.*

33. The argument that slaves are one object, and free colored persons another, overlooks the fact that both compose a single, homogeneous class of beings, distinguished from all others by nature, custom and law, and never confounded with citizens of the State. No white person can be a slave; no colored person can be a citizen. A slight change of phraseology without any change of substance, will show that there is unity in the object of the law in question, as indicated by its title; it is an act *relative to persons of color whether bond or free.* The division of this class of persons into bond and free, does not duplicate the object of the law which was intended to regulate the entire class. SPOFFORD, J., (with whom concurred LEA, J.,) dissenting. *Ibid.*

34. The design of a title is merely to indicate the general subject of the law, and not to furnish a detailed exposition of its provisions. If the latter were the case, it would lead us to the absurd conclusion that the title should be as long as the act, unless indeed the act abounded in tautology and surplusage. What good sense would dictate is what the Constitution exacts, namely, that by some general but concise expression at the head of the law, the attention of both legislator and citizen should be fixed upon the main subject-matter to which all the details in the body of the statute are auxilliary. SPOFFORD, J., (with whom concurred LEA, J.,) dissenting. *Ibid.*

35. In a suit, instituted by a citizen of another State, to recover slaves from a citizen of this State, which he alleges are fugitives from his service, the slaves have, in the eye of the law, no interest in the result of the suit. The 2d section of Art. 4th of the Constitution of the United States does not contemplate a case of this kind. Were the Constitution construed otherwise, it would apply to all questions of ownership in slaves, between citizens of different States.

Reynolds v. *Batson*, 729.

See NEW ORLEANS—*Arnoult* v. *New Orleans*, 54.
See LEVEES AND ROADS—*Yeatman* v. *Crandall*, 220.
See RAILROADS—*Pontchartrain R. R.* v. *Carrollton R. R.*, 258.
See SHERIFF—*Bell* v. *Hufty*, 303.

CONTINUANCE.

1. The non-attendance of jurors who had been summoned, but not excused, is not good cause for a continuance. *State* v. *Johnson*, 422.

2. Where a bill of exceptions, taken to the refusal of a judge to grant a continuance in a criminal case, shows that there were matters of fact known to the judge, which, though they do not appear, may have had an important bearing on the decision of the question of continuance, the Supreme Court will not interfere. *State* v. *Ballerio*, 81.

CONTRACTS.

1. A right of way for a railroad was granted by the owner of land on the Mississippi to a proprietor in the rear, and an acre of ground leased for a depot, etc. Subsequently, by order of the proper parochial authorities, a new levee was constructed, and the greater portion of the land for the depot was thrown outside of the levee, and consequently the public road,

CONTRACTS (*Continued.*)

and so rendered useless for the purposes for which it was leased. Suit was brought to compel a surrender of an additional piece of land, to be used for a depot in lieu of that rendered useless. *By the Court:* The contract in question is not so much a lease as the creation of a servitude, or right of way from plaintiff's plantation to the river's bank for a term of years—a predial servitude in favor of plaintiff's estate, and due by defendant's estate. This right of way is of a particular character—a railroad, an indispensable part of which is a depot at the landing. The dimensions of the depot are precisely defined by the contract, and the lessee has the right to a depot of that size to the expiration of the term, fronting on the public road, and running back from that road for quantity. *Smith* v. *Buhler*, 98.

2. The caving of the bank of the river, and hence the necessity for a new levee, etc., might have been foreseen (as shown by the evidence) and the parties must be supposed to have contracted with reference to such a contingency. *Ibid.*

3. In commutative contracts the party who seeks to put the other in default, must, on his part, perform all that which is incumbent on himself to perform. *Lafourche* v. *Rossi*, 102.

4. If the intention of the parties to a marriage contract cannot be discovered by the ordinary rules of interpretation, the contract must be declared void for uncertainty. *Stratton* v. *Rogers*, 380.

5. Plaintiff was liable on certain notes on which M. was primarily bound. M. died; and plaintiff having applied for the curatorship of M.'s estate, was induced to withdraw his application at the instance of defendant—who having an interest in the estate of deceased—agreed to deliver a certain quantity of lumber to plaintiff, at certain designated times, equal to the amount of the notes. *Held:* there is nothing immoral in such a contract; and defendant having failed to deliver all the lumber within the stipulated period, his liability to plaintiff is absolute for the amount of the notes, less the value of the quantity of lumber actually delivered. *Woodworth* v. *Wilson*, 402.

6. *Quære.* Whether it is not against the policy of the law to enforce any contract which directly or indirectly has for its consideration the withdrawal of the applicant for the office of Executor, Curator, or Administrator of a succession, in order to secure the appointment to another?—MERRICK, C. J. *Ibid.*

See DAMAGES—*Vanhorn* v. *Templeton*, 52.
See RAILROADS—*Pontchartrain R. R.* v. *Carrollton R. R.*, 253.

CORONER.

See SHERIFF.

COSTS.

1. A liability for judicial costs is solidary. By Art. 2082 it was not contemplated that a distinction should be drawn between the liability of plaintiffs and of defendants for costs. *Dunbar* v. *Murphy*, 713.

2. Art. 3503, C. C., refers exclusively to the fees of Parish Judges, Sheriffs, Clerks and Attorneys—compensation due to experts is not included. *Ibid.*

COURTS.

1. It is impossible to lay down any definite rules limiting the discretion of a court in ordering or maintaining such steps as may be necessary for the protection of the persons or property of minors. Cases may arise for which the law has made no specific provision, and in such cases, it is the duty of the court, in its discretion, to order such steps as may afford effectual protection; but for all the ordinary purposes of administration, the interests of minors are placed under the control of tutors and under-tutors, acting under the supervision of the court.

Succession Landry, 85.

2. All cases are excluded from the jurisdiction of the First District Court of New Orleans, which do not come within the definition of criminal cases, as found in the sixth section of the Acts of 1853 and 1855—"prosecutions for crimes, misdemeanors and offences committed within the limits of the First Judicial District."

State v. *The Judge of the First District*, 187.

3. The 42d section of the Act of 1855 does not give the First District Court of New Orleans jurisdiction to try a contested election of District Attorney of the parish of Orleans. *Ibid.*

4. If the 42d section of the Act of 1855 applies to the parish of Orleans, the section would be satisfied, without conflicting with previous statutes, by filing the petition contesting the election of District Attorney for the parish of Orleans in any of the five district courts of general jurisdiction in the parish of Orleans. *Ibid.*

5. The First District Court, being a court of limited powers, any extension of its jurisdiction must be strictly construed, and should not be stretched by implication to cases not named. *Ibid.*

6. Courts will not lend their aid to foster, circuitous, idle and wasteful litigation. The only real complaint plaintiffs have, is that they anticipated the payment of what afterwards became a debt. As the debt was due when they brought their suit, there was no equitable ground for repetition, in the fact that they paid it under a mistaken belief that they owed it before they really did. *Hyde* v. *New Orleans*, 191.

7. As between two executors, the action of the court cannot be invoked for the purpose of assessing their proportionate shares of a liability growing out of a joint fraudulent administration. *Girod* v. *Pargoud*, 329.

8. A State Court may enjoin the United States Marshall from seizing the property of one person under an execution against another.

Mock v. *Kennedy*, 525.

9. An action for the revendication of immovables is a real action, and an action to compel a conveyance of lands falls within this category.

The State courts of Louisiana have no jurisdiction to compel a conveyance of lands situated in Texas—and, *by the Court:* When the plaintiff entered into a Texas partnership in Texas land claims, he impliedly submitted himself to the Texas laws and tribunals. His attempt to bring those titles before the courts of Louisiana for adjudication, either directly or indirectly, is not to be favored, as it is not necessary for the due enforcement of our own laws, nor for the suppression of fraud

COURTS (*Continued.*)

within our borders. Aside from matters confided to the Federal Government by its Constitution, the relation of the States of this Union, inter se, is that of foreign States in close amity. Each is sovereign in its proper domain. If we would secure respect for our own sovereignty, we should pay respect to the sovereignty of others.

Mussina v. *Alling et als.*, 568.

10. Plaintiff claims to have been a joint owner with two of the defendants of certain lands in Texas. He charged a combination of his co-defendants to defraud him of his interest in those lands, and brought this suit for damages resulting therefrom. But *held* that, so far as the record disclosed, there was a title paramount to that under which plaintiff claimed. *Held, also*, that there was no proof that he was entitled to damages. *Ibid.*

See PRACTICE—*Julia Haughton* v. *Her Husband*, 200.
(For Appointment of Liquidator) See PARTNERSHIP—*Pratt* v. *McHatton*, 160.
See EVIDENCE—*Anderson* v. *Folger*, 269.
See CONSTITUTION—*N. O. Draining Co., praying, etc.*, 338.

CRIMINAL LAW.

1. A bench warrant need not be signed by the Judge. The entry on the minutes is the judicial order; the affixing the seal and signature of the Clerk are merely ministerial. *State* v. *Martinez*, 23.

2. "Selling liquor to slaves, without the consent of their masters," is a penal offence under the statute of 1852. *Ibid.*

3. In a bail bond it is not necessary to describe an offence with the certainty required in an indictment. *Ibid.*

4. The statute of 1852 punishes the offence of "selling liquor to slaves, without the consent of their masters," by fine and imprisonment. The State has the right to the presence of the accused on the trial for such offence, and the accused cannot plead, or be tried by attorney, at least without consent on the part of the State. *Ibid.*

5. Where a bill of exceptions, taken to the refusal of a Judge to grant a continuance in a criminal case, shows that there were matters of fact known to the Judge, which, though they do not appear, may have had an important bearing on the decision of the question of continuance, the Supreme Court will not interfere. *State* v. *Ballerio*, 81.

6. The accidental omission of some names from the jury-list will not furnish a sufficient ground for challenging the array; to make a perfect list would be impracticable, and to construe the law so as to require it, would operate an indefinite suspension of the trial by jury. *Ibid.*

7. A party under indictment has not the right to move for attachments against absent persons, whose names are found on the jury list, in order to bring into court a greater number of jurors, when there are enough in attendance to complete the panel. *Ibid.*

8. It is good cause of challenge in capital cases that a juror has conscientious scruples against finding an unqualified verdict of "guilty." *Ibid.*

9. In determining the guilt or innocence of a party indicted, the jury are the judges of the law as well as the facts, but not in exactly the same sense. Under our statute, they are the exclusive judges of the facts; they are,

CRIMINAL LAW (*Continued.*)

subordinately, judges of the law, because the statute proceeds upon the assumption that they are not familiarly conversant with it, and therefore requires the presiding Judge to "give them a knowledge of the law applicable to the case." They have power to decide against the Judge's opinion of the law—nay, they have power to pervert or ignore the law itself by their decision, and no penalty awaits them. But as they cannot trample on the law without spurning the obligation of their oaths, so they cannot in general overrule the authoritative exposition of the law given by the Judge, without endangering the cause of justice, and forgetting the theory upon which its administration is based. The theory is, that the complicated duties of a criminal trial should be so parcelled out amongst various officers as to give to no one man or set of men unqualified and arbitrary control over the life and liberty of the citizen and the welfare of the State. After hearing the arguments on both sides, the Judge, unbiassed by interest or passion, is expected to declare the law; the jury to apply it to the facts which they find. They may safely take the law from the Judge, for, if he mistakes it to the prejudice of the prisoner, the latter is not without remedy: his exceptions may be heard in another tribunal, after the excitement of the hour is past. But the error of the jury is subject to no such revision. *Ibid.*

10. The following charge to the jury was asked and refused: "In all criminal cases the jury are the judges of the law as well as the facts. The province of the judge is to explain the law, and they are bound to listen to and weigh such explanation with due care and attention, although not bound to admit it as conclusive of the law, should they differ in opinion from the judge." *By* MERRICK, C. J., *dissenting:* I think the instructions should have been given the jury as prayed for. *Ibid.*

11. Appeal from a judgment overruling a motion in arrest of judgment after conviction of murder, on the ground that the words "then and there" were omitted in the concluding sentence of the indictment. *Held*: That if such indictment were defective at common law, it is aided by the statute of 1855, which provides that it shall not be necessary to state any venue in the body of an indictment; and that no indictment shall be held insufficient for want of proper or perfect venue.

State v. *Wilson*, 163.

12. Under the same statute any formal defect apparent on the face of the indictment must be taken by demurrer or on motion to quash before the jury is sworn; and every court before which objection is taken for such formal defect, may, if necessary, cause the indictment to be forthwith amended, whereupon the trial may proceed as if no such defect had existed.

Ibid.

13. Objections to the admissibility of the prisoner's confession, and to the instructions of the court, must be taken by bill of exception, and not by assignment of error. And where the Justices who presided at the trial of slaves, were of opinion that they had no power to sign bills of exception, evidence of this should appear of record.

State v. *Bob*, 192.

CRIMINAL LAW (*Continued.*)

14. Assignment of error, "that the tribunal who convicted said slave were informally and illegally constituted." *By the Court:* This objection is entirely too vague and has not been made more explicit by any specification, even in argument, in this court. *Ibid.*

15. It is good ground of challenge in a capital case that the juror has conscientious scruples against capital punishment. *State* v. *Costello*, 283.

16. The court has a right to discharge the jury in a capital case, when such discharge is of evident necessity; and by necessity is not meant that which is physical only, but it has application to cases of moral necessity, as where the ends of justice would of necessity be frustrated, or where it arises from the impossibility of proceeding with the case, without producing evils which ought not to be sustained. *Ibid.*

17. The jury empannelled and sworn to try the prisoner on an indictment for murder, before the indictment was heard or evidence received, was, on the suggestion of prisoner's counsel, and with the written consent of the prisoner, allowed to separate—the District Attorney reserving his right, with the consent of prisoner's counsel, of making his objection the next day, should he think it important to do so, and to move for the discharge of the jury. On the next day the District Attorney, considering the separation of the jury illegal, moved for the discharge of the jury, which was accordingly ordered. Another jury was subsequently empannelled for the trial of the prisoner, when his counsel filed a plea in bar, alleging that having been once put in jeopardy of his life, he could not be tried by a different and distinct jury. There was a verdict of guilty. On appeal—*Held:* the separation of the jury, under the jurisprudence of this State, would have vitiated the verdict they might have rendered. The motion to discharge the jury was made in good faith; the discharge of the jury was without prejudice to the prisoner's rights; the prisoner stood before the second jury with every advantage he enjoyed when the first jury was empannelled. The conviction was valid. *Ibid.*

18. On a trial for murder the Judge told the jury that "murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict in order to deter others from crime." *By the Court:* Such a charge was calculated to impress upon the mind, of the jurors that in all cases of murder they were not at liberty, or, at least, could not with propriety exercise that discretion which is expressly conferred by the statute of 1846, which declares that in *all cases* where the punishment demanded by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, "without capital punishment." We think the discretion of the jury should not have been trammelled by the instructions which were not only calculated to secure an unqualified verdict, but might have been construed by the jury into an intimation of the opinion of the court as to the guilt or innocence of the prisoner. *State* v. *Shields*, 395.

CRIMINAL LAW (*Continued.*)

19. Generally speaking the Supreme Court is inhibited by the restraints of the Constitution from entering upon such inquiries as are necessary to determine a question of continuance in a criminal case. In such cases its jurisdiction is limited to questions of law alone. The propriety of granting or withholding a continuance in most criminal cases, depends wholly upon facts within the knowledge of the District Judge, but not cognizable in the Supreme Court. The only proper mode of bringing the subject before the Supreme Court, is by a bill of exceptions which will show affirmatively upon its face that the ruling of the District Court was predicated exclusively upon a matter of law in which the court erred.
State v. *Johnston*, 422.

20. A bill of exceptions was taken to the refusal of the District Judge to grant a continuance because the prisoner had been served with a list of jurors, upon which were the names of three jurors who had been excused for the term, prior to the service of the jury list. *By the Court:* Although in these matters affecting life and liberty, the clerks of courts cannot be too particular in the discharge of their duties, and should be held to strict accountability for their negligence, still we are not prepared to say that the accidental insertion of the names of three jurors who had been excused for cause in a list of eighty two, could have confused or embarrassed the prisoner in regard to his challenges. Before the trial he knew that those three were excused. He averred no surprise. He did not allege that the absence of the three jurors entailed any embarrassment upon him in getting an impartial jury. We have no reason to suppose that he was surprised or confused by the failure of the clerk to omit the names of three excused persons. All the jurors who had been summoned, aud none who had not been summoned, figured upon the list; and we think the statute requiring a list of the jury who are to pass upon his trial to be served upon the prisoner, was sufficiently complied with. *Ibid.*

21. Bill of exceptions to the refusal of the court to charge that "the jury are not the judges of the law and fact in a criminal case, but must take the law as laid down by the court"—*Held:* The charge asked for was erroneous. *By the Court:* In both civil and criminal cases, the jury are judges of the law and the fact; otherwise it would be impossible for them to render a general verdict in any case.
State v. *Scott*, 429.

22. It is in general safe, as it is in conformity with the theory and the presumptions of our criminal jurisprudence, for the jury to regard the exposition of the law given by the court as correct and decisive—but they are under no compulsion to do so. They not only have the physical power to disregard the instructions of the court, but there might be extreme cases where it would be right to exercise the power. Still the statutes require the Judge to expound the law to the jury and, in general, they will do well to heed it as authoritative. *Ibid.*

23. When the prisoner provokes an inquiry into the character of the deceased' he cannot complain that the State, on re-examination, seeks to obtain

CRIMINAL LAW (*Continued.*)

from the same witness evidence of a general character calculated to rebut the unfavorable impression produced by the answers of the witness to the prisoner's questions. *State* v. *Bass*, 478.

24. The prosecuting officer always has the right to open the argument of the cause. If the prisoner offer no evidence, it seems that it is usual for the argument to cease with the reply of his counsel to the argument of the prosecuting officer. But the prisoner's counsel is not entitled to open the argument upon the merits before the jury, in any case, as a matter of right. *Ibid.*

25. Bill of exceptions to the order of the judge directing the clerk to commence calling the jury list at No. 70. *By the Court:* The industry of counsel has not furnished us with any adjudged case, nor have we been able to find any, in which it has been held that it was error if the jury were not called to the book in the order in which they were placed on the list served upon the accused. There is nothing in the statute which directs the order in which the jury are to be called to be sworn, nor which requires the names to be set down on the list in the order in which they are drawn, although that is the more regular and natural mode of transacting the business. The statute which provides that the accused shall be furnished with a list of the jury who are to pass upon his case, at least two days before his trial, does not require that the list should be numbered. Yet, we believe the practice is almost universal, (and it ought not unnecessarily to be departed from) to number the list, and in capital cases to call the jurors in the order of their number. It is not sufficient for the accused to show a mere irregularity in the manner in which the jury is called—he should show that he has been prejudiced by the action of the court in that particular.
State v. *Kennedy*, 479.

26. The Act of May 29, 1856, authorizing juries, in capital cases, to qualify their verdicts of guilty by adding "without capital punishment," did not change the pre-existing jurisprudence which held it to be good cause of challenge on the part of the State in such cases, that the juror had conscientious scruples about inflicting capital punishment.
State v. *Melvin*, 535.

27. The following bill of exceptions was taken to the charge of the District Judge. "Be it remembered that on the trial of this cause, the Judge, in his charge to the jury, and at the beginning and in the course of his said charge, stated to the jury that cases of murder were fearfully numerous in this city; that a conviction on a charge of murder had ceased to be a cause of excitement, and had become a common affair of almost daily occurrence; that confinement in the State penitentiary for life was no adequate punishment for the crime of murder, and that juries had no right to qualify their verdict unless there were mitigating circumstances; that convicts in the penitentiary seldom served out their term, when confined there for life; that a late Governor of this State had pardoned almost every body, and that convicts were always in the hope that after a few years they would appeal to a clement executive, and that none but capital punishment would put a stop to the practice

CRIMINAL LAW (*Continued.*)

now common of man and woman killing; that he, the Judge, on a late visit to the penitentiary, had been told by parties sentenced by him, inmates of the State prison now, that they hoped in a short time to come out; to which charge the counsel for the defendant objected, &c." *By the Court:* It is obvious that the charge as above detailed embraced several matters of fact within the personal knowledge of the Judge, which would not have been admissable in evidence, had they been offered on the trial, which did not contribute in any way to the elucidation of the law applicable to the case, and which yet had a tendency to influence the finding of the jury by motives extraneous to the cause before them. *Ibid.*

28. Under the statutes of this State, the Judge should carefully avoid giving the jury any indication of his own opinion touching the facts of the case, or the guilt, or innocence of the prisoner. *Ibid.*

29. The qualification of the verdict in capital cases should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility—which is to do their whole duty to the State as well as to the accused. *Ibid.*

30. A simple appearance is not sufficient to entitle a party to relief from a judgment forfeiting his recognizance. There must be an effective appearance—an appearance that finally disposes of the case. *The State* v. *Grice et al.*, 605.

31. If it is ever allowable for the accused to procure relief from such a judgment, it must at least be a case where he has done all in his power to procure a trial without effect. *Ibid.*

32. Where a person states, when examined on his *voir dire*, that he has formed and expressed an opinion relating to the guilt or innocence of the prisoner, and that it might bias him in forming an opinion after having heard the testimony—that direct evidence only would change his opinion—that circumstantial evidence would not—he should be rejected as incompetent to act as a juror, although he should further state that the opinion he has formed is not so fixed that it could not be changed by the evidence which might be adduced on the trial—that he thought he could do justice between the State and the prisoner—and that the opinion he had formed would not influence his mind as a juror. As to the appointment of triors, when there is a challenge to a juror, although such a request is unusual in this State, it should be allowed on the request of the prisoner. *The State* v. *Bunger*, 607.

33. The power to grant a change of venue is confided to the District Courts exclusively, and the exercise of it is not subject to revision by the Supreme Court. *Ibid.*

34. Where the accused is not called at the courthouse door to receive his sentence, nor his sureties called to produce his body, there is no forfeiture of the bond obligating him to appear and receive his sentence. *State* v. *Evans*, 626.

35. The statute against carrying concealed weapons does not contravene the second article of the amendments of the Constitution of the United States. *State v. Smith*, 683.

CRIMINAL LAW (*Continued.*)

36. A partial concealment of the weapon, which does not leave it in full open view, is a violation of the statute. *Ibid.*

37. An indictment which charges the selling liquor to a slave without the written consent of the master does not necessarily charge any offence by the Acts both of March 18, 1852, p. 225, and of March 15, 1855, p. 380. It is of the essence of the offence that the selling to the slave should be "without the consent in writing, of the owner, overseer or employer of such slave." Selling liquor to a slave, without the written consent of the owner, is no offence, if the slave has the written consent of the overseer or employer for the time being.
The State v. *Delerno*, 648.

38. Such a defect in an indictment is one of substance and not of form. The Statute of March 14, 1855, p. 171, to "regulate the mode of procedure in criminal prosecutions," did not debar the accused from moving to arrest the judgment for such a material omission in the indictment.
Ibid.

39. Section 17 of the same Act relates only to *formal* defects. *Ibid.*

40. The court, on a trial for murder, may rightfully reject as incompetent a juror who has conscientious scruples against finding an unqualified verdict of guilty in a capital case, even after he was accepted, both by the State and by the defendent, if he has not been sworn.
State v. *Reeves*, 685.

41. Where the whole of the regular panel of jurors has been exhausted, without securing a single juror, the prisoner has no right to require the service upon him, two days before the trial, of the list of the jury *de talibus* which is summoned. In such case the court may proceed with the trial *instanter*. *Ibid.*

42. The confessions of the accused, being entirely voluntary, made to the officers w ho went to arrest her, are admissable.
State v. *Adeline, a slave*, 736.

43. The jury found the prisoner guilty of manslaughter, and condemned her to the penitentiary for twenty-five years. *Held:* That there was no error in the period of time fixed for the imprisonment of the accused. The Act of 6th April, 1856, page 114, did not repeal the 7th section of the Act of 1843, page 92. *Ibid.*

See EVIDENCE—*Shea* v. *Wedemeyer*, 49.
See SUPREME COURT—*State* v. *Bass*, 478.
See SUPREME COURT—*State* v. *Kennedy*, 479.

DAMAGES.

1. The assessment of damages to the wife and children from the homicide of the husband and father, can only be the balancing of probabilities and chances. *Herrman* v. *Carrollton Railroad*, 5.

2. The Statute of March 1st, 1855, (Acts of 1855, p. 271,) having been passed since the Act complained of, can have no effect on this case. *Ibid.*

DAMAGES (*Continued.*)

3. Action of damages for non-performance of contract. Defendants agreed to convey plaintiffs from San Francisco to New Orleans, in about twenty-four days, connecting at San Juan, whence they were to be taken by the steamer Daniel Webster to New Orleans. The D. W. did not appear at San Juan for ten days after the arrival of plaintiffs. A violent storm at sea prevented the defendants from having a steamship at San Juan in time. *Held:* This was an inevitable accident and overpowering force, which exempted defendants from responsibility.

Van Horn v. *Templeton*, 52.

4. Any other steamship, equally fitted to transport passengers with comfort and safety as the D. W., would have been a compliance with the contract. *Ibid.*

5. Defendants contracted that the only extra expense of passengers would be for their board in crossing the Isthmus; and that on their arrival at San Juan they should immediately go on board the steamer. After their arrival at St. Juan they were not permitted to go on board the D. W. for about ten days. *Held:* That plaintiffs were entitled to recover their expenses for that length of time. *Ibid.*

6. Action for the value of a slave killed by the unskilfulness and fault of persons who were in the employment of defendant. The evidence showed that the defendant had contracted with the undertaker to put up the iron front on a building, and that afterwards defendant made a special contract with T. for T. to do the same work, with assistants and laborers employed and paid exclusively by T. The work fell to the ground and killed the slave. *Held:* That T. was not the servant or overseer of defendant, and consequently defendant was not liable.

Peyton v. *Richards*, 62.

7. A runaway slave, supposed to belong to defendant, was concealed in defendant's fodder house, among the fodder. Two slaves of defendant were sent to capture him. They thrust a broadsword into the fodder to frighten him out, and in so doing, inflicted a wound of which he died. *By the Court:* It was a grossly negligent and wanton act on the part of the defendant's slave to thrust a dangerous weapon like a broadsword into the fodder where they believed a fellow-slave was concealed. It matters not that they did not intend to kill him. The master is liable for the damage done by this inexcusable negligence and barbarity, to the extent of being compelled to pay for the slave killed or to abandon his own guilty slaves to the person injured.

Griffin v. *Routh*, 135.

8. Action against the proprietor of a newspaper for damages for a libel. In actions of this character malice is often implied. At common law, if the words spoken or published are themselves actionable, (as if they import an accusation of an indictable offence,) malicious intent is an inference of law, and therefore needs no proof. In this case malice does not mean a spite against the individual, but *malus animus*, a wanton disposition, grossly negligent of the rights of others.

Tresca v. *Maddox*, 206.

DAMAGES (*Continued.*)

9. The defendant had a right to report the fact that the plaintiff had been arrested and held for examination on a particular charge. But he had no right to go beyond this, and assume the guilt of the plaintiff upon an *ex parte* charge, heap accusations of other crimes upon his head without any foundation, and villify his character, except upon the responsibility of proving the truth of his accusations when sued for libel, and that they were made with good motives and for justifiable ends.
Ibid.

10. The fact that defendant recanted the charges against the plaintiff the day after they were made, was proper to be considered by the jury in estimating damages, but could not exonerate plaintiff entirely.
Ibid.

11. The satisfaction expressed by plaintiff at the apology and recantation made by the defendant was not a waiver of his claim for damages, as it was consistent with a reservation of his right to sue, if he thought proper. *Ibid.*

12. Although the libel was written by one of defendant's employees in the regular course of his employment, yet defendent was responsible, and though wholly without moral turpitude, yet damages could be recovered against him without special proof of the pecuniary amount actually suffered. *Ibid.*

13. Action to recover damages from defendant for alleged illegal conduct of the Board of Health, in ordering the ship to Fort Jackson, after her arrival in the city. *By the Court:* We think that the fault lies with with the captain of the ship in proceeding to the city without first having been visited by a health officer, and that he thereby took upon himself the risk of being compelled to return to Fort Jackson, particularly as the cholera had so recently shown itself on his ship, and there was a case of ship fever among the emigrants.
Rudolphe v. *New Orleans*, 242.

14. The doctrine that the city of New Orleans has a right to violate a contract, and redress is to be had only in damages against the city, is as unsound as it is novel. The violation of a contract may be, and very often is, the ground of an action sounding in damages against the party who has violated the contract. But the claim in such a case is for the reparation of a wrong, and the very opposite of a recognition of a right to violate a contract. *New Orleans* v. *Church of St. Louis*, 244.

15. The following charge to the Jury held to be strictly correct. In order to maintain an action for damages for a malicious arrest, the plaintiff must prove malice in fact, and that the arrest complained of was made, or procured to be made by the defendants from malicious motives, and without probable cause.
Gould v. *Gardner*, 289,

16. If it appears from the evidence, that the defendants in making or procuring the arrest, acted under the advice of counsel given in good faith; that they had a good cause of action against the defendant in said ar-

DAMAGES (*Continued.*)

tion, and a legal right to hold him to bail therefor—then the defendants are not liable in damages to plaintiff, and the action cannot be maintained against them. *Ibid.*

17. The verdict and judgment rendered in the District Court and confirmed in the Supreme Court, in the case of the present defendant *O'Connell & Gould*, in which the plaintiff was arrested and held to bail, and which arrest is the cause of action in this case, is conclusive evidence of a good cause of action in that suit, and cannot now be contradicted by parol or other evidence. *Ibid.*

18. The evidence of the existence of malice on the part of the defendants, in making the arrest of the plaintiff, is not sufficient to maintain this action, if there was a good or probable cause of action at the time, and an apparent legal right to hold to bail. *Ibid.*

19. In order to enable the plaintiff to recover in an action of damages against a railroad, it must appear that there was no want of care, and no imprudence on the part of the plaintiff, by which the injury was in any manner directly brought about, and that the injury was occasioned by the negligence of the company, or its officers, either in not having provided the necessary apparatus and fixtures to the locomotive or train by which the accident might have been guarded against, or by the carelessness or malfeasance of its agents. If it appear that the injury would have equally happened with or without such guards to the locomotive or train, then the want of them will not increase the responsibility of the company. *Hill* v. *Opelousas Railroad Co.*, 292.

20. In actions of this kind vindictive damages cannot be given, although the negligence is clearly proven. Vindictive damages are sometimes allowed in the case of wilful or malicious injuries. *Ibid.*

21. In estimating damages the jury may consider the painful nature of the wound, as well as the length of time the plaintiff may have been kept from his employment, and the permanent character of the injury. The jury should allow such reasonable sum as will compensate the plaintiff, and no more. The company in such cases is not to be punished for the negligence or carelessness of its agents as a crime. *Ibid.*

22. Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach, in the absence of any fraud or bad faith, are the amount of the loss he has sustained and the profits of which he has been deprived; and only for such damages as may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. Damages for supposed profits based on the speculative opinions of witnesses, are clearly inadmissible.
Gobet v. *Municipality No. One*, 300.

23. It is well settled in the jurisprudence of Louisiana that where a collision occurs, if both parties, by their own fault, contribute to the collision, the damages will not be apportioned as in admiralty, but neither party shall recover. But in determining the question of fault, we must look to the proximate and not to the remote cause of the injury.
Sackett v. *McComb*, 325.

DAMAGES (*Continued.*)

24. An injunction issued to restrain the negotiation of a bill of exchange, which being dissolved, this suit for damages was brought on the injunction bond. *By the Court:* The rule of damages would seem to be that the probable loss sustained by a party in consequence of having been deprived of the free disposal of his own property should be the true standard; in other words, he should be placed as nearly as possible in the situation in which he would have been if the disturbance had not taken place. Consequential or vindictive damages cannot be allowed.

Gray v. *Lowe*, 391.

25. Plaintiff is entitled to recover lawyer's fees actually expended by him to obtain the dissolution of the injunction. *Ibid.*

26. Action of damages for a malicious arrest and imprisonment. Damages disallowed. *Lisk* v. *Mathis*, 418.

27. When the engineer of a steamer directed the manner in which certain repairs to the engine were to be made, in a matter in which his own knowledge was supposed to be superior to the persons employed by him, and directly against their opinion and advice, such person cannot be held liable for the imperfection of the repairs.

McCan v. *Steamer R. J Ward*, 437.

28. Where the plaintiff does not interfere with the officer charged with the execution of a final process upon a judgment regulary obtained, he cannot be held responsible for the wilful or negligent acts of such officer in the execution of the writ. *Mays* v. *Schmidt & Co.*, 478.

29. A person is responsible, under C. C., Art. 2294, for the damages resulting from an assault and battery committed by him.

Donnell v. *Sandford*, 645.

30. The future diminished capacity to earn wages, consequent upon injuries resulting from an assault and battery, properly enters into the computation of damages—also bodily pain and suffering occasioned by the battery may properly be considered by the jury in making up their verdict. *Ibid.*

31. Damages will not be awarded against a plaintiff who has seized property belonging to a third party, under an execution against his debtor, where the plaintiff acts in good faith and has reasonable ground to suspect that such property is really the property of his debtor.

Phœbe v. *Vienne*, 688.

32. An action will not lie for damages resulting from a lawful act.

Donovan v. *New Orleans*, 711.

See LEVEE—*Dubose* v. *Levee Commissioners*, 165.
See SHERIFF—*Brand* v. *Wilkinson*, 278.
See DEFAULT—*Gobet* v. *Municipality No. One*, 300.
See LESSOR AND LESSEE—*Fitzgerald* v. *Ferguson*, 396.
See SALE—*Foulks* v. *Howes*, 448.

DEFAULT AND PUTTING IN DEFAULT.

1. Putting in default is a pre-requisite to the rescission of a real contract, but not to a simulated sale, which is not a real contract as to third persons injured thereby. *Lucas* v. *D'Armond*, 168.

DEFAULT AND PUTTING IN DEFAULT (*Continued.*)

4. Where the violation of a contract is passive, the putting in default is a prerequisite to the recovery of damages.

Gobet v. *Municipality No. One*, 300.

3. A violation is said to be passive, by not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated, or implied from the nature of the contract. *Ibid.*

4. It is a sufficient bar to an action for recovery of damages for the passive violation of a contract, that the defendant was not put in default by the plaintiff previous to the expiration of the time within which the plaintiff stipulated to perform his part of the contract. *Ibid.*

5. Plaintiffs sued for the specific performance of a contract, by which defendant agreed to buy of him certain land *free from incumbrances: Held*, that plaintiff, in order to maintain his action, should have done all required of him by law to put the defendant *in mora*; C. C. 1907, 1908. Besides executing an act of sale of the land to defendant he should have procured the receipt of the Tax Collector and the certificate of the Recorder of Mortgages, showing that the property was free from incumbrance.

Faisans v. *Moore*, 741.

DONATION.

See WILLS AND TESTAMENTS.

DEPOSIT.

See PRINCIPAL AND AGENT—*Beatty* v. *McLoed*, 76.

DONATIONS *INTER VIVOS.*

1. That defendant's ancestor once lived in a state of concubinage with the plaintiff will not defeat an action brought by the latter against the former to carry out an act of donation, *inter vivos*, made by defendant's ancestor to plaintiff, "of movables not exceeding one-tenth part of the whole value of his estate." C. C., 1468. *Bush* v. *Decuir*, 503.

ELECTION.

1. There is no law which makes an election day a *dies non juridicus.*

Anderson v. *Folger*, 269.

EMANCIPATION.

See SLAVES AND SLAVERY.

ESTOPPEL.

1. The objection that no legal notice of seizure was given cannot be urged by a party who appointed an appraiser, and was present at the sale.

Bermudez v. *Union Bank*, 64.

2. A written admission made by plaintiff, that a certain slave is the property of F. D., and that "he can do as he pleases with her," estops her from claiming the slave from one to whom F. D. had made title.

Webb v. *Deeson*, 84.

3. However informal the act of a family meeting may be, parties to it, who are *sui juris* at the time, as well as their assignees, are bound by their declaration therein, and estopped to deny the title of a person in whom the act declared it to exist. *Lejeune* v. *Barrow*, 501.

ESTOPPEL (*Continued.*)

4. A defendant, in an action for the partition of community property, who demands in reconvention a judgment for one-half of the charges incurred in supporting the slaves in controversy, will be precluded from asserting title to plaintiffs' interest in the property, as a "*dation en paiement*." *Dorvin* v. *Wiltz*, 514.

5. In a possessory action, where plaintiff alleged himself to be the owner and possessor of the land in question—*Held:* That the defendant having, in answer to interrogatories propounded to him, admitted that he leased the land from the plaintiff, defendant was estopped to deny the allegation of ownership and possession. *Williams* v. *Douglas*, 632.

6. The fact that a party gave his promissory note for the balance due, as set forth in an account, does not operate as an estoppel to a subsequent inquiry into the correctness of the account. Such a doctrine would abolish all equitable defences upon promissory notes or upon accounts stated. *Waters* v. *Briscoe*, 639.

See PRINCIPAL AND SURETY—*Borgeat* v. *Adams*, 78.
See CONTRACT—*Woodworth* v. *Wilson*, 402.

EVIDENCE.

1. All that a prisoner says on the subject matter at the time of making a confession is admissible; but the jury is at liberty to believe one part of the confession and disbelieve another. *State* v. *Wedemeyer*, 49.

2. In a prosecution for selling or giving spirituous liquor to a slave, the onus is upon the accused to show that such liquor was sold or given with the consent of the owner or person having charge of such slave. *Ibid.*

3. An act under private signature has no date against third persons; but a date may be given to such an instrument by evidence *dehors* the instrument itself. *Hubnall* v. *Watt*, 57.

4. The endorsement of the payee must be considered as proved when the note is offered in evidence, without objection, as the endorsement then constitutes a part of the instrument declared upon. *Blanque* v. *Woods*, 103.

5. Where plaintiffs allege that the defendants, and those under whom they claim, hold illegal possession, defendants' titles are admissible to rebut the allegation of illegal possession. *Kellar* v. *Parish*, 111.

6. Defendants' titles are also admissible to prove prescription when pleaded by the original defendants, and which their warrantors were authorized and interested to maintain. *Ibid.*

7. It is not competent for a party, against whom one of his letters is offered in evidence, to show by the parol evidence of the witness who wrote the letter for him that he "intended" something different from what the letter expresses. *Williams* v. *Hood*, 118.

8. A transcript of a later date than the one sued on, containing copies of writs and returns, &c.—which had been omitted by mistake in the first transcript—was properly received in evidence. *Davis* v. *Dugas*, 118.

9. The certificate of the Recorder was properly received in evidence. He was the obligor in the act of mortgage, and of course knew his own signature. Code, 3331. *Haines* v. *Verret*, 122.

EVIDENCE (*Continued.*)

10. When the cross interrogatories are not answered, the depositions should not be received in evidence. *Le Baron* v. *Dupont*, 140.

11. It is for the jury, and not the witness, to determine from all the circumstances disclosed whether the plaintiff occasioned any damage to defendant by his negligence, or want of skill, and if so, to assess the amount of such damage. Hence, the testimony of the witness as to his opinion of the amount of damage suffered is not admissible.
Wilcox v. *Leake*, 178.

12. Appeal from an order of seizure and sale, on the ground that the mortgage notes contained a condition that could not be judicially assumed as having happened. The mortgage notes contained the following clause: "And in case of an overflow of the river, the payment to be extended one year longer, by paying interest." *By the Court:* This clause cannot be considered as containing a suspensive condition. It is clear that the defendant's obligation did not depend upon a future, or uncertain event; on the contrary, its terms were express. Code, 2015, 2016, 2038. The object of this clause, it is in evidence, was to secure to the defendant, in the event of an overflow, the right to prolong the term of his obligation. In order to exercise that right, the burden was on him to show that the event had happened at the time the order of seizure and sale was sued out. *Marsh* v. *Foster*, 181.

13. Where a bill of sale of slaves is dated in this State, a party will not be permitted to show that the sale was made in another State, in order to ingraft on it the laws of that State. *McCall* v. *Henderson*, 209.

14. A memorandum book, kept wholly in the handwriting of the deceased, is admissible in evidence to show his indebtedness to a surviving partner.
Succession of Cousteaud, 216.

15. Acknowledgments of the receipt of money by the husband from the wife are not evidence against third persons not parties to them, and the judgment rendered against the husband in favor of the wife can have no more effect against third persons than the acknowledgments themselves.
Dunn v. *Woodward*, 265.

16. The fifth section of the Act of 1855, "relative to evidence," does not empower the courts of this State to take judicial notice of the statutes of other States. It provides, "that the published statutes and digests of other States, shall be *received* in the courts of this State as *prima facie* evidence of the statute laws of the States from which they purport to emanate." *Anderson* v. *Folger*, 269.

17. Action for damages for injury done plaintiff by being thrown from the cars. A bill of exceptions was taken to the admission in evidence of the declarations of the Superintendent as to the conduct of the engineer. *By the Court:* It is clear that the Board of Directors alone had the power to make admissions in regard to the controversy which would bind the company, and that no ordinary agent of the company would possess the power unless expressly granted.
Hill v. *Opelousas R. R.*, 292.

EVIDENCE (*Continued.*)

18. The flatboat of the plaintiffs being lawfully moored where she was made, the burden of proof is on the defendants to show that the accident could not have been avoided. *Sackett* v. *McComb*, 325.

19. Parol proof is inadmissible to prove a *dation en paiement*, or an exchange of slaves by an administrator. *Laycock* v. *Davidson*, 328.

20. Parol evidence is inadmissible to explain a patent ambiguity in a marriage contract. *Stratton* v. *Rogers*, 380.

21. The licitation of property to effect a partition may be ordered, on proof by witness of its necessity, as well as upon the report of experts. *Florance* v. *Hills*, 388.

22. It is incompetent for a maker of a promissory note, secured by authentic act of mortgage, in which the note is said to be given for money borrowed of payee—to prove by parol, especially against a third person, not a party to the mortgage—that the payee had acknowledged that no consideration had passed for the note. *Douatt* v. *Louge*, 399.

23. A mulatto having been examined in chief as a witness for the State—on cross-examination it appeared that he had been a slave, whereupon the prisoner's counsel called on the court to exclude his testimony, there being no evidence that he had been emancipated. *Held:* the objection came too late—there being no averment that the incompetency of the witness was not known before the examination in chief. The color of the witness would naturally have suggested an inquiry into his condition on his *voir dire;* and as the prisoner had a person in court to prove that the witness had once been a slave, there could have been no surprise when, on the cross-examination, the witness testified to that fact. The prisoner could not be permitted thus to take the chances of the witness' testimony if it had been favorable to him, reserving the right to object to his testimony if unfavorable. *State* v. *Taylor*, 430.

24. Where the objection to the competency of the witness arises from his own *examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might, on other grounds, be inadmissible. When the whole ground of the objection comes from himself only, what he says must be taken together, as he says it. *Ibid.*

25. Under an allegation made by the plaintiff, who sought to enjoin the sale of property seized by defendant, that plaintiff was the owner of the property seized, he cannot be permitted to prove the extinguishment of the mortgage note held by defendant. *Patterson* v. *Tompkins*, 452.

26. After the testimony had been taken, and the argument commenced, the cause was continued. Pending the continuance a new judge was elected, who refused to try the case *de novo*, but permitted counsel to take bills of exceptions to the testimony which had previously been introduced. *Held:* The plaintiff had the right to have the cause tried *de novo*, but as he was not prejudiced by the action of the court, inasmuch as his bill of exceptions shows that his sole purpose in asking for a trial *de novo*, was to allow him to except to certain evidence, which the court permitted, there is, therefore, no error in the proceedings of the inferior court. *Ealer* v. *Freret*, 455.

EVIDENCE (*Continued.*)

27. Parol evidence is admissible to show fraud in the registry of title to a steamboat. *Ibid.*

28. Parol evidence is admissible to prove the manual gift of movables. *Maillot* v. *Wesley*, 467.

29. As our laws do not permit either replication or rejoinder, all matters of defence set up in the answer must therefore be considered as open to every objection of law and fact, as if such objections had been specially pleaded. So, where plaintiffs claim certain furniture as belonging to the succession, and defendant answers that the furniture was a donation to her from the deceased, it is competent for the plaintiff to prove that defendant was the concubine of the deceased, so as to reduce the donation if it exceeded one-tenth of the estate. *Ibid.*

30. Where neither the plaintiff nor defendant sought to avail himself of the report of experts in the manner provided by Article 456 of the C. P., the plaintiff had the right to disregard altogether the report, and prove up his claim. *McCarty* v. *Zacharie*, 474.

31. Where counsel for a married woman admitted in his brief that the person who filed an answer on her behalf, was her accredited agent, "with the full authorization and consent of her husband," the court will presume that the proceedings against the wife were fully authorized by the husband. *Bach* v. *Lakin*, 489.

32. The testimony of witnesses as to identity of a slave, when the slave is before them, preferable to that of witnesses who describe him from memory only, though the presumption be strong that the latter testify as to the same negro. *Brack* v. *Wood*, 512.

33. Parol evidence of plaintiff's admission that he promised to abandon the slaves in question to the defendant, although received without opposition, will not have the effect to entitle defendant to assert such title. *Dorvin* v. *Wiltz*, 514.

34. The Supreme Court will give effect to evidence which would have been inadmissible under the pleadings, but to which no objection was made. BUCHANAN, J., dissenting. *Ibid.*

35. A verbal quit claim of slaves, amounting to an informal settlement of a community, will avail as a *dation en paiement*, notwithstanding it was not reduced to writing. BUCHANAN, J. dissenting. *Ibid.*

36. A duly certified copy of an act under private signature, recorded in the office of conveyances, is admissible in evidence, in lieu of the original, when the latter is lost, and due diligence has been used in searching for it and publishing the loss. *Boykin* v. *Wright*, 531.

37. The fee dockets of clerks of courts are official records authorized by Art. 776 of the Code of Practice, and copies from them, duly certified, are admissible in evidence. The fact of their serving as account books for the fees of the clerk, does not lessen their authenticity as records of the proceedings had in suits. *Ibid.*

EVIDENCE (*Continued.*)

38. In an action of revendication for a slave, the parol declarations of defendant in regard to plaintiff's title, are inadmissible. The plaintiff cannot recover by the weakness of defendant's title—it must be by the strength of his own. *McMaster* v. *Stewart*, 548.

39. The answer of one of the defendants, who are commercial partners, is admissible against his co-defendant. *Allen* v. *May & Kohn*, 637.

40. The nature and extent of the service of counsel may be proved by parol. *Brewer, executor*, v. *Cook*, 637.

41. The defendant was entitled to the production of plaintiff's accounts, or such of them as, in his opinion, might tend to establish his defence, subject to the plaintiff's right to introduce all of his accounts having any bearing upon the matters in issue. *Waters* v. *Briscoe*, 630.

42. A party will not be allowed, collaterally, to vary or complete a record by parol evidence, but when the ground of action was solely to obtain a remedy for an injury suffered by plaintiff through a clerical omission of an important entry connected with and indispensible to a certain legal proceeding, namely, the omission to enter the order of appeal, and when the plaintiff had laid the foundation for the introduction of proof of the omission, by the production of the bond of appeal and the transcript made for the review of the proceedings in the Supreme Court. Under these peculiar circumstances, parol proof, by the custodian of the record, of the omission to enter the order of appeal, should have been allowed. *Temple* v. *Marshall*, 641.

43. The statement by an administrator that "he could not pay a certain claim until he had rendered his tableau," is not a sufficient acknowledgment of debt to bind the estate. *Figuras v. Benoist*, 663.

44. Although the witnesses are neither nurses nor physicians, they are competent to prove the value of services rendered by a nurse. *Ibid.*

45. The answers of two witnesses to interrogatories propounded to them, were written down by the commissioner as one deposition, which was signed by both witnesses—*Held:* That the whole of the answers must be taken as testimony given by both the witnesses. *May* v. *Norton*, 714.

See WITNESS.
See WILLS—*Succession of Betsy Young*, 65.
Succession of Clark, 124.
See OFFICE AND OFFICERS—*Rudolphe* v. *Board of Health*, 242.
See PARTNERSHIP—*Pratt* v. *McHatton*, 260.
See PRIVILEGES—*Antognini* v. *Bailey*, 275.
See DAMAGES—*Gould* v. *Gardner*, 289.
See COMMON CARRIER—*Humphreys* v. *Switzer*, 320.
See SALE—*Fellows* v. *Carson*, 121.
Webb v. *Coons*, 232.
Foulks v. *Howes*, 448.
See ATTORNEYS—*Perkins* v. *Douglass*, 471.
See CRIMINAL LAW—*State* v. *Bass*, 478.
See HUSBAND AND WIFE—*Crane* v. *Allen*, 493.
See PRINCIPAL AND AGENT—*Bush* v. *Decuir*, 503.
See CRIMINAL LAW—*State* v. *Bunger*, 607.
See HUSBAND AND WIFE—*Tulley* v. *Alexander*, 628.
Succession of Peyran, 694.
See CRIMINAL LAW—*State* v. *Adeline*, 736.

EXECUTION.

1. Appeal from a judgment overruling a motion to quash an execution, on the ground that the execution issued on the judgment, instead of the twelve months' bond given by defendant at a sale of his property, bought by him under a previous execution on the same judgment. *By the Court:* Wherein does it concern defendant whether the present *fi. fa.* issued upon the judgment or the bond? He is the principal debtor in both, and he does not pretend by his pleadings that he has ever paid the debt, or that it has been extinguished in any mode known to the law or that he has any possible defence to it. *Trescott* v. *Lewis*, 184.

2. A twelve months' bond taken under execution upon a judgment does not operate a satisfaction or novation of the judgment. *Ibid.*

3. The Act of March 14th 1852, p. 82, concerning the licensing of drinking houses, does not confer the power of seizing property by summary process to secure the payment of a license when granted.
Hall v. *Corporation of Bastrop*, 603.

4. If a person has obtained such a license, without paying for it, the remedy to enforce payment, is by ordinary action. *Ibid.*

See USURACT—*Davis* v. *Carroll*, 705.

EXECUTORS AND ADMINISTRATORS.

1. It is well settled that payments by an executor, without an order of court are irregular, and not binding, unless it be shown that they liberate the estate from a legal obligation. *Beatty* v. *Dufief*, 74.

2. In a suit on a bill of exchange by an administrator, the defendant will not be permitted to attack the legality of the appointment of the administrator. *Williams* v. *Hood*, 113.

3. An administrator has no capacity to appeal in behalf of parties whom he has placed on his account as creditors, and whose claims have been opposed and rejected by the court. *Succession of Pettis*, 177.

4. To consider the acknowledgment by an administrator of a claim against the estate as conclusive of its correctness, notwithstanding an opposition specially made to that item of the account, and without further proof, would be virtually to abrogate Articles 1004, 1005 and 1006 of the Code of Practice. *Ibid.*

5. Executors, administrators, curators and syndics, are bound to keep a bank book in their official names, and deposit all moneys collected by them, as soon as received, in a chartered bank, if there be one in the parish, although no chartered bank of the State pays interest on deposits.
Succession of Pasquier, 279.

6. In a compromise partition of the effects of the succession between the widow and heirs in 1850, the ship C. fell to the heirs. The executor, however, was not discharged. In 1851 the ship was in Liverpool, where she was supplied by plaintiff with patent metal for sheathing, for the price of which this suit was brought. The ship seems to have been sent on this voyage by B. & C., B. being the executor. *By the Court:*

EXECUTORS AND ADMINISTRATORS (*Continued.*)

Under the circumstances of this case, the executor, in that capacity, cannot be rendered responsible for this bill. The plaintiff must be left to his remedy against B. & C. and the heirs who authorized this voyage. The executor, as such, can only be rendered responsible for expenses incurred in the legitimate administration of the succession.

Munts v. *Succession of Broom*, 417.

7. It is unjust that the owners should be benefited to the extent of the labor and materials furnished by the plaintiff, without any liability for a reasonable remuneration. LEA, J., with whom concurred SPOFFORD, J., dissenting. *Ibid.*

See PRINCIPAL AND SURETY—*Borgeat* v. *Adams*, 78.
See CONTRACT—*Woodworth* v. *Wilson*, 402.

EXPROPRIATION OF PROPERTY.

1. Although the parish had no title to the site for the court-house reported by the commissioners, they could have acquired title by a forced expropriation upon a previous indemnity to the owners. Code, 2604 *et seq.*

Watts v. *Carroll parish*, 141.

FACTOR.

1. A planter shipped his cotton to defendants, merchants in New Orleans. He afterwards wrote to them to sell by the time his brother returned from Texas, a period fixed by a conversation had with him. Cotton was then worth 12¼ cents. They did not sell for several months afterwards, when cotton fell to 7 cents. *Held:* That the letter was a positive instruction to sell, and that they were liable for the difference in the price. C. C. 2971, 2972. *Magoffin* v. *Cowan*, 554.
2. The fact that he shipped a subsequent crop to the defendants was no ratification of their acts in the premises. *Ibid.*

FACTS.

1. Facts constituting bad faith in a purchaser or possessor.

Mathis v. *Gerants*, 1.

2. Facts warranting an abandonment of a voyage by a steamboat on the Mississippi, and the recovery of freight thereupon, on a policy of insurance. *Roe* v. *Crescent Insurance Co.*, 408.
3. Question of fact as to whether the damage to goods was before or after shipment. *Whitney & Co.* v. *Gauche*, 422.
4. An act of sale declared not to have effect as such, because there was no real price. *Hill* v. *Maddox*, 511.
5. Facts, under which acts of agent were held to bind principal.

Person v. *Rutherford*, 537.

FAMILY MEETING.

1. Where a family meeting assented to the second marriage of the tutrix, on condition of her giving bond to secure the minors, it will be time enough to consider the effect of this condition after the second marriage is contracted. *Succession of Landry*, 85.
2. A mere informality in the organization of a family meeting, does not involve a nullity of its proceedings, and they will not be set aside in the absence of proof of injury to the minors. *Ibid.*

FAMILY MEETING (*Continued.*)

3. A mortgage on the property of a minor was attacked on the ground that the under tutor was not called to the family meeting which consented to the mortgage. The following acknowledgment, signed by the under tutor, witnesses and notary, was written at the foot of the *proces verbal* of the family meeting, to wit: "And S. N., the under tutor of said minor children, having waived due notice to attend, and having taken full cognizance of the foregoing proceedings, declared that he approved the same in every respect." *Held:* That it cannot reasonably be inferred from this acknowledgment that the under tutor was absent from said family meeting. The law makes it the duty of the under tutor to oppose the homologation of the family meeting when he is of opinion that it is injurious to the interest of the minors. Its requirements to attain the object were substantially complied with.

Judson v. *Hertz*, 715.

FEES.

1. Where witnesses differ as to the charges made by physicians, the correct rule is to allow the lowest estimate. *Succession of Duclos*, 406.

GARNISHEE.

1. Answers by garnishees, which are manifestly evasive, ought not to be amended; such practice might lead to frivolous delays. But where an answer is really responsive to the question, though it might be more comprehensive, it is within the discretion of the court to allow the garnishee to answer more fully, in cases where the questions propounded admit of a truthful but, at the same time, of an unsatisfactory answer.

Davis v. *Oakford*, 379.

HARBOR MASTER.

1. There is nothing in the Act of 8th of March, 1841, creating the office of Harbor Master, which justifies the conclusion that the 8th of March was the day fixed by law for the commencement of the term of office of Harbor Master. *Ivy* v. *Lusk*, 486.

HEIR.

1. The children and grandchildren of a natural aunt of the deceased are not entitled to the estate—there being no statute authorizing them to set up such an illegitimate relationship as a basis for the right of inheritance, which is the creature of positive law. Code, 911, 915, 917, 923.

Fletcher et al. v. *Decoudreau*, 59.

2. Natural children are not like legitimate heirs seized of the succession at the instant the ancestor dies. They have only a right of action to cause themselves to be put in possession upon a proper showing. Code 919, 943. *Ibid.*

3. The State claimed the succession, charging that M. L. was an adulterous bastard; to the evidence of which she objected, under Article 968 of the Code, which provides that "the exclusion [from the inheritance,] either for cause of incapacity or unworthiness, shall not be sued for others than the relations who are called to the succession of the unworthy heir," &c. *Held:* The State is not suing to exclude M. L. under

HEIR (*Continued.*)

any of the pretences contemplated in Article 368. She is an actor seeking by proof to have herself recognized heir. She must, therefore, make out her case like other plaintiffs, and, when apparently made out, it is open to be rebutted. *Ibid.*

4. If the act upon which she bases her claim to the heirship be a nullity, she cannot be put in possession of the estate; and the act is a nullity if made in contravention of Article 222 of the Code, which prohibits the acknowledgment of children the offspring of an adulterous or incestous intercourse. *Ibid.*

5. This prohibition would be futile if the State could not insist on the inquiry whether the acknowledged child was an incestous or adulterous bastard—for such a bastard can only exclude the State. C. C. 477, 1184, 1185, 1186, 1202, 1203. *Ibid.*

see SIMULATION—*Dupuy* v. *Dupont*, 226.

HOMESTEAD LAW.

1. Mrs. B. claimed a thousand dollars out of her deceased husband's estate, under the "Act to provide a homestead for the widow and children of deceased persons"—against *bona fide* mortgagees. In answer to interrogatories, the widow said that she owned a house worth seven hundred dollars, and added a vague statement that she was in debt. *By the Court:* The statute does not say that the amount of property owned by her must be estimated over and above her indebtedness, whatever it may be and whenever due, and we cannot add such a provision to it. Three hundred dollars allowed. *Duchamp* v. *Butterly*, 67.

2. Creditors of the succession of a deceased husband cannot question the constitutionality of the Act of 1852, to provide a homestead for widows, on the ground that it violates a marriage contract made prior to the passage of the Act. *Succession of Aaron*, 671.

3. Where the claim of a widow under the homestead Act is set up by way of opposition to a tableau of distribution, the administrator only offers evidence to show that she has appropriated property to her own use, belonging to the succession of her husband, or only offers any other defence tending to reduce her claim. *Succession of Balzaretti*, 674.

HUSBAND AND WIFE.

1. By the laws of Pennsylvania and Maryland, if the husband has not, during his life, reduced to possession the choses in action of his wife, they will pass to her representatives. *Bone* v. *Sparrow*, 185.

2. *By the Court:* In a case similar to this we have held that the laws of Louisiana must control the distribution of the residuary interest of a succession in this State—the right of action for the recovery of the same being immovable from the object to which it applies. *Ibid.*

3. The meaning of Article 1738 of the Code is this: if the donor has made a donation to his wife simply of future property, and he survives her, the donation will fail, although there was issue of the marriage.
Stratton v. *Rogers*, 380.

HUSBAND AND WIFE (*Continued.*)

4. Construction of a marriage contract. *Ibid.*

5. Though recognizing the decisions of common law courts, that where a father sends home slaves with his married daughter, it is presumed to be a gift—yet it is settled in Mississippi, that the character of the wife's possession of such property may be shown by her acts and declarations, out of the presence of her husband. *Crane* v. *Allen*, 493.

6. When a judgment of separation from bed and board is rendered, the husband ceases to be the head of the community, and one undivided half of the property thereof vests immediately in each of the spouses, who thereby become joint owners; the wife having in this case continued to possess *nomine communi*, is accountable for the fruits of the property. *Dorvin* v. *Wilts*, 514. 514

7. A married woman on proof of the insolvent condition of her husband, and on proof also that she has skill and industry to earn a separate livelihood, has a right to a separation of property, whether at the time of marriage she had or had not property. *Mock* v. *Kennedy*, 525.

8. See 10 A. R. for decision remanding this case. In Mississippi (as is admitted,) a settlement, *bona fide*, made before and in contemplation of marriage, is good not only against the husband but against his creditors and subsequent purchasers. This rule is yet more inflexible, where, in anticipation of marriage, the wife has secured her own property to her own use and that of her children. *Spears* v. *Shropshire*, 559.

9. Even though, before the marriage settlement, the parties had been formally espoused, the husband having then a wife living (in Tennessee,) which espousals were by the law of Mississippi *void;* yet a divorce having taken place between the husband and his first wife, and a second marriage, after such divorce, formally celebrated in Mississippi, between the husband and his second wife, in view of which this marriage contract was executed, the contract is as valid as if the first illegal marriage had never existed, as against subsequent creditors. *Ibid.*

10. The contract must be governed by the law of Mississippi, where the parties resided at the time of the marriage. C. C. Art. 10. *Ibid.*

11. Where the husband and wife by their marriage contract, executed in France, stipulated: 1st. That they adopted, as the law of their marriage, the dotal system, (*régime dotal,*) to the exclusion of that of the community, (*régime en communauté,*) and 2d, that the acquisitory (*acquets*) made during the marriage should be shared equally by the spouses, and should revert to the children of the marriage, each of the contracting parties, in default of such children, to have the free disposition of his or her moiety. It was held that this contract created under the French law a modified or limited community (*communauté conventionelle*) between the spouses—and that all acquisitions made after the marriage, except such as were made by inheritance or donation to one of the spouses, belonged to this community.

Rochereau et al. v. *Jonau et al.* 598.

HUSBAND AND WIFE (*Continued.*)

12 *Held*, consequently, that the husband and wife having removed to Louisiana after the marriage, immovable property acquired here in the name of the latter was not the separate property of the wife but formed a portion of the community, and the husband having become insolvent and having made a surrender of his property to his creditors, the title of the immovable so acquired, vested, by force of the surrender, in them. *Ibid.*

13. *Held*, also, under this contract, the wife could not acquire a separate estate in her own name until the community was dissolved by the decree of a competent tribunal, unless the acquisition was made by a re-investment of her paraphernal capital. *Ibid.*

14. The rule that the husband cannot be a witness for or against his wife, nor the wife for or against her husband, C. C., 2260, being founded on considerations of policy and morality, is believed to be without exception, and the fact that the spouses live apart does not change this rule of law. *Tully* v. *Alexander, Ex.*, 628.

15. The decree of separation from bed and board does not dissolve the bonds of matrimony. C. C. Art. 133; C. C. Art. 152.

Gee v. *Thompson*, 657.

16. The surviving wife is not precluded from claiming the marital portion, under Art. 2359 C. C., by the fact of having obtained a judgment of separation from bed and board, and of having lived separate from her deceased spouse up to the time of his death, for though separated in bed and board, she is still the wife, and incapable of contracting a second marriage. *Ibid.*

17. When the husband died worth $31,000, and the surviving wife was fifty-five years of age, and all the means she had was $1,180, *Held:* that the husband died rich, and the surviving wife was in necessitous circumstances within the meaning of Art. 2359 of the Code. *Ibid.*

18. The Art. 918 C. C., which provides the heir to the entire succession, does not repeal nor introduce an exception into Art. 2359, which provides for the sole case where one of the spouses dies rich, leaving the other in necessitous circumstances. *Ibid.*

19. The husband or wife, separated in bed and board, is not entitled to the marital portion. LEA, J. dissenting. *Ibid.*

20. A married woman, cited as garnishee, must answer the interrogatories propounded, though she be not authorized by the court or her husband, under penalty of having them taken *pro confesso*.

Henry v. *Bryce*, 691.

21. Although it may be true, that when creditors of the husband attack a judgment of separation, it is incumbent on them to allege and prove that they were creditors at the time of its rendition, and further, that it was obtained by fraud and collusion in order to defeat their recourse on the husband's property, *yet* this must be held to apply to a case where the judgment is ostensibly valid, and not to a case which does not appear to have dissolved the community.

Levistones v. *Brady*, 696.

HUSBAND AND WIFE (*Continued.*)

22. The judgment offered in evidence was "that M. de M., wife of L., have judgment against her said husband, decreeing a separation of property between her and her said husband, and granting to her the administration of her private and individual property," &c. No other part of the record of said suit was before the court. *Held:* that the judgment, as it reads, creates a strong presumption that it was a consent judgment—a voluntary separation of property which did not dissolve the community. C. C. 2401, and besides, there being no publication, as required by Arts. 2402 and 2403 C. C., that the creditors of the husband were justified in making a seizure of property apparently belonging to it.

Ibid.

See COMMUNITY.
See PLEADING—*Cowand* v. *Pulley* 1.
See SHERIFF—*State* v. *Cooley*, 79.
See MORTGAGE—*Ashford* v. *Tibbitts*, 167.
See PRACTICE—*Dunn* v. *Woodward*, 265.
See EVIDENCE— ——— ——— 265.

IMPROVEMENTS.

1. To entitle plaintiff to payment for fruits and revenues accruing before the institution of a suit, it must be shown that defendant possessed in bad faith *Lejeune* v. *Barrow*, 501.

2. As to value of improvements, the judgment of the District Judge will not be disturbed unless there be manifest error. *Ibid.*

INJUNCTION.

1. The destruction of forest and and other trees is an irreparable injury from which parties may be restrained by injunction, and such injunction cannot be set aside *ex parte* under Article 307 of the Code of Practice.

De la Croix v. *Villere*, 39.

2. Plaintiff proceeded *via executiva* on a supposed authentic act of mortgage, and procured an order of seizure and sale of the land sold by him to defendant, who had neglected to pay a balance of the price. Defendant sued out an injunction on the grounds: 1. That the act was not authentic; 2. That the fees and costs of copies were exorbitant; 3. That he was in danger of eviction. Plaintiff answered the petition in injunction, admitted that the act was not authentic, and converting his proceedings into the *via ordinaria*, prayed for judgment against the plaintiff in injunction. *By the Court:* The effect of this answer was to reinstate the parties in their original position as plaintiff and defendant in an ordinary suit. The injunction had fulfilled its office, and the order of seizure and sale was at an end; the petition in injunction stood as the answer to the original petition for executory process, now converted into a petition for a judgment personal against the defendant, with a recognition of a mortgage on the land. *Haines* v. *Verret*, 122.

3. The petition in injunction contained a prayer for a trial by jury, which the District Court refused to allow. *Held:* the court did not err. The obligation to pay the plaintiff the price of the land was unconditional, and there was no affidavit denying defendant's signature, or averring that it had been obtained through fraud or error, or of want or failure of consideration. *Ibid.*

INJUNCTION (*Continued*).

4. In an injunction suit, where the issues have once been properly presented to the court upon pleadings involving issues upon the merits, a judgment dissolving the injunction, unless appealed from, will be conclusive between the parties, where the same grounds are again set up to enjoin a second seizure for the same debt, or of the same property.

Mock v. *Garthwaite*, 387.

5. In an injunction suit, where there is judgment of non-suit on the plaintiff's being called and not appearing, the injunction bond is forfeited.

Whitehead v. *Tulane*, 302.

6. Matters available in defense of a suit, will not authorize an injunction, at least in the absence of any showing, that an irreparable injury is about to be inflicted. *Taylor* v. *Clark*, 560.

7. If the Sheriff has seized more property than could be considered reasonably necessary to satisfy the judgment, the proper course is not an injunction but an application to the District Judge to reduce the seizure. C. P. 683. Where it appears that plaintiff, in injunction, was not only surety on a twelve month's bond, but co-debtor, *in solido*, with the principal in the judgment on which the execution had issued, and that the property had been sold, for which the twelve month's bond was given, and also that the bond was past due and unpaid—the defendants had the right to issue execution against him in his capacity of surety. C. P. 719, 720.

Temple v. *Marshall*, 613.

INTEREST.

1. The depositary owes no interest for the money deposited, except from the day on which he became a defaulter by delaying to restore it.

Faucette v. *New Orleans*, 190.

2. Interest is due by a depositary only from the demand for restitution.

Fogle v. *Delmas*, 200.

3. Suit upon a factor's account. Where the defendant had never acquiesced in the account as rendered, and there was no contract for interest, the plaintiffs can only recover legal interest. *Brander* v. *Lum*, 217.

4. Any device, by which a larger amount is sought to be obtained, for the use of money, than the highest rate of conventional interest, is usurious and operates as a forfeiture of the advantage thereby sought to be illegally obtained. *Anderson* v. *Coxe*, 638.

5. The Act of 1852, allowing interest at the rate of five per cent. per annum, upon all debts from the time they become due, is applicable only in cases where no stipulation for interest has been made. *Ibid.*

INSOLVENCY AND INSOLVENT PROCEEDINGS.

1. Cases might arise in which a provisional syndic would not only be authorized, but required to institute suits, or defend them. The expense of counsel fees in such would be chargeable to the mass surrendered to the creditors. *Mathews & Finley* v. *Their Creditors*, 36.

2. The opposition to a voluntary surrender, under the 18th section of the Act approved February 20th, 1817, must be made within ten days. The 10th

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued.*)

section of the Act of 1840, which allows one year for proceedings under it, has no application to cases of voluntary surrender. *Ibid.*

3. No opposition can be filed, under the 18th section of the Act of 1817 after the lapse of ten days, though the creditor did not know of the fraud complained of within that time. *Ibid.*

4. In May, 1850, C. deposited certain shares of bank stock with S., as collateral security for the payment of $10,000 due S. On the 10th of June, 1851, C. executed a power of attorney to S., authorizing him to "sell, transfer, and assign unto himself, or any other person or persons," the shares of bank stock. On the 29th of August following, under this power, an actual transfer of the stock was made to S. In the mean time say about the 1st of July, 1851, C. came under protest—and, on the 7th of November of the same year, made a cession of his property. His syndic, the plaintiff, instituted this suit, alleging that C. was in insolvent circumstances on the 10th of June, 1851, as well as on 29th of August, and to the knowledge of defendant. He prays that the transfer be set aside, and that the stock be decreed to belong to him in his capacity as syndic. *Brother* v. *Saul*, 223.

5. *By the Court:* We have here a pledge of the stock made in good faith, to secure a *bona fide* debt, at a time not suspicious, and by which no creditor was injured. The allegation of the petition, that *Conrey* was insolvent on the 10th of June, 1851, and that to the knowledge of *Saul*, is disproved by the evidence, and even by the admission of the plaintiff. Simultaneously with the pledge of the stock, the power of attorney was given, purporting to be *for value received* and *irrevocable*. Those clauses sufficiently indicate the interest of *Saul* in the object of the mandate—the stock. That interest was an interest of pledgee. As pledgee he has no power to sell the object pledged, unless by virtue of a judicial order; and the power to him to do so was a nullity, even between the parties. C. C. 3132. It follows that the transfer which was made of the stock under this power, was also a nullity. But the nullity of the assignment of the ownership of the stock, leaves defendant's right as pledgee in full force. *Ibid.*

6. As to any informality in the pledge, as for instance, the want of the act of pledge required by Article 3125 of the Code, the syndic of the pledgor cannot disturb the pledge on any such ground, when the contract was made in good faith, and no creditor was injured thereby. *Ibid.*

7. The pretended pledge of the bank stock was void as to other, and even subsequent creditors of C., and it invested S. with no privilege upon the stock, under Articles 3124, 3125 of the Civil Code, which were in full force at the time. SPOFFORD, J., with whom concurred LEA, J., dissenting. *Ibid.*

8. An insolvent cannot be subjected to more than one trial for fraud, under the Act of 1840, for the same fraudulent acts. One conviction or acquittal, is conclusive upon all the creditors who were parties to the insolvent proceedings. *Leland* v. *Rose*, 268.

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued.*)

9. The commissions of syndics upon the property sold take precedence of the vendor's privilege as an expense of administration resulting to the benefit of the vendor, but not so the fees of the counsel for insolvent, nor the counsel for syndic, nor the attorney of absent heirs.

Marsh v. *His Creditors*, 481.

See Respite.

INSURANCE.

1. Where property insured by the vendor was sold, and the policy not assigned to the vendee, the latter cannot, after a loss, recover from the vendor the amount of insurance collected by him.

King v. *Preston*, 95.

2. Liability for contribution to a general average rests upon the broad and equitable principle that no one shall enrich himself at another's expense.

Meeker v. *Klemm*, 104.

3. The measure of each person's contributory share to a general average should be regulated proportionally by the extent to which each of the contributing parties has been benefited by the sacrifice. *Ibid.*

4. The valuation of a ship or vessel in a policy of insurance, when disputed and discredited by evidence creating a reasonable probability of its incorrectness, cannot be assumed as an arbitrary basis in an apportionment for a general average contribution. *Ibid.*

5. A liability for a general average contribution cannot properly be called a risk; it is an obligation incident to a sacrifice made to avert a risk. It is based upon the equitable rule that no one should enrich himself at another's expense. *Hunter* v. *N. Y. Mutual Ins. Co.*, 139.

6. A valid abandonment passes the property in the vessel to the underwriters, and from that moment, at least, the captain becomes the agent of the underwriters, and his sale of the vessel, however reprehensible it may be, is made for their account and cannot relieve them from liability.

Phillips v. *St. Louis Insurance Co.* 459.

7. In estimating the cost of repairs in order to ascertain whether it will exceed fifty per cent. of the ship's value, the deduction of one-third new for old is not to be made; that rule applies to repairs made in certain cases of partial, or average losses, and seems to have been extended to a case of technical total loss only by local usages in two or three States. *Ibid.*

8. Where but two-thirds of the valuation is insured, the owner is his own underwriter for the balance, and the net proceeds of the sale of the vessel, should be divided as salvage between the parties, in proportion to the amount each had at risk. *Ibid.*

9. A person having effected insurance with a company in its corporate capacity, and having received from it the payments made under the supposed obligation growing out of that contract, will not be permitted to deny the corporate existence of said company, when sued by it for the restitution of the money thus paid.

The Liverpool Ins. Co. v. *Hunt*, 623.

INSURANCE (*Continued.*)

10. Plaintiff sued on a policy of insurance, upon a floating dock, containing the clause: "Insurance was against all risks." *Held:* That testimony offered to prove that the terms "harbor risks" and "river risks," included the only risks covered by said policy of insurance, and that they have a definitive and settled meaning in the law of insurance, and comprehended only risks from fire, from collision, from extraordinary losses arising from extraordinary perils of the winds and waters, from external accidents only, and not from defects in the thing insured, is inadmissible. In the absence of a custom in regard to "floating docks," by which the terms used in the policy have acquired a particular signification, the construction is one of law, for the courts, upon the instrument itself. The opinion of witnesses upon the evidence, as it did not appear that they were shipwrights, or had any experience in building docks, was properly excluded.

Marcy et al. v. *The Sun Mutual Insurance Co.*, 748.

11. That the terms "all risks" includes all river risks and harbor risks, so far as those risks were applicable to floating docks. *Ibid.*

12. That there was a warranty on the part of the insured that the dock was seaworthy, well built, staunch, and capable of the business in which it was employed, and fitted with machinery and well protected against accidents arising from the ordinary effects of the elements in which it was employed. *Ibid.*

13. That where a loss occurs without any known or apparent cause, the presumption is that such loss was occasioned by the unseaworthiness of the dock; yet this presumption may be rebutted by sufficient positive proof, by disinterested witnesses, of its seaworthiness. *Ibid.*

INTERROGATORIES.

1. Unanswered interrogatories will be taken as confessed, although there is no order of court requiring defendant to answer.

Seaman v. *Babington*, 173.

2. Where interrogatories are propounded to certain witnesses by name, "and others," and crossed without any objection reserved, the depositions of witnesses not named in the affidavit for commission, nor in the interrogatories, are admissible.

Quadras v. *Steamer Daniel Webster*, 203.

3. In reply to interrogatories, plaintiffs said that "they are in the habit of taking out open policies from the insurance offices against fire and river navigation, to cover shipments of all cotton that may be made to them," &c., and that "they pay the premiums of insurance, which they charge in the account of sales to the planters." This answer was made in reply to an interrogatory asking if the insurance was made in a mutual insurance company, "and what dividend or script plaintiffs had received." Answer held to be unsatisfactory. *By the Court:* As the defendant is charged with the premiums, it is but fair that he should be credited with, at least, the value of such amount of scrip as, under a fair apportionment, he would have been entitled to receive.

Brander v. *Lum*, 217.

INTERROGATORIES (*Continued.*)

4. The defendant who has been sued on his draft, has the right to interrogate plaintiff on facts and articles, to show that the draft was given in error, or without consideration. *Kelly* v. *Ledoux*, 688.

5. The rule as to exclusion of parol testimony to contradict written agreements, does not apply in such a case. *Ibid.*

JUDGES.

1. The Act of March 15th, 1855, creating an interchange between the Judges of the Fourth, Seventh and Eighth Judicial Districts, contemplates nothing but a provision for the regular jury terms, as fixed by law, and does not annul the power conferred on every District Judge to call special jury terms, when the public necessity requires them, provided they do not interfere with the discharge of his duties, as imposed by law. *State* v. *Judge of the 7th Dist.*, 66.

JUDGMENT.

1. A reservation in a judgment in a petitory action, by which the right of defendant, or others, to demand that the property recovered should be used as a market, etc., will not restrain the plaintiffs from executing their writ of possession. The effect of the reservation is to allow to the parties in interest a right of action to compel the plaintiffs to use the property in a particular way, should the plaintiff's title contain any such limitation. *David* v. *Municipality No. Two*, 47.

2. A judgment by confession is a "final judgment," for no appeal lies from it. *Hewitt* v. *Stewart*, 100.

3. More than two clear days must elapse between a judgment by default and a definitive judgment, and the error is not corrected by the fact that the judgment was not signed for two days after the definitive judgment was rendered. *Ward* v. *Graves*, 116.

4. A judgment by default in Indiana, after personal citation, when sued upon in this State, cannot be opened to let in a defence that might have been pleaded to the original action. *Davis* v. *Dugas*, 118.

5. The action of debt will lie here if it will lie in Indiana; the judgment is shown to be executed in Indiana, but even if an affidavit, or *scire facias*, were required to revive it there, the action of debt answers the same purpose. *Ibid.*

6. A judgment by default, confirmed by one law partner, who was ignorant that the other had given time to defendant's counsel to file an answer, will be reversed. *Brooks* v. *Cavanaugh*, 183.

7. Where a decree of court is rendered "*by reason of the consent of parties, plaintiff and defendant*," it does not matter whether the consent was given in writing, or verbally, it will be presumed, until the contrary is made to appear, to have been given in such a way as to justify the decree. *Woodward* v. *Lurty*, 280.

8. Foreign judgments have no executory force in this State until they acquire it by the judgment and fiat of our own tribunals. To procure such a fiat a personal action must be brought upon the judgment—an action, the prescription of which is governed by Article 3508 of the Code. *Succession of Lucas*, 296.

JUDGMENT (*Continued.*)

8. Where it was stipulated, in a consent judgment, that an intervention, to which an exception and answer in reconvention had been filed, should be withdrawn, and the whole litigation terminated—*Held:* That the consent judgment cannot be considered merely as a judgment on the exception, dismissing the intervention, but as a final judgment on the adverse claims of the intervenor and the defendants.

Girod v. *Pargoud*, 329.

10. The validity of a judgment ordering a partition cannot be inquired into, on the trial of an opposition to an administrator's account, which is not based on the partition, and which does not embrace any of the property divided. *Estate of John and Martha Routon*, 621.

11. A judgment, based upon a defective citation, and an attachment that was set aside, is an absolute nullity, which may be urged as matter of defence by any one having an interest. *Williams* v. *Clark*, 761.

See CONSTITUTIONAL LAW—*W. Baton Rouge* v. *Bosman*, 94.

JURIES.

1. Malpractice should be suggested and made probable before the array will be set aside, unless there is some apparent legal defect.

State v. *Cooley*, 79.

2. In all appealable cases the jury are judges both of the law and fact, but in all cases the judge may be required by the counsel of either party to charge the jury in writing. *Tresca* v. *Maddox*, 206.

See SHERIFF—*State* v. *Cooley, J.*, 79.
See INJUNCTIONS—*Haines* v. *Verret*, 122.
See CRIMINAL LAW—*State* v. *Costello*, 288.
State v. *Ballerio*, 81.

JURISDICTION.

1. The Sixth District Court of New Orleans has jurisdiction of a rule against a surety on an appeal bond, the principal in which is dead, and his succession under administration in the Second District Court.

Trimble v. *Brichta*, 271.

See COURTS—*State* v. *Judge 1st Dist. Court*, 187.

LEASE AND LESSOR AND LESSEE.

1. The dissolution of the lease, by the destruction of the premises, does not give the lessee any right to recover back money paid for previous rent.

Schadel v. *St. Martin*, 175.

2. Where a person is injured by the carelessness of a slave, the lessee of the slave is the person first liable to respond in damages, under Art. 2299 of the Code. *Fitzgerald* v. *Ferguson*, 396.

3. Where a slave occasions injury to any one by his negligence, and the lessee has not induced it by any want of vigilance or care on his part, the lessee may recover against the owner of the slave any indemnity for such damages as he may have been obliged to pay third parties.

Ibid.

4. C. F. was injured by the carelessness of a slave in driving a carriage; the slave was hired to defendant, but the title was in B. Plaintiff obtained

LEASE AND LESSOR AND LESSEE (*Continued.*)

a judgment for damages, and B. abandoned the slave, who did not bring enough to satisfy plaintiff's judgment, and the balance was claimed from defendant. *Held:* That in the particular case, both the owner and the lessee were relieved by the abandonment. *By the Court:* Whether there may not be cases where the parties would not be permitted to relieve themselves from a responsibility by a surrender of the slave, as in those cases where particular skill and experience are required, and an incompetent slave is employed as a workman, it is not necessary for us to determine. *Ibid.*

5. Insolvents leased a hotel from S. for one year from the 14th Jan., 1855, for $15,000 per annum, payable in monthly installments of $1,250. In May, 1855, the lease was sold by order of court, and S., the lessor became the purchaser. *Held:* That the purchase of the lease by the lessor extinguished the lease, and the lessor should be put down on the tableau as a creditor of the insolvents only for the sum due at the date of the sale of the lease. For the remaining seven months nothing was due him, as (being the purchaser) the lease was dissolved by confusion. *Bartels* v. *Their Creditors*, 433.

6. The order for the sale of the lease does not say that the purchaser shall assume the payment of the rent, and no such construction is warranted by implication of law. Neither the forced nor voluntary assignment of a lessee's right of occupation carries with it any such obligation. LEA, J., with whom concurred SPOFFORD, J., dissenting. *Ibid.*

7. There are two ways of selling the unexpired term of a lease: one by selling it for a premium, subject to the payment of rent to the landlord; the other by selling or assigning the right of occupation without the assumption of rent. The latter is the more frequent, as it rarely happens that the unexpired term of a lease is worth a premium. LEA, J., with whom concurred SPOFFORD, J., dissenting. *Ibid.*

8. Where a lease is offered for sale upon the condition that the purchaser shall assume the payment of the rent, confusion would take place should the lessor himself become the purchaser. But where the payment of the rent is not to be assumed by the terms of the sale, the rights of the lessor who purchases are not extinguished: he has not acquired any obligation due himself, and the price of the purchase, in such cases is due, not to the lessor, but to the principal lessee, or his representatives. LEA, J., with whom concurred SPOFFORD, J., dissenting. *Ibid.*

9. Defendant was in possession of plaintiff's house under a lease, and when the lease was about to expire, defendant refused to renew it on the terms proposed by plaintiff. Defendant continued to occupy, and was notified by plaintiff that he considered the annual lease renewed, to which defendant responded that he would leave the premises at the end of the month, and continued to notify plaintiff from month to month that he would leave. *Held:* There was no contract, and the relation of lessor and lessee can only be created by contract; and that defendant was only liable for the rent of the house during the period it was actually occupied by him. *Marmiche* v. *Roumieu*, 477.

LEASE AND LESSOR AND LESSEE (*Continued.*)

10. Plaintiff sued defendant for rent. A third party, claiming to be the owner of the land, never having had possession, intervened, and claimed the rent and privilege on the crop. *Held:* That the privity of contract and lessor's privilege existed alone between the lessor and lessee. The intervenor's remedy was by petitory or possessory action, to be brought against the lessor when the tenant disclosed his name. C. P. 43.

McElroy v. *Dean*, 612.

11. The possession of lessee is that of his lessor. C. C. 3404. *Ibid.*

12. The damages which a tenant has the right to recover from his landlord, under Art. 2665 C. C., are those which are the immediate result of the defect in the thing leased. The plaintiff claimed as damages, not only the price of his fixtures, which he lost in consequence of being obliged to abandon *Caffin's* house, by the defect of its construction, but also, the difference in the amount of his profits in the store rented of defendant, and in that to which he removed. *Held:* That plaintiff cannot, under his contract, recover consequential damages of this latter sort.

Redon v. *Caffin*, 695.

13. Construction of the following clause in a contract of lease: "The State and municipal taxes, over and above the amount now paid by the lessors, shall be chargeable to and reimbursed by the lessees to the lessors." *Held:* That the lessor was entitled to annual reimbursements of whatever sums he paid for taxes, above the amount fixed in said clause. No reference was made in the contract to a final adjustment in 1861; no intimation was given of an intent to keep up a debtor and creditor account of excess and deficiency each year through the term of lease. No account was to be taken of the deficiency; what was "over and above" was provided for. The deficiency was not to benefit the lessees in any case; the excess was to be chargeable to them, and was therefore exigible as soon as paid by the lessors.

Boutté et al. v. *Dubois & Mish*, 755.

LEVEES AND ROADS.

1. Action to recover cost of a side levee, which had become necessary in consequence of the removal back, of the levee above, by the parish of Pointe Coupée. *By the Court:* It is to be presumed that the change in the levee would not have been made by the authorities of Pointe Coupée unless the public safety had required it. It was the duty of the proprietor of the tract below, and of the parish of West Baton Rouge, to accommodate themselves to this change, as much so as if such change had been occasioned by a sudden caving of the banks of the river above.

West Baton Rouge v. *Bozman*, 94.

2. The discretion in regard to the plan and size of the levees is reposed by law and the regulations of the Police Jury in certain persons, who, in this respect, act in an official capacity. If, in the exercise of their functions, they should err in regard to the size of the work to be constructed, an application to the Police Jury should be made to correct the error. But, as a general rule, after the work is done, and the expense incurred, the Supreme Court will not interfere with the discretion of officers who appear to have acted in good faith. *Ibid.*

LEVEES AND ROADS (*Continued.*)

3. The penalty of a bond given by a purchaser of work to be done on the levee, road, &c., in the parish of Lafourche, cannot be recovered without the production of the *proces verbal* of adjudication, as required by law. *Lafourche* v. *Rossi*, 102.

4. Action of damages for injury to the value of plaintiff's property, by constructing a new levee behind plaintiff's buildings, so as to place them out of the protection of the levee. *Held:* That plaintiff, in claiming damages from defendants, admitted that the levee was constructed by their order, and that, under the pleadings, the regularity in point of form, of their proceedings, as a deliberative body, could not be inquired into. *Dubose* v. *Levee Commissioners*, 165.

5. All landed proprietors, whose property lies adjacent to a navigable stream, hold it subject to certain conditions imposed for the common utility. *Ibid.*

6. There is no law prescribing where the levee opposite the town of Providence should be run. The Levee Inspectors and two freeholders are directed by law to lay off the levees at a suitable distance from the bank of the Mississippi river, and there is nothing in the law to restrain the discretion thus conferred. *By the Court:* But the Commissioners have not an arbitrary discretion; and if they were wantonly and unnecessarily to set the levee so far back as to ruin the plaintiff's property, he would not be without remedy. At the same time, this court will be reluctant to interfere with the exercise of that discretion which is confided to sworn officers living near the locality; and before doing so, will require a clear case of oppression or injustice to be made out on the part of the complainant. *Ibid.*

7. The law concerning the expropriation of private property for public use does not apply to such lands as may be found necessary for levee purposes. *Ibid.*

8. The Act entitled "An Act forming a levee district, to be composed of the parishes of Carroll, Madison and Catahoula, for the better protection of the same from inundation," approved March 18th, 1852, is constitutional. *Yeatman* v. *Crandall*, 220.

9. The Act is not repealed, so as to exempt plaintiff from paying the amount of his tax, by the Act "To reclaim and drain the swamp and overflowed lands donated to the State of Louisiana," &c., approved April 30th, 1853. *Ibid.*

LIBEL.

See DAMAGES—*Tresca* v *Maddox*, 206.

LIS PENDENS.

See MORTGAGES—*Citizens' Bank* v. *Armor*, 468.

MANDAMUS.

1. Inhabitants of a parish who are put to great trouble, inconvenience and injury in reaching the court-house, have such an interest in the erection of a new one in a proper place, as provided by law, as to authorise a mandamus to compel the Police Jury to proceed to the construction of the new court-house. *Watts* v. *Police Jury of Carroll*, 141.

MANDAMUS (*Continued.*)

2. The vote of the Police Jury, refusing to make an appropriation for the building of a court-house, and their inaction with regard to the levy of a tax for many months after the parish site had been selected and reported by the Commissioners, were in violation of the command of the sixth section of the Act of 4th March, 1858; and a mandamus was the suitable remedy. C. P., 844. *Ibid.*

3. A peremptory mandamus will issue to compel the Sheriff to assess and levy a tax within a school district of the parish to pay a judgment against the school directors of such district. *Basset* v. *Babin*, 672.

MANUMISSION.

1. In an act of manumission before a notary and two witnesses, the deceased described M. L. as his "natural daughter slave." This is a sufficient acknowledgment of paternity, although the object of the act was to enfranchise the slave. *Fletcher* v. *Decoudreau*, 59.

2. No form is prescribed for such an acknowledgment, except that the declaration be made in the presence of a notary and two witnesses. (Code 221.) If the declaration be thus made, it seems immaterial whether it be the main object of the act or not. *Ibid.*

MINORS.

1. B., the guardian, appointed in Mississippi, of a minor having property in this State, filed a petition in the proper court, representing that the minor's property here was unproductive, and that she had no other; that it was to the interest of the minor that it should be sold, and the proceeds invested, and being unable to induce any person to become the tutor of the minor, he prayed the appointment of a special tutor and under-tutor, and that a family meeting be convoked to deliberate on the propriety of selling the property. The prayer was allowed, the appointment made, and under the advice of the family meeting the property was sold, and G. became the purchaser. He refused to comply with the terms of the sale, on the ground (among other grounds) that no special tutor could be legally appointed to the minor. *Succession of Coleman*, 109.

2. The appointment of a special tutor in this case was not legal, and the sale was a nullity. *Ibid.*

3. In the sale of minors' property all the formalities of law must be observed for the validity of such sale. *Ibid.*

4. Minors, when they become of age, can always avail themselves of nullities resulting from the omission of any of the formalities established by law in the sale of their property. *Ibid.*

5. The purchaser of a minor's property at a judicial sale cannot be compelled to a compliance with the terms of the sale, unless the proceedings are clothed with all the formalities of law requisite to vest in him a legal title. *Ibid.*

6. The appointment of the special tutor should be considered as mere surplusage. The petition for the sale was made by the foreign guardian,

MINORS (*Continued.*)

and the proceedings of the family meeting advising the sale might have been transmitted to the judge by any relative, or even a stranger. (Bliss, J., dissenting, with whom concurred SPOFFORD, J.) *Ibid.*

7. Any embarrassment on the question of the right of the special tutor to receive the price might easily be avoided by making the price payable to the foreign guardian. (LEA, J., dissenting, with whom concurred SPOFFORD, J.) *Ibid.*

8. The whole system of administration of minors' estates in Louisiana is opposed to an anticipation of the means of the minor by purchasing property on credit for his account. *Williams* v. *Chotard*, 247.

9. Article 334 of the Code, which authorizes, under certain circumstances, the mortgage of a minor's property, has reference to property which belongs to the minor at the time of the application of the tutor, and the convening of the family meeting; but a prospective mortgage of property which it is proposed to acquire, is not authorized by the Article. *Ibid.*

10. The tutor of the minor, defendant, had filed a petition, proposing an investment of funds of his ward, to the amount of three thousand five hundred dollars cash, and the advice of the family meeting and judgment of the court followed that proposition. But the tutor only invested one thousand dollars in cash, and created a debt for the remainder. *By the Court:* This variance would release the defendant from the obligation of paying the price of this purchase, even were it such as would have been legally binding on her, if made in accordance with the terms fixed by the family meeting. *Ibid.*

See FAMILY MEETING—*Succession of Landry*, 85.
See COURTS—*Succession of Landry*, 85.
See SALE—*Succession of Foulkes*, 598.

MORTGAGES.

1. A judicial mortgage results from a *bona fide* judgment, though rendered on the confession of defendant.
Hewitt v. *Stewart's Executor*, 100.

2. A mortgage is binding between the parties without registry. Code, 3318.
Haines v. *Verret*, 122.

3. The fact that plaintiff had a legal mortgage on the property, for which a writ of possession, issued in favor of W., would not, if true, be a valid reason to stay the execution of the writ. That execution would not impair her mortgage rights. *Ashford* v. *Tibbitts*, 167.

4. The wife's legal mortgage takes effect only from the date when the paraphernal funds went into the husband's hands. *Ibid.*

5. The wife's renunciation is defective when the notary does not detail in the act the nature of the rights she renounced. *Ibid.*

6. Mortgages are so far *stricti juris* that they cannot be extended by implication. *Schadel* v. *St. Martin*, 175.

7. Mortgage certificate of reinscription, as follows: "And the general one against R. M. W., in favor of *Thomas R. Ingalls*, resulting from a judg-

MORTGAGES (*Continued.*)

ment rendered by same court as above, on the 9th December, 1839, for six thousand one hundred and sixty-one dollars and sixty-nine cents, interest and costs, being the reinscription made in this office on the 6th of August, 1849, of the same judgment recorded on the 13th December, 1839, in this office; *which original judgment was, on the 16th November, 1843, cancelled and annulled but so far only as it bears on and affect the three squares of ground above described, and no further.*" *By the Court:* It is not pretended but the original mortgage was properly cancelled by the Sheriff. What then was the effect of the reinscription? We think it was merely to continue in force the judicial mortgage, just as it existed previously. The mortgage had no greater force the day after its reinscription, than it had the day before. The reinscription informed *Ingalls*, as it did all the world besides, that the judicial mortgage as to these lots had been cancelled. We do not think *Ingalls* can now be permitted to gainsay the record, which he has caused to be made in the office of Recorder of Mortgages, where alone his judgment could acquire the force of a mortgage, even as against W.

Klein v. *Dewees*, 194.

8. D. D. V., Jr., son of D. D. V., the deceased, mortgaged a house to G. The mortgage contained the pact *de non alienando*. G. transferred the mortgage, by public act, with subrogation to V., and afterwards D. D. V., Jr., sold the property to his father, who died; and the property was duly inventoried as belonging to the succession. The succession property was ordered to be sold. The house was accordingly sold, and bought by M. In the meantime V. obtained an order of seizure and sale, under which the house was sold and V. became the purchaser. On a rule taken by the administratrix to raise the mortgage, it was *Held:* That the mortgage of V. was superior to the title of the deceased, and as the mortgage contained the pact *de non alienando*, V. had the right to pursue the property by executory process, not only in the hands of the administratrix, but against any purchaser of the property at the sale of the property of deceased.

Succession of Vancourt, 383.

9. It is the effect of the inscription, and not the effect of the mortgage, which ceases at the expiration of ten years, unless there be a reinscription within that time; and hence the reinscription after ten years has effect only from the date of the reinscription.

West Baton Rouge v. *Bergeron*, 390.

10. The removal of a mortgaged slave from Louisiana to Alabama, and his subsequent sale there, cannot be set up in this State as a bar to the mortgage existing prior to his removal.

Flemming v. *Rotchford*, 400.

11. By Article 2428 of the Code, a thing claimed by suit cannot be alienated pending the suit by the defendant, to the prejudice of the plaintiff. Mortgage is a quasi alienation, and if made pending a suit for the property, cannot prejudice the plaintiff. *Citizens' Bank* v. *Armor*, 466.

MORTGAGES (*Continued.*)

12. Where mortgage creditors not only did not oppose the sale by the syndic of the mortgage property, and did not endeavor to enforce against him the pact *de non alienando*, but took a rule upon him to compel him to sell the property for cash, they cannot complain that the proceeds of the sale are burthened with the charge of the surrender, the movables proving insufficient. *Devron* v. *His Creditors*, 482.

13. *By the Court:* We are not prepared to say that a privilege for law charges does not attach as well to property mortgaged with the foregoing pact as without it, so long as the title to the property has not been divested by a sale. The pact gives the creditor a more easy mode of seizing the mortgage property, but does not elevate his mortgage into a privilege. *Ibid.*

14. The proceeds of mortgaged property ought to be applied, whether there are one or several immovables, to the payment of the privileges in the order in which the property was mortgaged, commencing with the most recent and ascending to the most ancient. *Ibid.*

15. The mode of contribution to debts privileged generally upon movables and immovables has been judicially determined. The decisions are that the immovables, not the mortgage creditors, owed the contribution, and that these privilege debts must be borne by the immovables *pro rata*, according to the price which they produced respectively, and this rule is not opposed to Articles 3236, 3237 of the the Code. SPOFFORD, J., with whom concurred LEA, J., dissenting. *Ibid.*

16. Where the purchaser took a rule on the prior mortgage creditors to release mortgages and distribute the purchase money, the latter may insist on their mortgage rights, and subject the property to the payment of their debts. *Bach* v. *Lakin*, 489.

17. The statute of 1855, relative to bonds of State and parish officers, so far as it relates to the enforcement of the rights created by the registry of the bond is purely remediable, and in no manner affects the previously existing rights, the enforcement of which it was intended to facilitate. It was intended to give to the registry of the bond, as to property sold after its registry, the same effect as that conferred on acts of sale by the clause of non-alienation. *Fluker* v. *Bobo et al.* 660.

18. The mortgage created by the act was intended to secure the bond. There is nothing in the legislation on the subject which justifies the inference that the bond was intended exclusively for the benefit of the State. It enured to the benefit of any person who had a claim against the Sheriff for malfeasance in office. *By the Court:* The provisions of the statute are applicable to "all public officers" who, under existing or prospective legislation, were "required to give bond." The Act of 1855 did not repeal the Acts of 1847 and 1848, so far as the provisions of these Acts were reënacted in the revisory legislation of 1855. *Ibid.*

19. The offspring of slave mothers, born whilst the mothers are affected by a mortgage or privilege, are born subject to the same mortgage or privilege. *Solibellas* v. *Consolidated Association*, 682.

MORTGAGES (*Continued.*)

10. The power to hypothecate must be express and special. C. C. 2966.
Levasseur v. *Martin*, 684.

11. The Archbishop of the Catholic Church of Louisiana cannot, without authorization, lawfully mortgage or encumber the real estate belonging to the church. *Ibid.*

12. The tacit mortgage in favor of a minor cannot be enforced against the purchasers of property of a succession which was sold to pay a community debt, to which the minors' interest was subordinate.
Rachel v. *Rachel*, 687.

See SHIPS AND SHIPPING—*Wickham* v. *Levistones*, 702.

NATURAL CHILDREN.

1. A document intended as a will, but never probated as such, may be good as an acknowledgment of the paternity of natural children.
Remy v. *Municipality No. Two et al.*, 148.

2. Acknowledged natural children, after having been put in possession of their father's succession—no legitimate heirs having been shown to exist, or none appearing—may prosecute any claim belonging to the succession.
Ibid.

NEW ORLEANS.

1. After the annexation of Lafayette to New Orleans the Legislature required the Parish Recorder of Jefferson to make copies of acts relating to property in Lafayette, for registry in New Orleans. The costs of these copies were fixed by law, and were to be paid by the city of New Orleans. *Held:* There is nothing in such legislation which either violates or impairs the obligation of a contract, or destroys a vested right.
Arnoult v. *New Orleans*, 54.

2. To the city of New Orleans, as a civil corporation, has been delegated a portion of the powers of the government; it was established, as are other city corporations, for the public convenience, and it is certainly competent for the Legislature, from time to time, as the public convenience or necessity may require, to add to or abridge the powers and duties of the corporation, to restrict or enlarge the boundaries of this delegated authority, except so far as they are recognized and guaranteed by the Constitution itself. *Ibid.*

3. A police officer may be entitled to a reward offered by the city, for detecting and bringing to conviction one charged with arson.
Murphy v. *New Orleans*, 323.

4. The ordinance offering the reward was not intended to be temporary, and is still in force. *Ibid.*

5. The third paragraph of the twentieth section of the Act of 8th March, 1836, supposing it to be in force, is not violated by the city ordinance of 21st December, 1854. *New Orleans* v. *Staiger*, 68.

6. The Common Council of New Orleans authorized the Mayor to appoint "a commissioner, expert or arbitrator" to meet an arbitrator of the plaintiff, and value a piece of land which plaintiff proposed to sell to the city. The two commissioners assessed the value at $10,000, and reported accordingly, and the Mayor recommended payment of that sum, but the

NEW ORLEANS (*Continued.*)

city never paid it. *Held*: there is a wide difference between an expert and an arbitrator, and between both and a commissioner. But in whatever capacity the referees acted, there was nothing in the record to show that they bound the city to pay anything.

Lecroix v. *New Orleans*, 556.

See BANKS AND BANKING—*New Orleans* v. *Southern Bank*, 41.
See CONSTITUTIONAL LAW—*Arnoult* v. *New Orleans*, 54.
See TAXES—*Kathman* v. *New Orleans*, 146.
See REWARD—*Murphy* v. *New Orleans*, 323.

NON-SUIT.

1. Where a plaintiff is seeking to recover from a defendant a sum of money, or to enforce from him the recognition of some right, or the performance of some obligation, a trial had in the absence of the plaintiffs will entitle defendant merely to a judgment of non-suit as against the plaintiff. But this rule is strictly applicable to cases where the position of the party sued is purely defensive, and it cannot be extended to cases where the defendant is himself obstructed in the recognition or enforcement of his own rights, or counter claims against the plaintiff.

Moch v. *Garthwaite*, 287.

NOVATION.

1. The delegation by which a debtor gives to the creditor another debtor, who obliges himself toward such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation. *Jackson* v. *Williams*, 93.
2. Suit brought by the creditor against the delegated debtor is not evidence of intention to discharge the original debtor. *Ibid.*
3. The debt due a community creditor is not necessarily novated by his taking the individual note of the surviving spouse, with mortgage to secure its payment. *Rachel* v. *Rachel*, 687.

See EXECUTION—*Prescott* v. *Lewis*, 184.

NUISANCE.

1. A cemetary is an indispensible part of every city, or town, and wherever situated, must be in the neighborhood of private property. Such cemetary is not a nuisance because it depreciates the marketable value of the property in its neighborhood. *New Orleans* v. *Church of St. Louis*, 244.

NULLITY.

See JUDGMENT—*Williams* v. *Clark*, 761.

OCCUPANCY.

1. The digging of ditches for the purpose of draining water from an adjoining property, the felling of trees, and the occasional cutting of wood on uncultivated land, are acts which do not necessarily partake of the character of detention, or intended occupancy.

Delavigne v. *Williamson*, 250.

2. The possession of a front tract of land held under a different title, as a distinct and separate property, cannot be considered as extending to a tract claimed under an alleged title from the United States, and subject to a reservation in favor of a third person. *Ibid.*

OFFICES AND OFFICERS.

1. It will not be presumed on slight testimony that sworn officers have violated their duty in matters of discretion confided to them. Those who allege an illegal exercise of that discretion should be held to establish such allegation by conclusive proof. *Rodolphe* v. *New Orleans*, 242.

See Attorney at Law—*Heistand* v. *Labatt*, 30.
See Clerks of Court—*Wilts* v. *Derbes*, 50.
See Sheriff—*Bell* v. *Hufty*, 308.
See Mortgages—*Holmes* v. *Wilts*, 439.
See Statutes—*Marsh* v. *His Creditors*, 469.
See Harbor Master—*Ivy* v. *Lusk*, 486.

OVERSEER.

1. The fact that an overseer had shot at one of the negroes under his charge who was endeavoring to escape punishment, justified his employer in discharging him. *Wilson* v. *Bossier*, 640.

PARTNERS AND PARTNERSHIPS.

1. Parties engaged in the purchase of materials, and the manufacture thereof into carriages for sale, are liable as commercial partners; but mechanics, who make carriages to order, or repair them, would not necessarily be commercial partners. *Cowand* v. *Pulley*, 1.

2. On the death of B. B. the partnership of B. B. & Co. owed his widow a sum of money. The widow married V., the surviving partner of B. B. & Co., who formed a new partnership with G. C. B. In this contract of partnership the wife of V. intervened, and consented that the money due her as widow in community of her late husband, should remain with the new firm as a loan, upon which she was to receive interest quarterly. *By the Court:* The terms of the contract of partnership show conclusively that Mrs. V. was not a partner, but a creditor. *Brower* v. *His Creditors*, 117.

3. The stipulation in the act of partnership by which Mrs. V. agrees not to be considered as a creditor until all the other debts are provided for, is a contract of suretyship for her husband, for the benefit of his creditors It is a contract entered into by her, without any consideration enuring to her own benefit, both for her husband and conjointly with him, by which she renounces her own rights as a creditor for the benefit of those who may hereafter become the creditors. Such a stipulation is repudiated by the spirit and letter of our laws. *Ibid.*

4. Although the firm of *O'Connel & Gould* had been dissolved before the commencement of the action instituted by the defendants against plaintiff, yet all the partners of the firm of *O'Connel & Gould* were bound *in solido* for all the debts of the firm, and liable to be sued for them. *Gould* v. *Gardner*, 289.

5. Defendants received a claim for collection from D. T. W. & Co. The firm of D. T. W. & Co. was dissolved, and B. who had been one of the members, instructed defendants to put the proceeds of the claim, when collected, to the credit of plaintiff, which defendants accordingly did, and so instructed B. and the plaintiff. Subsequently defendants paid the money under instructions from D. T. W., as liquidating partner of D. T. W. & Co. Plaintiff then brought this suit for the amount of the

PARTNERS AND PARTNERSHIP (*Continued.*)

claim. *Held:* That after defendants had notified plaintiff that, as requested by B., they had placed the money collected to plaintiff's credit, they had no right to divest the funds without plaintiff 's assent; that having done so, they were liable to plaintiff. *Durkee* v. *Price*, 333.

6. After the dissolution of partnership, no one of the partners can use the social name so as to bind the others; and to draw or endorse a note in the name of the former partnership, the authority must be express and special. Any subsequent power must be derived, not from the previous relations of the parties as partners, but from a new contract, which is one of mandate, and this mandate must be express and special. VOORHIES, J., dissenting. *Ibid.*

7. No one of the partners, after the dissolution, can alienate anything more than his own interest in the partnership property. He is not permitted to do any act, still less, to make use of the partnership funds in a manner inconsistent with the purpose of a just and proper settlement. VOORHIES, J., dissenting. *Ibid.*

8. A partner whose interest in the partnership is for two-seventeenths of the profits and loss, is liable in that proportion to one of his co-partners who extinguishes this liability to third persons, whether by payment or novation. *Maginnis* v. *Crosby*, 400.

9. A contract, however inartificially or obscurely drawn, by which two persons agree to furnish merchandise "to the concern" and stipulate that one should act as salesman and the other pass as the proprietor, and that both should share equally in the expense and profits, constitutes a partnership between the parties. *Marks* v. *Stein*, 509.

10. And one party cannot sue the other upon an account for any specific sum, until the affairs of the partnership have been liquidated. *Ibid.*

11. A partnership formed for the purpose of running a steam-sawmill, and making and selling lumber, and carrying on the lumber business generally, is a commercial partnership. C. C. 2796.
Copley v. *Lawhead*, 615.

12. It is well settled that partnership books are evidence for and against the partners, in controversies arising among themselves, but only the books, and entries contained in them, at the time of the dissolution of the partnership. The entries made after this time by one of the partners, who has possession and care of the books, cannot bind the other partners, unless he has also had the books in his possession, examined the entries and, when he had the means of ascertaining their correctness, made no objection, or in some similar manner acquiesced in or approved of the books. *Pratt* v. *McHatton*, 260.

13. By the contract of partnership, two of the partners (defendants) were required to transact the out-door business, and superintend the sales. *Held:* They could not be expected to attend at remote places, nor await the slow process of sales at the principal points where goods were in store for the purpose of being offered for sale; and they are entitled to a credit for commissions for sales actually paid by them in good faith. *Ibid.*

PARTNERS AND PARTNERSHIP (*Continued.*)

14. In order to hold one of the partners liable for losses on the sales of goods, it should be shown that he violated the obligations imposed upon him by the contract of partnership; and that the partners objected to his acts as soon as advised of them, or within a reasonable time after the entries in regard to such sales had been made upon the books of the firm. It is not enough to await the result of the sales to ascertain whether the same have been fortunate, or unfortunate, before objecting. *Ibid.*

15. Defendants, who assumed the collection of outstanding debts, assumed as *negotiorum gestores*, the obligation of using due diligence. *Ibid.*

16. The appointment of a liquidator for the settlement of partnership affairs rests, in a great measure, in the sound discretion of the court. *Ibid.*

17. Accounts due a partnership in liquidation should not be sold, unless the trouble, expense and delay of collecting, will render them less productive to the firm than their immediate sale; or unless they are desperate, or of little value, and the delay in regard to their collection, prevents a final decree of partition within a reasonable time. These and like reasons, render a sale proper.

18. Charges for interest made since the dissolution of the partnership, must be confined to such sums as the respective partners had promised to bring into the partnership, or for funds withdrawn by them, and in the absence of any agreement in writing, the rate must be five per cent. *Ibid.*

19. The lessees of the penitentiary have no right to make any contract for the use or hire of the negro convicts, except in the employment required by law, and any items for such services made by one of the partners must be disallowed. *Ibid.*

20. A several judgment against one, in favor of the other individual partners, should not be rendered where there are available partnership assets by which the amounts received by the partners can be readily equalized. *Ibid.*

21. A steamboat was purchased to be resold, and not to be engaged in the carrying trade. *By the Court:* Under the circumstances the parties were merely joint owners of the property, and not partners, or joint traders within the meaning of the law. *Pickerell* v. *Fisk*, 277.

22. A partnership is founded on the voluntary contract of parties, as contradistinguished from the relations that may arise between them by the mere operation of law, independent of such contract. *Ibid.*

23. The surviving partner cannot alienate the partnership property. The power to alienate ceases with the dissolution of the partnership; the heirs of the deceased become joint owners of the common property, and the survivor can only dispose of his right in the thing sold. *Ibid.*

See PRINCIPAL AND AGENT—*Stewart* v. *Clark*, 319.

PARTY WALL.

1. Until plaintiff pays defendant one-half of the cost of the wall, it is not a wall in common, but remains the exclusive property of the defendants, though resting one-half upon the plaintiff's land; and defendants may open or shut apertures in it at pleasure, subject only to the police regulations of the city. In this she exercises not a right of servitude, but a right of property. *Jeannin* v. *DeBlanc*, 465.

2. The fact that the plaintiff was indemnified by the insurance company *for his portion* of the wall damaged by the fire, does not impair his right to recover from defendant, reimbursement to the extent of its value, of that portion of the wall which he had rebuilt, and which he was not paid for by the company, and which was not protected by the policy of insurance, and which defendant had used. *Sullivan* v. *Smith*, 701.

PENALTY.

1. When there is a partial execution of the principal obligation, the Judge may modify the penalty, unless there is a contrary agreement. *Schadel* v. *St. Martin*, 175.

PLEADING.

1. It was objected that the plaintiff did not allege in her petition that she was separated in estate from her husband. *By the Court:* No such allegation is necessary. The evidence shows conclusively that the debt originated in a loan of money made by the petitioner, in her own name, out of funds which were paraphernal. She had a right to assume at any time the administration of her paraphernal property, and the taking of this due bill for money lent by herself was itself an act of administration. *Cowand* v. *Pulley*, 1.

2. The defence that the plaintiff has, through his acts, lost any of the securities upon a note, and thereby has become unable to subrogate the surety to his rights, is an admission that the plaintiff did have a demand against the surety, and that the same has been discharged by the act of plaintiff. Such a defense is in the nature of an exception *in factum composite*, and should be specially pleaded. *Hoffman* v. *Atkins*, 172.

3. Action of jactitation—plaintiff alleged himself to be the owner and possessor of a certain lot of ground. Defendants excepted that plaintiff had not the necessary possession to maintain the action. The District Court ordered the exception to be referred to the merits—when defendants, after acquiescing in the order, amended the answer and set up title. *Held:* The amendment of defendant's pleadings waived the question of possession, and converted the action into a petitory one, in which the burden of proof was upon the defendants. *Short* v. *Methodist Episcopal Church*, 174.

4. In a suit for taxes, where the defendant, after setting up certain dilatory exceptions, added that should the exceptions be overruled, "the respondent pleads a general denial, and especially the ownership of the property taxed," defendant will not be permitted, under such an answer, to show that he had alienated the property previous to the assessment. *New Orleans* v. *Lacroix*, 193.

PLEADING (*Continued.*)

5. Defendant should have alleged specially what were the errors he complained of in the assessment roll, and that he had, without avail, resorted to the means afforded him by law to correct such errors, or at least allege a sufficient reason for having failed to do so. *Ibid.*

6. A plea of "failure of consideration" in a suit on a promissory note, without specification of the consideration, or of the time, place or circumstance of its failure, is too vague to authorize the admission of proof upon it. *Langstaff* v. *Lees*, 271.

7. It is not customary to file answers to oppositions made to tableaux of distribution; such answers being in the nature of replications. Oppositions in such cases are open to every objection of law and fact, such as minority, fraud, simulation, &c. In case of surprise, a remedy may be afforded by a continuance, or a new trial. *Succession of Lerude*, 386.

8. The plaintiff was, by will, directed to be emancipated as soon as she could be. She sued for her freedom. It was objected that she could not have a decree ordering the defendants to enfranchise her because she had not prayed for it. *Held*: The prayer for general relief was sufficient. *Delphine* v. *Guillet*, 424.

9. Plaintiff offered to prove that she was of good character and sober habits, and had always behaved well and conducted herself respectfully towards white persons; to the reception of which evidence defendants objected on the ground that no such allegations were made in the petition, which objection was sustained by the District Court. *Held:* The defendants, by their answer, having put plaintiff's character and fitness for emancipation at issue, the testimony should have been received. *Ibid.*

10. The defendant, a tutrix, made a declaration of her intention to change her domicil from the parish of West Baton Rouge to New Orleans. The declaration was filed and recorded, and a copy served on the under tutor who, in answer, set up various grounds on which he prayed that the tutrix be decreed to be unworthy to retain the tutorship; that the order confirming her as natural tutrix be rescinded, and that if deemed worthy, she be appointed dative tutrix, on giving security, &c., &c. *Held*: that these issues presented to a simple declaration of intention for a change of domicil, which the party had a clear right to make, are utterly inadmissible, and has no parallel in the jurisprudence of this State. *Elam* v. *Nolan*, 523.

11. The allegation "that plaintiff is about to subject the said schooner or the bond substituted for the release thereof, to the payment of said judgment," is vague, uncertain and in the alternative, and is insufficient to support a demand for an injunction. *Taylor & Co* v. *Clark*, 560.

12. Where land, once public, has become private property, the possessory action will protect the possession of him who holds as owner against the intrusions of all persons, whether claiming the property in virtue of title or not. *Fowler, tutrix*, v. *Dugal*, 561.

13. Plaintiff brought suit upon a decree rendered by a Chancery Court in Arkansas, and upon a delivery bond executed by defendants to entitle them

PLEADING (*Continued.*)

to retain possession of certain property seized under an execution issued upon the decree. He alleged, in his petition, "that said bond having been forfeited, acquired the force and effect of a judgment according to the laws of Arkansas; that the original judgment was satisfied and novated in this, that the bond was taken for the delivery of property as aforesaid, and forfeited as aforesaid, and therefore the said bond became a new judgment, having the effect as aforesaid; that both said judgments, the original and statutory judgments, have the effects of and are joint and several judgments, according to the laws of Arkansas." The defendant alleged, in his answer, that the bond set up by plaintiff was false and forged as to his signature. *Held:* that the allegation of novation, with the qualification annexed, is not so absolute as to prevent the plaintiff from recovering on the original decree in chancery. If, therefore, the defendant did not execute the bond, the original judgment was not extinguished: if he did execute the bond the plaintiff is entitled to recover on the forfeited bond. *Jones* v. *Moore*, 616.

14. An exception of want of amicable demand will not lie when defendant, prior to being sued, has refused payment of a smaller sum than that claimed in the petition. C. P. 984.

Figuras v. *Administrator of Benoist*, 683.

15. Allegations contradictory of each other cannot be heard.

Edson v. *Freret*, 710.

16. An expert sued the plaintiffs in the suit in which he had been appointed, for compensation for his services; no citation having been made on one of said plaintiffs, it was objected by the other that the liability of co-plaintiffs for costs being joint, both should have been cited: *Held*, that the objection should have been pleaded as an exception, *in limine litis*.

Dunbar v. *Murphy*, 718.

17. Plaintiff died pending the suit in the District Court of Caddo, the administrator of his succession also died. There being no publication to fill his vacancy, the Clerk of the court, representing the succession, entered appearance, *ex officio*, in the Supreme Court—*Held:* That he could do so under the circumstances by the provisions of the Act of 1855, without proof of his appointment of administrator.

Allen v. *May & Kohn*, 627.

18. Complaint of the non-joinder of other parties defendant and the misjoinder of plaintiffs, can not be made when the case stands at issue on the merits. *Brewer, Ex'r, et al.* v. *Cook*, 637.

19. It did not appear that defendant had any establishment or agent in the parish of West Feliciana, at the time suit was brought, and it did appear that he had a house and home in Catahoula, to the jurisdiction of the court of which parish he had excepted—*Held*: Even if he resided alternately in the two parishes, he might have been sued in either.

Ibid.

20. The plea of discussion must be made *in limine litis*.

State v. *Bradley*, 643.

PLEADING (*Continued.*)

21. The petition alleged that plaintiff "is the owner of the following described tract of land, to wit, the lot or fractional number," &c. This description of title is two vague and general to satisfy the requirements of C. P. 172. *Bry et al.* v. *Fouché*, 665.

22. Defendant excepted to the petition on the ground that it did not set forth the plaintiff's title with sufficient clearness. The exception was overruled. On the trial plaintiff offered a patent to prove his title; defendant objected to it as inadmissible under the pleadings, the plaintiff's title not being set forth in the pleadings; his objection having been overruled, he excepted, and then filed an amended answer, and after alleging that he was taken by surprise, attacked the patent on the ground that it had been obtained by fraud. Defendant did not apply for a continuance nor move for a new trial. *Held:* That the exception was well taken, but that the defendant, by his amended answer attacking plaintiff's title, was precluded from availing himself of the defect in the petition. *Ibid.*

See SURRENDER—*Leland & Co.* v. *Rose*, 69.
See CITATION—*Succession of Penny*, 197.
See EVIDENCE—*Patterson* v. *Tompkins*, 452.
Jeannin v. *De Blanc*, 465.
See ESTOPPEL—*Dorein* v. *Wills*, 514.

PRACTICE.

1. Defendant had summoned more than forty witnesses, and asked for attachments, which the court refused him without security for the costs of all attachments exceeding six. *By the Court:* There is no averment that he expected to prove anything material by the absent witnesses, nor that he was unable to give the security required. Much discretion must be left to the Judges of the first instance in such a matter as this, in order to prevent the abuse of the process of the court.
Julia Haughton v. *Her Husband*, 200.

2. Where the witness had lived several months in defendant's house, and defendant was present at the trial and cross examined witness, he cannot allege surprise, or claim a new trial, to inquire into the competency, or credibility of the witness. *Ibid.*

3. The sale under *fi. fa.* set aside for want of valid writ and notice.
Webb v. *Coons*, 252.

4. Where the husband joins the wife in the suit, and the petition alleges that the wife is herein authorized and assisted by her husband, it is a sufficient authorization for the wife to sue.
Dunn v. *Woodward*, 265.

5. Where the answer shows that the bill was drawn to release the boat from a seizure, it is too late to object that the captain of the steamboat was without authority to draw the bill.
Anderson v. *Folger*, 269.

6. A sufficient authorization for the wife to appear is shown, when she and her husband were duly cited; both filed their answer on the same day—were represented by the same counsel—and the wife, in her answer, expressly alleges that she was duly authorized to appear and defend the suit. *Woodward* v. *Lurty*, 280.

PRACTICE (*Continued.*)

7. Suit for taxes. Defendant excepted that he had been cited as *B. Saloy*. Exception overruled, and citation ordered to be amended *nunc pro tunc*. *By the Court*: In a matter of taxes where the party appears, as in this instance, and admits that he is cited, we think the court might well order the correction of the name, where merely inaccurately spelled, instanter, and proceed with the cause. The case might be different where judgment was taken in a proceeding of this kind against a party, in his absence, by a wrong name. *New Orleans* v. *Saloy*, 420.

8. Matters properly triable in a hypothecary action, should, after the parties have gone to trial, be determined by the court, on a rule, where the proceeding had not been objected to at the proper time.
Bach v. *Lakin*, 489.

9. A rule against a surety on an attachment, if taken after the actual return of an execution against the principal, is regular, even though taken before the return day named in the execution.
Doane v. *New Orleans and Ohio Telegraph Co.*, 504.

10. When the co-plaintiff or co-defendant dies, pending a case in the High Court of Errors and Appeals of Mississippi, the practice is to suggest the death on record, and to let the cause proceed.
Muncaster v. *Bland*, 507.

11. Plaintiff sued for the nullity of a judgment, and for an injunction to restrain the execution of a *fi. fa.* issued under it. The defendant in the injunction and the owner of the judgment directed the Sheriff to release the seizure, and afterwards made a motion in open court for the release of the seizure, which motion was allowed, but the District Court went further, and ordered the suit to be dismissed. *Held:* that the order dismissing the suit was improperly made, the plaintiff having a clear right to a trial of the issue of nullity of the judgment.
Leverich v. *Adams*, 510.

12. No special order to answer is necessary when the interrogatories are annexed to the petition, and the garnishees are duly cited.
Elder v. *Rogers et als.*, 606.

13. The Act of 20th March, 1839, p. 168, assimilates parties cited under its provisions to garnishees, and makes them liable in the same manner. The garnishees must answer within the usual delay, and in case of his refusal or neglect to do so, it shall be considered as a confession of his having property in his hands belonging to the debtor sufficient to satisfy the demand. *Ibid.*

14. It is in the sound discretion of the District Judges to rescind their interlocutory orders. *Ibid.*

15. An order, rendered on an *exparte* motion, that the interrogatories be taken as confessed, is not a definitive judgment, and no formal motion for a new trial is necessary in order to have it set aside. *Ibid.*

16. It is a sufficient evidence of a Clerk of a District Court in this State, being the administrator of an estate, which he assumes to administer ex

PRACTICE (*Continued.*)

officio under the Act of 1855, that he files a written appearance in this court as such. No order of court, oath, bond or letters of administration are required to authenticate his capacity.

Garcia v. *Kitchings et al.*, 642.

17. An exception to the capacity of plaintiff to sue will be considered as waived by a trial on the merits without any judgment on the exception.

Phœbe v. *Vienne*, 688.

18. A judgment was rendered by the Supreme Court, wherein it was ordered "that the heirs of *Jean Junek* be recognized as entitled to one-half interest in the partnership established between their late father and *L. F. Hezeau;* that it be decreed that said partnership has continued since the death of their father, and still exists between the said *Hezeau* and the said heirs of *Junek*, and that said heirs are entitled, through their tutrix, to exercise all their rights, incident to their capacity as partners, for the protection and management of their interest in said partnership," &c. The mandate of the court having been filed in the court *a quo*, plaintiff obtained a writ of possession, by which the Sheriff was ordered to put her in possession of the premises, without reserve or exception, together with superintendence, &c., of the same. The defendant obtained a rule on plaintiff, to show cause why said writ should not be set aside. *Held:* Where a mattter of defence is set up against the execution of a writ regularly issued, it is, perhaps, irregular to proceed by rule, but where the issue has reference to the regularity of the writ itself, the proceeding, being a mere incident to the judgment, may be disposed of summarily. *Junek* v. *Hezeau*, 731.

19. The judgment of this court did not decree that plaintiff was entitled to the exclusive possession of the entire entablishment appertaining to the partnership, nor that she should divest defendant of his possession nor (so far as the partnership articles allowed it) his control over the business for which the partnership was established. Judgment affirmed, making the rule absolute. *Ibid.*

See PRINCIPAL—*Gilly* v. *Romieu*, 746.
See ATTORNEY AT LAW—*Lacoste* v. *Robert*, 33.
Martin v. *Moore*, 121.
See SHERIFF—*Brand* v. *Johnson*, 278.
See NON-SUIT—*Moch* v. *Garthwaite*, 287.
See CONTINUANCE—*State* v. *Johnston*, 422.
See EVIDENCE—*Ealer* v. *Freret*, 455.
See STREETS—*New Orleans* v. *Dryades Street*, 458.

PRESCRIPTION.

1. The prescription of three years, applicable to a loan of money, does not apply to a due bill given at the time for such a loan.

Cowand v. *Pulley*, 1.

2. The maxim *contra non valentem agere, non currit prescriptio* has been admitted in some instances, where a party was acting to recover or protect his property, but never in order to enable him to inflict a penalty on his adversary. *Matthews & Finlay* v. *their Creditors*, 36.

PRESCRIPTION (*Continued.*)

3. There is nothing in the Registry Laws which precludes a title not registered from being the basis of the prescription mentioned in Article 3444 of the Code, when it is accompanied by actual possession and the incidents prescribed in Article 3453. *Watt* v. *Hubnell*, 87.

4. Where the purchaser of land failed to give his notes according to the terms of sale, he cannot set up the prescription of five years. *Succession of Jewell*, 83.

5. A debtor said he would "settle provided his claims were allowed." *Held*: insufficient to interrupt prescription. *Ibid.*

6. The only *indicia* of taking possession by defendant—to make a basis for prescription—before 1844, were that in 1840, he sent hands to aid in stopping a crevasse in front of the tract in question, and that the next year, some of his negroes worked on a road and levee running over a part of it. *By the Court:* It would be contrary to the text and meaning of the Code to declare these *indicia* sufficient to establish such an unequivocal corporal possession—*animo domini*—as is required to mark the commencement of the prescription of ten years. Defendant had other lands in the vicinage. He had an obvious interest in stopping the crevasse and assisting to keep the road and levee in repair, and his doing so did not clearly indicate an intention to take possession of this piece of land as owner. *Doleman* v. *Barrow*, 87.

7. The land in dispute was abandoned by plaintiffs in 1827 or 1828. It is not shown that they exercised any act of ownership over the land from that period until the institution of this suit—a period of twenty-two or three years—and under Article 3467 C. C., it would seem that the plaintiffs have lost their civil possession, because they did not pay taxes, keep up the roads and levees, or do other similar acts. (MERRICK, C. J., dissenting.) *Ibid.*

8. While on the one hand, the positive acts of defendant show possession before 1844, much can be inferred, on the other, from the passive conduct of plaintiffs, which seems to have amounted to an intention of ridding themselves of the burden of taxes and keeping up levees, by abandoning the property to the purchaser at the tax sale and his vendees. (MERRICK, C. J., dissenting.) *Ibid.*

9. Three-fourths of the territory of the State, consisting of forests, prairies, swamps and wood lands, for the present at least, admit of scarcely any other possession than that shown by the defendant in this case. To require this sort of real estate to be enclosed, in order to prescribe, would be the virtual abrogation of the provisions of the Code as to a large part of the wealth of the State. (MERRICK, C. J., dissenting. *Ibid.*

10. A title not registered may be the basis of prescription. *Bracy* v. *Buck*, 100.

11. A suit claiming property and rent is a totally different action from that of rescission of a sale for fraud, and will not interrupt prescription as to the latter. *Seavers* v. *Journee*, 143.

PRESCRIPTION (*Continued.*)

12. *Remy* died in the actual possession of the property, which he held under a valid title. There could have been no adverse possession anterior to his death, and, therefore, whatever may have been the character of the alleged possession of the defendants, it should have been accompanied by a title translative of property, and exercised in good faith to form the basis of prescription.

Remy v. *Municipality No. Two*, 148.

13. Possession, to be the basis of prescription, must be inconsistent with an adverse ownership—must be continuous, unequivocal, uninterrupted and with the intention of holding, as owner, or on behalf of one assuming to be owner. In the absence of such adverse possession, the civil possession of the original owner will be presumed to continue.

Ibid.

14. Mere possession of battures and banks of rivers for the public use can in no case form the basis of prescription, because such possession is not incompatible with a right of ownership in a riparian proprietor.

Ibid.

15. An offer by a debtor to give the creditor in payment or discharge of creditor's claims, a tract of land, if the creditor would give one hundred dollars to boot, will not interrupt prescription.

Pearson v. *Harper*, 184.

16. Suit to recover amount of certain notes obtained by defendant from plaintiff and paid by her, as alleged, for defendant's benefit. Plea, prescription of five and ten years. To meet this, the plaintiff urged that the Supreme Court had not decided until 1854 that she was not responsible for the debts of her former husband, and that, previous to that decision, she was not bound to bring this action. *By the Court:* The action of the court in that case did not have the effect of suspending the course of prescription against her.

Wilcox v. *Henderson*, 190.

17. An admission of the execution of a note, accompanied by an assertion that it was not really due because it had been extinguished by compensation, is not such an acknowledgment as will interrupt prescription.

Carrollton R. R. Co. v. *Harper*, 212.

18. Depositaries holding by a precarious tenure cannot prescribe on the thing thus held. But the deposits made with plaintiff's bank were not real but irregular deposits; the ownership of the identical money deposited passed to the bank, and the relation of debtor and creditor in a cash account arose between the parties. *Ibid.*

19. A corporation may plead prescription. *Ibid.*

20. The prescription established by Article 1939 of the Code does not apply to simulated sales. *Dunn v. Woodward*, 265.

21. An action for the recovery of the value of property belonging to a succession for which the defendant has made himself liable, is not an action for damages resulting from an offence, or a quasi-offence, and the prescription of one year is inapplicable to it.

Pickerell v. *Fisk*, 277.

PRESCRIPTION (*Continued.*)

22. The prescription of actions is regulated by the law of the forum.
Succession of Lucas, 296.

23. The prescription of three years of actions for the recovery of money loaned, is not applicable where there has been an acknowledgment of the loan in writing amounting to an obligation.
Garrahan v. *Curley*, 462.

24. The acknowledgment of the correctness of the account by the captain who contracted for the repairs, withdrew it from the application of Article 3499 of the Code, and subjected it to the prescription provided by Article 3508. LEA, J., with whom concurred SPOFFORD, J., dissenting.
Muntz v. *Broom*, 472.

25. Only adverse possession can be the basis of prescription in Mississippi.
Crane v. *Allen*, 498.

26. In an action against the wife, service of citation on husband or wife is sufficient to interrupt prescription. C. P., 192. The fact that the husband was not personally cited, and the wife not authorized to defend the suit until after the term of prescription pleaded had elapsed, did not destroy the effect of a legal service of citation upon the wife.
Bush v. *Decuir*, 503.

27. Privileges for wages of crew is prescribed by sixty days. The rule is the same as to the furnishers of supplies. Such items of both as fall within sixty days are allowed, rateably. Civil Code, 3205.
Mooney v. *Brig Hondurino*, 538.

28. The prescription of one year to actions for *quasi offences* is not applicable. The case is one *ex contractu* and not *ex delicto*.
Magoffin v. *Cowan*, 554.

29. The heirs of G. were bound to account for the proceeds of the batture conveyed to M. when called upon, but the right of action only accrued when the money was received, which, being less than two years before this suit was brought, the prescription of ten, twenty and thirty years could not avail.
Michon v. *Gravier*, 596.

30. The principles decided in *Roselius* v. *Delachaise*, 5 Ann., affirmed.
Ibid.

31. In the absence of an appeal or action of nullity, no irregularity in the form of proceeding before the district court can be inquired into after the lapse of one year. When the police jury has been regularly cited or made its appearance, no inquiry can be entertained after the lapse of that period, as to whether the power to confess judgment was or was not formally conferred by sufficient authority.
Parker v. *Scogin*, 629.

32. An action for the dissolution of a sale for non-payment of the price is not in legal parlance action of *nullity* or *rescission*, and is not regulated, as to prescription, either by Art. 2507 or Art. 2218 C. C.: it falls rather within the general category of personal actions, limited to ten years by Art. 3508.
George v. *Lewis*, 654.

PRESCRIPTION (*Continued.*)

23. An action of nullity or rescission of a contract lies only for an alleged vice in the contract itself, tainting it *ab initio;* whereas, the dissolving condition is never enforced except upon the happening of some event posterior in date to the contract and not affecting its original validity. Nullity and rescission imply the total avoidance of the convention of the parties for some inherent defect therein; the dissolution of a commutative contract for non-compliance by either party with his engagements, is really the carrying into effect of a part of their convention either express or implied. *Ibid.*

24. The maxim *contra non valentem agere non currit prescriptio* does not apply to relieve the plaintiff in a case where the plea of prescription was set up by the defendants, *acquirenda causa.* It has been applied to prescriptions, *liberanda causa*, in three classes of cases: 1st. Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action. A class of cases recognized by the Roman law, as proper for the allowance of the *utile tempus.* The cases of *Querry's Ex.* v. *Toussier's Ex.*, 4 M. R. 609; *Ayraud* v. *Babin's Heirs*, 7 N. S. 481; and *Smith* v. *Taylor*, 10 R. R. 133, are of this kind. 2d. Where there was some condition or matter coupled with the contract or connected with the proceedings, which prevented the creditor from suing or acting. See cases of *Landry* v. *L'Eglise*, 3 L. R. 219; *Flint* v. *Curry*, 6 L. R. 69. 3d. Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action. The following are cases of this class: *Boyle* v. *Mann*, 4 An. 170, and *Martin* v. *Jennings*, 10 An. 553. Art. 3444 C. C. and the Act of 1848, p. 60, declare that property in slaves is acquired by the prescription of five years, whether the parties reside in the State or any of them reside out of it. Prescriptions run against all persons unless included in some exception established by law. C. C. Art. 3487. *Reynolds* v. *Batson*, 729.

See SLAVES AND SLAVERY—*Eulalie* v. *Long*, 463.

PRINCIPAL AND AGENT.

1. The deposit of a letter in one's box at the post-office is not a delivery of the letter to such person: and where a clerk, who had been discharged by defendant for dishonesty, obtained a letter containing money out of defendant's box at the post-office, which money he kept, defendant held not liable to the party remitting the money.

Johnson v. *Martin*, 27.

2. An agent may properly be held responsible for a neglect to provide against the risks or perils to which property entrusted to his care may, in the ordinary course of business, be exposed, but he cannot be held liable for not anticipating a danger altogether out of the ordinary course of business or natural events. *Ibid.*

3. The maxim that money has no identity, when applied to agents, is true in this sense: if it is deposited in bank in the name of the agent, with his own funds, or kept with his own money, it cannot be identified, and

PRINCIPAL AND AGENT (*Continued.*)

must necessarily be held to belong to the agent, in any contest between the principal and third persons claiming the same.
Beatty v. *McCleod*, 76.

4. So also if the agent pays out the money to one who receives it in good faith, it cannot be recovered back—it has no identity. *Ibid.*

5. But this doctrine has never been held to extend to cases where the money has become capable of a complete identification from the manner in which it has been kept—as in packages, labeled in the name of the principal, or deposited by the agent in bank in the name of the principal. *Ibid.*

6. When the agent makes the deposit in the name of the principal, it is to be presumed that the money he so deposited is the identical money which he received from or on account of his principal. *Ibid.*

7. A tutor, who was insolvent, believed himself about to die, deposited a sum of money with M., stating it to be the property of his ward. It was shown that the tutor was in possession of no means but those belonging to his ward, and that he had recently obtained certain notes of his ward to be discounted, amounting to a larger sum than that deposited with M. *By the Court:* As by law the tutor ought not to use the funds of his ward, and as he has the right to deposit such funds in bank in his name as tutor, or to keep them distinct from his own by proper labels, there is no good reason why, on an occasion like the present, he might not deposit the money with some trusty person for safe keeping. *Ibid.*

8. Plaintiff sent her slave from Tennessee to defendant, at New Orleans, for sale. The slave was permitted to go, with one belonging to defendant, (which he kept for such purpose,) to the steamboat for his clothes, whence he escaped, and plaintiff sought to make defendant liable. *By the Court:* The defendant took the slave for sale upon commission; the contract was a mandate mutually beneficial to the parties, and the defendant was bound to the exercise of ordinary diligence; that is, such a degree of diligence as persons of common prudence are accustomed to use in their own affairs of a similar nature. *Hill* v. *White*, 170.

9. There was in the knowledge of plaintiff's agent, who brought the slave to New Orleans, facts which showed that more than ordinary diligence would be requisite to prevent the slave's escape; and these facts being withheld from defendant, he cannot be made liable. *Ibid.*

10. The charge of forty-five cents per bale, made against defendant, for drayage, labor, storage, weighing, &c., of defendant's cotton, cannot be recovered, unless actually paid by plaintiff. *Brander* v. *Lum*, 217.

11. Where the principal, though present, is physically incapable, from sickness, of making an affidavit for a provisional seizure, the affidavit may be made by an agent. *Schneider* v. *Vercker*, 274.

12. It is not necessary that the agency be sworn to, it is sufficient to allege and prove it. *Ibid.*

13. Plaintiff enclosed an account against defendants to P. & H., (partners,) with instructions to take all necessary steps for the collection of the same. P. made an affidavit for and obtained a sequestration, which was

PRINCIPAL AND AGENT (*Continued.*)

set aside, and plaintiff appealed. *By the Court:* The authority conferred on the agents was that of taking all necessary steps for the collection of the plaintiff's debt. Either of the partners was competent to act for the plaintiff in the matter. The affidavit points to the necessity which existed for the sequestration as a necessary step for the collection of the debt. The plaintiff was not present. Under the statute of 1828, his agent was authorized to make affidavit and give bond.
Stewart v. *Clark*, 319.

14. M., one of the partners, defendants, was the agent of the Bank of Kentucky. Pending this agency, defendants received from S., L. & Co., of Louisville, a consignment of flour, which they were directed to sell and retain proceeds towards payment of a draft drawn by plaintiffs. They sold the flour, and M., acting under instructions from the bank, attached the proceeds. After the attachment, defendants received a dispatch from S., L. & Co., directing them to deliver the flour, or its proceeds, to plaintiffs. *By the Court:* The defendants, as factors, and holding the funds as an irregular deposit, ought not to defeat the arrangement of the parties by taking upon themselves the agency of the Bank of Kentucky. The two agencies are incompatible, and having received the consignment of the flour for a particular purpose without objections, and made a sale, they became absolutely the agents of the parties interested in the shipment of which they had notice, and they cannot be permitted to defeat the very object of the consignment of the flour by diverting the proceeds to their individual claims against S., L. & Co., nor by acting as the agent of third parties. *Gordon* v. *Goodrich*, 410.

15. The duty of a clerk is to treat his employer with respect, and not to insult or wantonly offend those who come to the establishment to transact business. A course of conduct on the part of the clerk inconsistent with this obligation, is certainly one of the very best reasons that can exist for dissolving the contract. *Frederich* v. *Ralli*, 425.

16. Proof that in the ordinary transactions of life one has acted as the agent of another does not show a power nor furnish presumptive evidence of a power to accept donations. *Bush* v. *Decuir*, 503.

17. Where an agent, whose authority having been revoked, rendered his account, showing certain assets in his hands belonging to and a balance of money due his principal, and having offered to pay the same on being released from all his liabilities on account of his agency, which was refused, instituted suit against the principal, to compel the homologation of his account and his discharge from all his responsibilities as agent, on delivering the assets and money, due according thereto: *Held:* that the principal was entitled to a judgment on a rule taken by him, for the money admitted to be due him. *Gilly* v. *Roumieu*, 746.

18. It is no objection to the judgment on the rule that a part of the case was left open for trial. While the mandatary is compelled to render his account, he has the right to retain only a sufficient amount out of the property of the principal in his hands, to satisfy his expenses and costs, and he may even retain, by way of set-off, what the principal owes him, provided the debt be liquidated. C. C. 2973, 2992. *Ibid.*

PRINCIPAL AND SURETY.

1. Where an administrator obtains a judgment against a former administrator, whose estate, as shown by the tableau, is utterly insolvent, no further proceedings need be had by him against the estate of the former administrator, to entitle him to judgment against the surety of the former administrator. *Bourgeat* v. *Adams*, 78.

2. The neglect or delay of the creditor to sue, or to use legal remedies, does not release the surety. *Barnes* v. *Crandall*, 119.

3. The surety is at liberty, if he thinks the creditor not sufficiently energetic, to pay the debt and become subrogated to his right, and manage the claim to his own satisfaction. *Ibid.*

4. It is only in those cases where the surety loses his right of subrogation by the act of the creditor that the surety is discharged. *Ibid.*

5. The discharge of the surety, under Article 3030 of the Code, only takes place to the extent to which the acts of the creditor have prejudiced the recourse of the surety for reimbursement of what he may be obliged to pay under his contract of suretyship. *Provan* v. *Percy*, 179.

6. Article 3032 of the Code applies only to obligations payable at a time specified. Such term cannot be extended without the consent of the surety, and if extended, the entire release of the surety follows. *Ibid.*

7. Equity will not permit the plaintiff and her husband to obtain a judgment against the surety of the tutrix, without accounting for so much of the funds of the plaintiff as were diverted to pay the individual debt of the tutrix and her husband to the plaintiff's husband. The husband is a co-plaintiff in this suit, and it has been shown that the funds of the minor have been received by him in payment of a debt due to him individually by plaintiff's tutrix and her husband. *Fuselier* v. *Babineau*, 393.

8. Where property is seized under attachment, and the property is bonded, the surety, in proceedings against him, will not, after judgment unappealed from by defendant, be allowed to show that the attorneys who filed an answer for the defendant were not authorized to represent the defendant. *Doane* v. *N. O. Telegraph Co.* 504.

9. A surety is bound to ascertain his principal, and where, by mistake, he signs a bond for the lessee of the owner, instead of the owner himself, to release property from attachment, he will be bound; for, if he had not signed the bond, the property would not have been released and the attachment dissolved. *Ibid.*

10. Where, in such a case, judgment has been rendered against the owner, and execution has issued against him, and has been levied on his property, and his lessee enjoins the sale, the surety on the attachment bond, being also surety on the injunction bond, cannot set up his mistake as a defence to proceedings against him. He should not be allowed to aid in defeating the levy, and then set up his own act as matter of defence. *Ibid.*

11. A surety on a bond given for the release of property sequestered by the vendor to satisfy his privilege, is liable to the vendor, notwithstanding the property was seized and sold to satisfy a judgment rendered to in-

PRINCIPAL AND SURETY (*Continued.*)

force the lessor's privilege for rent of premises in which the property had been stored and which existed on the property at the time the sequestration was sued out. The obligation of the bond was "faithfully to present the property to answer the judgment in the case;" it was no compliance with the condition of the bond to present the property to satisfy the execution of a third party. *Clapp* v. *Seibrecht*, 528.

12. It is a complete answer to a suit upon a bond for the release of the sequestration to show that the plaintiff's right upon the property has been overridden and extinguished by a superior right existing at the time and prior to the sequestration. SPOFFORD, J., and LEA, J., dissenting. *Ibid.*

PRIVILEGES.

See MORTGAGES.

1. Injunction of sales by Sheriff, under defendants' execution against J., of three billiard tables claimed by plaintiff under a private writing, which, after reciting the sale to J. by plaintiff, of the billiard tables, says, "it is further understood by the parties that these billiard tables will be the property of *B. Antognini*, until the payment of those notes" (the price.) *By the Court;* This private writing had no date as to third persons—at least no date prior to that of its filing in this suit—and the plaintiff should have proved not only the signature of the document, but that it was made at the date which it bears. The defendants had acquired a lien upon these billiard tables, by their seizure before this suit was brought. *Antognini* v. *Railey*, 275.

2. The plaintiff, as vendor, had no right to enjoin the Sheriff's sale. He had only the right to claim the price, in virtue of the privilege of vendor, by third opposition. *Ibid.*

3. No privilege is granted by law to one who furnished feed for the horses of a keeper of a line of omnibuses employed on such line. *Whipple* v *Hertzberger*, 475.

4. The seizure and even the sale of property does not deprive the vendor of his privilege, so long as the property, or its proceeds, are in the hands of the Sheriff, syndic, administrator, etc., and the property has not been sold confusedly with a mass of other things belonging to the vendee. C. C 3195. *Ibid.*

5. Legal charges and wages of the captain and crew of a vessel are superior in rank of privilege to the claim for repairs of the boat. C. C., Art. 3204. *Fields* v. *His Creditors*, 545.

6. A contractor with the owner of a boat for the repairs, after repairing it, voluntarily delivered it to the Syndic of the owner who since the contract had gone into insolvency. *Held*, that this was an abandonment of the contractor's right to detain the boat until the debt due for repairs should be paid, and that he must look to his privilege alone. C. C. 3204, C. P. 888, 890. *Ibid.*

7. E. constructed buildings for B. under a contract which was duly recorded. Afterwards S., G & Co. purchased the property and buildings at Sheriff's

PRIVILEGES (*Continued.*)

sale; E. drew a draft in favor of Mrs. S. on B., which was accepted by B. in consideration of the amount due for the buildings. Mrs. S. sued E. and B. on the draft and claimed a privilege on the buildings; S., G. & Co., intervened. *Held:* E. had the right to claim from B. the amount due him for constructing the buildings, independent of the draft, and therefore no subrogation was necessary by payment of the draft or otherwise to enable E. to assert any rights which he might have asserted, had no such draft been given. There was no novation of the debt and no payment. E's rights against B's vendee were those of a mortgage creditor against property in the hands of a third person. Mrs. S. was entitled to judgment against B. and E. on the draft, but without privilege; E. to judgment against S., G. & Co., and with privilege.

Swain v *Barrow et al.*, 547.

See HOMESTEAD ACT—*Succession of Aaron*, 671.
Succession of Balzaretti, 674.
See SHIPS AND SHIPPING—*Wickham* v. *Levistones*, 702.

PROHIBITION.

1. In cases in which a party has an adequate remedy by appeal, this court will not listen to an application for a writ of prohibition.

State v. *Judge of Fourth District Court*, 696.

PUBLIC LANDS.

1. The claim of C. to a tract of land was confirmed. Plaintiff employed at his own expense, and without the knowledge of the heirs of C., a surveyor to locate the claim confirmed to C. on other land, and entered the C. tract as subject to private entry, and obtained his patent therefor. The defendant, who claimed under C.'s title, was quieted in his possession by final judgment of the Supreme Court. *Davis* v. *Fletcher*, 506

2. A perfect Spanish grant and survey made by order of the court, wherein the old lines are ascertained in conformity to the grant, and confirmed by the Act of Congress of 3d March, 1819, is valid and conclusive against a preëmption certificate and patent from the United States, as respects the lands embraced in the grant, although the portion of said land embraced in the patent may have been returned as vacant by an officer of the United States. In such case a survey made by officers of the United States are not conclusive evidence of the boundaries of the tract described in the Spanish grant, and courts are at liberty to receive other testimony in relation thereto, and if superior, to decide in favor of such evidence. The rule is different as to imperfect, and other titles emanating from the government of the United States. The approved surveys in such cases are generally, if not always, conclusive. *Fowler* v. *Duval*, 561.

3. A part of the internal improvement lands granted to this State by Act of Congress of September 4, 1841, were located by agents of the State, and for the sale of the unlocated lands an office was created by Act of the Legislature of 1844, the Register and Receiver being authorized to issue warrants for such lands. Under this Act and that of 1847, purchasers of these land warrants become the agents of the State, for the location of so much of the internal improvement lands as was indicated by the warrant. *Hood* v. *Martin*, 552.

PUBLIC LANDS (*Continued.*)

4. The patent issued, pursuant to the approval of such location, could only issue in favor of the person holding the warrant under which the location was made. It cannot be supposed that the Legislature intended to confer upon the Governor the power to grant a patent to any other person than him to whom the State had sold the warrant. *Ibid.*

RAILROADS.

1. The Pontchartrain Railroad Company was incorporated in 1830, with the exclusive privilege of "constructing and using a railroad, or railway, leading to and from the city of New Orleans, its faubourgs, and the incorporated limits thereof, to and from Lake Pontchartrain," etc. In 1833 the New Orleans and Carrollton Railroad Company was incorporated for the construction of a railroad from New Orleans to Carrollton. In 1840 the Jefferson and Lake Pontchartrain Railway Company was incorporated for the construction of a railroad from Carrollton to Lake Pontchartrain. The two last named companies entered into an arrangement by which "through" trains were run from New Orleans to the Lake. The first named company (the plaintiffs) sued out an injunction against the defendants, and asked for damages, because of the alleged violation of the exclusive privilege granted to plaintiffs. *By the Court:* A railroad from New Orleans direct to the terminus of the Jefferson and Lake Pontchartrain Railroad at the Lake would have been an infringment of the privileges granted to the plaintiffs by the act of incorporation. Does the connection of the two points, by means of the union of the two roads by a circuitous route, change the character of the Act. Here we think a distinction must be taken. If the object of the two companies was, in good faith, to accommodate different lines of travel and trade, and not to engross the same travel and trade which would naturally pass over plaintiff's road, it would doubtless be lawful, although occasionally a person might use first one road and then the other to arrive at the lake or city. For it is not so much the motives of the traveling public with which we have to do as it is the motives of the two companies. But if the union of the two roads was made for the purpose of transporting freight or passengers to and from the prohibited points, it is difficult to see on what ground the Act can be maintained. The Legislature could no more grant this power to two or more companies than it could grant the same to one.

Pontchartrain R. R. v. *N. O. & Carrollton R. R. et al.* 253.

2. Neither of the Acts incorporating defendants is unconstitutional in itself, because their roads were not within the prohibited points. But the moment they, by their union, connect these points by railroad, their act becomes unconstitutional (so far as it concerns the direct travel between the two points) as much so as would have been a single Act of incorporation and railroad for the like purpose. *Ibid.*

2. Parol evidence which does not contradict anything in the written proceedings of a corporation is admissible to explain omissions in its proceedings. *V., S. & Texas R. R. Co.* v. *Parish of Ouachita*, 649.

3. Giving full weight to the ordinance of the Police Jury of the parish of

RAILROADS (*Continued.*)

Ouachita, of June 27, 1853, as an ordinance legally adopted, its adoption cannot be considered as constituting *per se* a subscription to the capital stock of plaintiff. *Ibid.*

4. The Act of 13th of March, 1852, which authorizes Police Juries to subscribe to works of internal improvement, while it required the Police Jury subscribing, to insert in the ordinance the number and amount of shares proposed to be subscribed, and the provision by taxation for the payment of the subscription, does not inhibit the insertion of such other clauses and conditions as the Police Jury may think expedient. The ordinance as adopted by the jury, is its proposition to contract, and the corporation to whom this proposition is made must accept it according to its terms and conditions, or else there is no contract. *Ibid.*

5. The Act relative to Police Juries approved 9th of April, 1847, provided that a "vote of all the members elect of Police Juries shall be required to levy any parish tax or to make any appropriation." There is nothing in the Act of the 12th of March, 1852, which is inconsistent with that of 1847, in this particular. *Ibid.*

See TAXES—*Parker* v. *Scogin*, 629.

RECORDER OF MORTGAGES.

1. An interpretation of a statute which must lead to consequences mischievous and absurd is inadmissible, if the statute is susceptible of another interpretation whereby such consequences may be avoided. The legislative intention must be honestly sought after and faithfully executed, if not in conflict with a paramount law. And in cases like this, the meaning must be sought, not merely in the words of the statute itself, but in its subject matter, in the history of the legislation thereupon, in the purpose of the law, the reason of its enactment, and the evil it sought to remedy. *State* v. *Wiltz*, 439.

2. The subject matter of the Act of 14th March, 1855, ("an Act creating a Recorder of Mortgages for the parish of Orleans,") is not the erection of a new office. It seems to imply the recognition of an existing office, whose duties are well known. It does not purport to extinguish that office, and to substitute a new and different one. It provides for the mode of appointing an incumbent to fill it at stated intervals, for the mode of giving his bond, and for the appointment of his deputy, whose duties are to be commensurate with his own, but for whose acts he and his sureties are to be responsible. All these sections relate to the officer, not to the office; the office exists independent of the statute; and these simple provisions about the incumbent constitute its whole subject matter. *Ibid.*

3. The statute in question is in fact but a grouping together in one act of parts of three pre-existing laws, with very slight changes of phraseology, and no change whatever of substance. By it the Legislature has merely said "here is a condensed statement of all the law now in force relative to the mode of appointment, term of service, amount and condition of the bond, and appointment, duties of and responsibility of a deputy of the Recorder of Mortgages for the parish of Orleans: all else, *upon these specified matters*, is repealed. *Ibid.*

RECORDER OF MORTGAGES (*Continued.*)

4. It cannot fairly be inferred that an ancient office was thereby abolished, and a new one created. The literal terms of the statute do not seem to require such a construction; its history, subject matter and purpose alike forbid it. *Ibid.*

6. A person holding an existing office under a fixed tenure cannot be removed, or his regular term of service abridged by an ordinary act of legislation, other than an Act abolishing the office. *The mode of removing officers is prescribed by the Constitution.* *Ibid.*

7. While the history of the legislation, and the circumstances under which the statute was enacted may be inquired into, as furnishing aids to its interpretation, still the plain and unequivocal meaning, according to its received acceptation, of the language in which an Act is expressed, should not be overlooked. LEA, J., dissenting. *Ibid.*

8. Under the Constitution unless the object of a law is expressed in its title, the law is absolutely void; indeed nothing else can be lawfully included in it; if therefore, the object or intention of the law-giver is not made clear by the other parts of the Act; it must be determined with absolute certainty by a reference to its title. LEA, J., dissenting. *Ibid.*

9. The object of the statute in question is *expressed in its title;* that title is "an Act *creating* a Record of Mortgages for the parish of Orleans." The statute created anew the office of Recorder of Mortgages, and authorized the appointment of a new office. LEA, J., dissenting. *Ibid.*

REDHIBITION.

1. Action of redhibition may be prosecuted against an absent defendant by attachment, where the plaintiff alleges that she made a tender of the slaves, and demanded a rescission. In such a proceeding the defendant is properly represented by a curator *ad hoc*, and service of citation is regularly made by posting on the door of the court house. *McCall* v. *Henderson*, 209.

2. *By the Court:* The third objection is, that the person signing the attachment bond was not authorized to sign the same. We agree with the defendants' counsel that the filing of a power of attorney under private signature, at the trial of the exception, is not proof of its existence at the suing out of the attachment, though it purports to bear the same date. But we find that the party signing the bond was examined as a witness. The objection and testimony seem to have been submitted to the jury, and we cannot say they erred in their conclusion. *Ibid.*

3. Suit to rescind sale of slaves. Judgment for plaintiffs and damages allowed. *Dixon* v. *Chadwick*, 215.

4. Want of tender under the circumstances of this case, is a fatal obstacle to plaintiffs' recovery. SPOFFORD, J., dissenting. *Ibid.*

5. The well established rule requiring a tender where the tender is not impossible, nor even inconvenient, results from the general doctrine of commutative contracts, and affords a salutary check against fraud, concealment, and the after thoughts of self-interest. The vendor, warned in time, may take back his property and by attention save it. The ven-

REDHIBITION (*Continued.*)

dee, who, having discovered a redhibitory defect, neglects to notify the vendor by an offer to restore the thing, seems to take the risk of its perishing from that cause upon himself. SPOFFORD, J., dissenting. *Ibid.*

6. A disease, to be the basis of a redhibitory action, must be such as would have baffled the efforts of regular medical aid promptly administered. *McLellan et al.* v. *Williams*, 721.

7. When it was not ascertained of what disease the slave died, or what was the cause of his death, and he received no medical treatment, it is impossible to say that he died of an incurable disease. *Ibid.*

8. The vendor does not take the risk of the service in which the slave may be employed. He does not warrant that the slave will not be attacked by disease within the time limited, nor that the slave will resist the disease without the aid of medicine or of medical art. He does warrant against the existence of any incurable disease, but until a sufficient test of incurability is supplied by the vendee, his warranty is not broken. *Ibid.*

9. Plaintiff sued for the rescission of the sale of a slave, and for restitution of the price paid the defendant, on the ground that the slave was afflicted with a redhibitory disease, to wit, fits. The slave was tendered to the defendants, and disappeared the following morning, and could not be found. *Held:* The rule embodied in Art. 2511 C. C. is but the embodiment in the Code of the maxim *res perit domino.* Until the thing is shown to have perished, the presumption exists that it may be recovered, and that there is still a property in the thing which may be divested by the rescission. *Nixon* v. *Boxeman et al.*, 750.

10. There is no force in the objection, that because plaintiffs has alleged one ground of redhibition, he shall not be permitted to show his inability to deliver the slave to the defendant, on account of defects, in the nature of a second ground of redhibition. By the force of the judgment rescinding the sale, the property in the slave, wheresoever he may be, is in the defendant. *Ibid.*

REGISTRY.

1. Where the affidavit of the subscribing witness, upon which the act under private signature was admitted to record, stated that the affiant was present when the act was executed, and saw the parties sign the same, it was a substantial compliance with Art. 2250 C. C. It is the recording of the title in the proper office which is notice to third parties, and not the testimony upon which the instrument was admitted to record. *Boykin* v. *Wright*, 531.

RES JUDICATA.

1. The judgment against the principal debtor has not the force and effect of the thing adjudged against the surety. It is *prima facie* evidence against him, but the surety is at liberty to show errors and mistakes in the judgment, as well as to show that it was obtained by fraud. *Fuselier* v. *Rabineau*, 393.

RES JUDICATA (*Continued.*)

2. A judgment homologating an administrator's account and discharging the administrator, rendered upon publications made pursuant to Art. 1172 of the C. C., is not *res judicata* as to the heirs. The form of notice prescribed by that Article is meant merely for creditors. The heirs should have been cited. *Truxillo v. Truxillo*, 412.

3. Parties to a judgment homologating a tableau of distribution cannot sustain an action against one who was also a party, to recover the amount decreed to him as legatee, on account of his incapacity to receive the legacy. *Girod* v. *Crossman*, 497.

4. A judgment confessed by the president of the police jury, is *res adjudicata* against each individual tax payer.

Parker et al. v. *Scogin et al.*, 629.

See INJUNCTION—*Mock* v. *Garthwaite*, 287.

RESPITE.

1. The right to require security, conferred by Article 3060 of the Code on the creditor, who has not consented to the respite applied for by his debtor, etc., appears to be absolute, and the creditor is not limited to a period of time beyond which he is debarred from its exercise.

Hufty v. *His Creditors*, 26.

2. Where a debtor applies for a respite, and any of his creditors make opposition, and he is required to give security under Article 3060 of the Code, the opposing creditors must be made the obligees in the bond, and the bond should be for a sum sufficient to satisfy their claims.

Nichols v. *His Creditors*, 38.

3. An opposition to the proceedings of creditors granting a respite is not too late, if the proceedings have not been homologated, although ten days may have elapsed since they were regularly filed in court.

Nichols v. *His Creditors*, 447.

REVOCATORY ACTION.

1. Articles 1698 *et seq.* of the Code have no application to cases of mere simulation. They refer only to the mode of avoiding a real contract in fraud of creditors—that is, to the revocatory action proper.

Lucas v. *D'Aimond*, 168.

2. Article 1972 of the Code applies only to the revocatory action, and not to the action *en déclaration de simulation*. It is where the contract is serious, though fraudulent, that the decree must avoid it only as to the complaining creditor, and subjects the property to the payment of the plaintiff's debt, unless the vendee chooses to satisfy it himself. But where there is no contract the property may be declared to belong to the pretended vendor; and if the vendor be dead, it should be inventoried as the property of his succession. *Ibid.*

SALE.

1. An adjudication made by an auctioneer not in accordance with the instructions of the owner is null and void, both as to the owner and purchaser, the latter, however, being entitled to his recourse against the auctioneer.

Bodin v. *McCloskey*, 46.

SALE (*Continued.*)

2. The laws requiring transfers of immovables to be in writing, would be vain and illusory, if the thing sold were not required to be described in writing. In forced sales, especially, it is necessary for the description to be such as to warn the public what is intended to be sold; that the purchaser may be able to identify the object of his purchase, and that the property of the original owner may not be sacrificed by a sale in the dark.

Dodeman v. *Barrow*, 87.

3. The adjudication by the State Treasurer of "six arpents, more or less, in the parish of Assumption," unaccompanied by a delivery of possession, did not convey a legal title to the specific land claimed in this action.

Ibid.

4. The monition law cannot cure such a substantial defect as this. *Ibid.*

5. In a sale it is essential that the price should be certain, that is to say, fixed and determined between the parties, either by themselves, or by the intervention of a third person; otherwise there exists no sale.

Wise v. *Guthrie*, 91.

6. A cotton plantation was sold, subject to an unexpired lease. Before the lease expired, the cotton gin was burnt. *Held:* that the vendor was not liable for the deterioration in the value of the plantation caused by the fire, which was the result of the carelessnesss and negligence of the lessee. The lessee was not the mandatary of the vendor. He was a third person, who had rights which neither the vendor nor vendee could disturb.

King v. *Hall*, 95.

7. The pendency of a suit by a third person for the land, however unfounded it may be, perhaps justifies the purchaser, according to the letter of Article 2535 of the Code, in requiring security from the holder of the note given for the land, which, by the terms of the instrument, is subject to all the equities between the original parties. *Fellows & Co.* v. *Carson*, 121.

8. In all cases where the thing sold remains in possession of the seller, it is to be presumed that the sale is simulated; and with respect to third persons, the parties are bound to show its verity. C. C., 2456.

Griffith v. *Frellsen & Co.*, 163.

9. It is where the purchaser is evicted on the ground that the thing adjudged to him belongs to another person than the party in whose hands it was taken, that he is left to his recourse for reimbursement against the seized debtor and seizing creditor. But where the seized debtor himself seeks to rescind the sale on account of informality, equity requires that he should make the *bona fide* purchaser whole before he evicts him.

Webb v. *Coons*, 252.

10. In a suit to rescind the sale of a slave, it is no defence that a tender has not been made, where the tender is impossible. *George* v. *Greenwood*, 209.

11. A vendee has no claim against his vendor for the reimbursement of expenses incurred in defending a title which was set aside for fraud, of which the vendee not only had knowledge, but in which he participated.

Girod v *Pargoud*, 329.

12. Defendant, the highest bidder at an auction sale of property belonging to the succession, refused to comply with the terms of adjudication. Th

SALE (*Continued.*)

property was regularly resold, and there was a loss. This suit was brought for the difference of price between the first and second sale. *By the Court:* The petition states that the property was adjudicated to *Robert Howes* at the first auction sale for the sum of five thousand dollars, *all of which will more fully appear by reference to the proces verbal of sale, hereto annexed for greater certainty.* But the *proces verbal* states that the property was adjudicated to *Robert Howes for the minor children of John Foulkes*, and this is confirmed by the evidence of the auctioneer, who produced on the trial the card handed to him at the time of adjudication with the name of the purchaser written on it, as follows: "*Tutor Robert Howes*, for minor children of *John Foulks.*" This is a variation between the *allegata* and *probata*, which in so rigorous a proceeding as that upon a *folle enchère*, is fatal to the action. *Foulks* v. *Howes*, 448.

13. In order to extend the operation of Article 2593 of the Code, to the granting of damages against the party who has made the bid in the name of another, there should be bad faith on the part of the bidder, or at least a want of that care which a good father of family would have used. *Ibid.*

14. The Supreme Court having decided both ways as to the rights of the defendant to make a bid for the minors without the previous consent of a family meeting, it seems unreasonable to hold the defendant liable for error of law as to his right so to bid. *Ibid.*

15. It having been irrevocably determined that the *folle enchère* was valid, it follows, as an irresistible sequence of that judgment, that defendant is liable under Articles 2589 and 2593 of the Code. SPOFFORD, J., dissenting, with whom concurred LEA, J. *Ibid.*

16. There is no fatal discrepancy between the *allegata* and *probata*. The *proces verbal* itself was annexed to the petition, and specially referred to in it for greater certainty. The liability of defendant is personal under Article 3893, for the very reason that he caused the adjudication to be made to him as tutor without sufficient authority to bind the minors. By legal intendment the adjudication was made to him personally. SPOFFORD, J., dissenting, with whome concured LEA, J. *Ibid.*

17. Neither error of law, nor the absence of bad faith can release the defendant and oblige the succession to lose the money. This is not an action in damages for a tort, where malice must be proved although even then, ignorance of the law, however obscure and uncertain it may be, has not been held to constitute an excuse. The substance of this action is to recover the damages, liquidated by the law itself, for the breach of a contract. SPOFFORD, J., dissenting, with whom concurred LEA, J. *Ibid.*

18. L., a member of the firm of S. P. & Co., pledged to B. 300 shares of Union Bank stock. *Pickersgill* obtained judgment against S. P. & Co., and seized and sold the stock. B. bought it by his agent. The agent refused to comply with the terms of adjudication, and gave his written consent to let the Sheriff resell. S. G. & Co. purchased it at the second

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SALE (*Continued.*)

sale; but, as the bank refused to transfer the stock, the Sheriff returned the writ, "nothing realized." After the sale, B. filed his third opposition in the suit of *Pickersgill* v. *S. P. & Co.*, claiming the proceeds under his act of pledge. He obtained judgment, which was appealed and affirmed. S. G. & Co. tendered the price of their bid to the Sheriff, and demanded the transfer. B. sued the bank for the dividends, and to have the stock transferred to him. The bank called S. G. & Co. in warranty. *Held:* First. That the letter of B.'s agent consenting to the resale of the stock, was a waiver by him of all objections to the sale, and the adjudication to S. G. & Co. was legal. *Brown* v. *Union Bank*, 543.

19. Second. The stock being so adjudicated, could not be divested from S. G. & Co. without a neglect or refusal to comply with the terms of the sale. The fact that they held the money in their hands while the opposition was pending, could not be construed into such refusal. It was not their fault that the bank refused to transfer the stock to them, and the Sheriff's return of the writ did not affect the title; the *mere act of adjudication* invested the purchasers with title—and the writ having performed its office, its return was a matter of course. *Ibid.*

20. A sale will not be set aside on the ground that it was made in fraud of creditors, by one in insolvent circumstances, where it was made openly, for a fair value, and with the knowledge of several of the creditors, although the sale was of the vendor's entire stock of goods.
Wright & Co. v. *Hogan et al.*, 563.

21. To authorize a tutor to purchase property for the benefit of the minors under his charge, he must obtain the advice of a family meeting *before the purchase.* And where he bids in property without such advice, the executrix, who caused the property to be sold, is not bound to wait till the tutor convene a family meeting, to approve of his purchase, but on failure of the tutor to comply with his bid, she may at once put up the property again for sale. C. C. 2589. *Succession of Foulkes*, 593.

22. A purchaser who holds an unliquidated demand, secured by a tacit mortgage on property sold at private sale, has no right to withhold the price of his bid and delay the adjudication until his claims can be liquidated by a court. *Ibid.*

23. Construction of a written instrument purporting to transfer title to slaves, executed in Mississippi, contains the following clause: "The condition of the above bill of sale is such that, whereas, the said *Ichabod Kelly* has paid and furnished the said *Vincent Singleton* divers sums of money which, when fully paid by the said *Singleton* to the said *Kelly*, will render this bill of sale null and void; and, provided, further, that should the said *Singleton* die without refunding said *Kelly* said sum of money, then and in that case, the said *Ichabod Kelly*, his heirs or assigns, is hereby and forever exonerated from any further liability for any further sum or sums of money to the said *Vincent B. Singleton*, his heirs or assigns. But that the absolute right and title of said negroes shall fully vest in the said *Ichabod Kelly*, his heirs and assigns forever." *Held:* That it is, to all intents and purposes, an act of sale defeasible

SALE (*Continued.*)

upon the performance of certain acts by the grantor in his lifetime. Even were it to be considered in the nature of a mortgage, it would have conveyed the legal title under the law of the place where the contract was made. And before the mortgagor could have exercised his equity of redemption, he would have been obliged to tender a full discharge of the debt for which the security was given.

Heirs of Singleton v. *Kelly, tutrix*, 647.

24. The instrument is a deed of trust to secure the payment of a sum of money. MERRICK, C. J., dissenting. *Ibid.*

25. Where there is no price there is no sale.

Fort v. *Union Bank of Louisiana*, 708.

26. A purchaser, at a Sheriff's sale, made without a previous seizure, acquires nothing, at least as against a third party in possession.

Williams v. *Clark*, 761.

27. The defendant purchased the land in controversy, at a public sale provoked by him to enforce a mortgage, in his favor, resting on it. The plaintiff, claiming the land by a deed from the mortgagor, which was executed subsequent to the mortgage, but anterior to the public sale to defendant, yet not registered until afterwards, instituted a petitory action and sought to rescind the sale to defendant for various alleged defects and vices. *Held:* That it is doubtful, under the facts of the case, whether plaintiff can inquire into the regularity or good faith of the proceedings under which defendant acquired title. The mortgagor was the proper party to attack the order of seizure and sale by a direct action, and that, conceding plaintiff could impeach defendant's title, he had not laid a foundation for doing so in his petition, having alleged no tender to defendant of the mortgage debt which burdened the land, and which was only discharged by the sale, which he sought to treat as a nullity. *Taylor* v. *Huey 3d et al.*, 614.

See SIMULATION—*Dupuy* v. *Dupont*, 226.
See LEASE, &c—*Bartels* v. *Their Creditors*, 433.

SALE JUDICIAL.

See ESTOPPEL—*Union Bank* v. *Bermudez*, 84.
See MINORS—*Succession of Coleman*, 109.
See LEASE, &c.—*Bartels* v. *Their Creditors*, 433.

SEIZURE AND SALE.

1. An appeal lies from an order of seizure and sale based upon an authentic act importing a confession of judgment. *Mathe* v. *McCrystal*, 4.

2. A note was executed by M. to his own order, and by him endorsed in blank, secured by mortgage in favor of C., *or any holder* of the note. *By the Court:* There was no matter *in pais* to be proved. The execution of the note, its endorsement in blank, and the act of mortgage, importing a confession of judgment in favor of the holder of the note, were all proved by authentic evidence. The exhibition of the note and mortgage by the plaintiff, identified him as the holder, who, by the terms of the contract, was entitled to the order of seizure and sale.

Ibid.

SEIZURE AND SALE (*Continued.*)

3. An authentic act identifying a note with the mortgage to secure it, which recites that B. mortgages &c. to C. and M., *or any holder of said note*, and further shows the note to be endorsed in blank by the payee, will entitle the holder, on this proof alone, to an order of seizure and sale.

Race & Foster v. *Rruen*, 34.

4. The subsequent endorsement of the note in blank by another—which is a matter *in pais*—could not affect plaintiff's right to executory process, as such endorsement could be stricken out—possession of the note being sufficient to identify them as holders and owners. *Ibid.*

SEQUESTRATION.

1. The makers of a note caused it to be sequestered, and prayed for its restitution, &c., on the ground of error and fraud. The sequestration was afterward set aside, and a judgment on the note obtained against them. Pending the litigation, the makers of the note became insolvent, and after execution against them returned *nulla bona*, this suit against the sureties on the sequestration bond was brought. *Held:* Plaintiff could not have maintained an action on the note pending the litigation for its restitution, the sequestration being merely a conservatory act.

Horne v. *Belcher*, 321.

2. The sequestration had the effect not only of suspending the payment of the note, but of placing it beyond the reach of commerce. *Ibid.*

3. Certain slaves were sequestered and bonded by intervenors, on the written consent of plaintiff's counsel that the slaves should be delivered to intervenors, "they having given bond for said negroes as co-administrators, the plaintiff being satisfied that the negroes would be forth-coming at the termination of the suit." A second writ of sequestration was granted for the reasons set forth in the first application and on motion it was dismissed. *Held:* The second sequestration was properly dismissed—because, by the bond on file which the plaintiff approved, the property sequestered had been released, and no additional grounds had been shown to authorize the subsequent seizure of the same property.

Levi v. *Penny*, 539.

See PRINCIPAL AND SURETY—*Clapp* v. *Seibrecht*, 528.

SHERIFF.

1. The fact that the Sheriff's wife has a law suit (to which he is a necessary party) pending before the court for which a jury is to be drawn, does not disqualify or exempt the Sheriff from performing the ministerial duties imposed upon him by the Act "relative to juries," approved March 14, 1855; nor does the fact that he has performed those duties furnish good cause for a challenge to the array by the party opposed to his wife, when a jury thus drawn is called to try her case.

The State v. *Cooley, J.*, 79.

2. The Sheriff was not disqualified to summon the jurors for the term, after they were drawn according to law; nor does the fact that he summoned them furnish ground for challenge to the array. *Ibid.*

SHERIFF (*Continued.*)

8. The Code of Practice, Articles 496-7, made it the duty of the Clerk to draw the names of the jurors from the box, for the trial of a particular cause, and although, by the Act of 27th of April, 1826, this is no longer necessary, it may furnish a guide for the present case. *Ibid.*

4. It would not be becoming in this case for the Sheriff to attend personally upon the jury during their deliberations. *Ibid.*

5. Where there is no qualified Coroner, the Act of 9th March, 1855, section 1st, furnishes a mode by which the vacancy may be speedily filled. *Ibid.*

6. *By the Court:* We would not be supposed to intimate that a cause must be utterly suspended when the Sheriff and Coroner are both disqualified to perform ministerial duties in a particular case. *Ibid.*

7. Damages against Sheriff for failure to return *fi. fa.* within the legal delay. *Brand* v. *Johnson*, 273.

8. The alleged insolvency of defendant in execution, will not excuse the Sheriff from calling on plaintiff to point out property, as required by C. P. 726, 727. *Ibid.*

9. The address for the removal of *Hufty* from the office of Sheriff of the parish of Orleans was presented to the Governor, and approved by him. His official approval and signature consummated the removal. *Bell* v. *Hufty*, 303.

10. Article 97 of the Constitution is in these words: "All civil officers, except the Governor and Judges of the Supreme and inferior Courts, shall be removable by an address of a majority of both Houses, except those the removal of whom has been otherwise provided by this Constitution." Accurately speaking, the Constitution itself nowhere else provides a mode of removing Sheriffs. *Ibid.*

11. Article 89 allows the impeachment and the prosecution of Sheriffs. But the power of impeachment, or prosecution for misdemeanor in office, which, in case of conviction, involves a removal from office as an incident, and the power of removal without impeachment, or prosecution, are concurrent powers, both of which are clearly recognized by the Constitution, and neither of which excludes the other. *Ibid.*

12. The theory of our representative Governments is, that offices are created not for individual emolument, but for the public good. And the object of the Constitution was to provide not only for the punishment of official delinquents, which would involve the dismissal from office, but also a mode of removing civil officers, against whom no accusation of crime could be made, or sustained, whenever the public good should require such removal. *Ibid.*

13. It would be rebellion in a judge to say that a plain and unqualified grant of power, given by the Constitution to a particular department of the Government, was null because he thought it was against common right. *Ibid.*

14. It is hardly tenable to say that a man can have a "vested right" to any public office under our form of government. Certainly it cannot be

SHERIFF (*Continued.*)

said of a Sheriff, when, in the language of the 80th Article of the Constitution, the very tenure of the office is, that he shall hold it "for the term of two years, *unless sooner removed.*" *Ibid.*

15. The power of removing an officer upon address of the two Houses is not a judicial power, but is essentially administrative, and therefore not within the prohibition of Article 2 of the Constitution, which provides that "no one of these departments, [legislative, executive and judiciary] nor any person holding office in any one of them, shall exercise power properly belonging to either of the others." But even if this power of removal did somewhat partake of a judicial character, its exercise would not, on that account, be void, for it is protected by the concluding words of the same Article 2: "No one of these departments, nor any person holding office in one of them, shall exercise power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted.*" *Ibid.*

16. The verdict of the jury in favor of *Hufty*, in the contested election between *Bell* and *Hufty*, was not a bar to the removal of *Hufty* by the Legislature. The question before the court was: Shall *Hufty* receive a commission? The question before the Legislature was: Shall *Hufty* be removed from office? In the one case there were two parties, each urging that he could count the greater number of votes in his favor. In the other case there were no parties, but a mere act of administration. The judgment in favor of *Hufty* has been enforced. *Hufty* has been placed in possession of the Sheriffalty. *Ibid.*

17. The reasons assigned in the preamble to the address for the removal of *Hufty*, whatever they may be, cannot vitiate the act of removal, which act was within the constitutional competency of the Legislature, uncontrolled by any superior power. With their reasons, whether good, bad, or indifferent, the judiciary have nothing to do. *Ibid.*

18. While the Legislature has power to remove a Sheriff by address, *proprio motu*, without any accusation preferred by memorial against him, yet Article 97 of the Constitution does not authorize the Legislature to hear evidence upon, and decide judicially, the legality or validity of an election of Sheriff. BUCHANAN, J., dissenting. *Ibid.*

19. Unless the reasons assigned by the Legislature exhibit an unconstitutional exercise of power, they could not be examined judicially. BUCHANAN, J., dissenting. *Ibid.*

20. The exercise of judicial power by the Legislature is unconstitutional, except in the instances expressly directed or permitted in the Constitution. BUCHANAN, J., dissenting. *Ibid.*

21. The identical specifications upon which the relator had contested the election of *Hufty* before a tribunal, the decision of which was final, are the very grounds set forth in the address for the removal of *Hufty*. The address is thus an interference with the legal course of proceedings of the regularly constituted judiciary of the State, and an appellate jurisdiction claimed and exercised by the Legislature. BUCHANAN, J., dissenting. *Ibid.*

SHERIFF (*Continued.*)

23. The obligations of the sureties on the Sheriff's bond, held not to be effected by the erasure of the unmeaning phrase "for a like sum," nor by the interlineation of the names of the last two sureties.
The State v. *Dunn*, 549.

24. The date of such instrument not being of the essence of it, a change of the date, so as to correspond with the date of its acceptance by the parish officers, could not invalidate it. *Ibid.*

25. The sureties on such bond may recede before they have been accepted, and until they give notice of their wish to recede, they may be accepted. After an acceptance the contract was perfect, and no party could retract. *Ibid.*

26. The addition of two other sureties separately bound, could not affect the liability of the first eight, who continued to be severally bound, each for the sum and upon the conditions he had specified, and no others. *Ibid.*

26. Where a Sheriff, by failure to give bond as Sheriff within the time prescribed by law, had thereby forfeited his capacity as Tax Collector, and afterwards he executes a bond as Sheriff with sureties and is made Collector of Taxes by appointment of the Recorder of the parish—*Held:* That the sureties were bound to know that he had forfeited his right as Tax Collector at the time of the execution of his bond, and that he could only be restored by the Recorder's appointment, and were not therefore discharged. *Ibid.*

27. A defaulting Sheriff may be appointed Tax Collector after exhibiting a discharge from the proper officer of the State. *Ibid.*

28. Sureties on a Sheriff's bond cannot be permitted to plead ignorance of a defalcation of the Sheriff at the time they signed the bond. The records of the Auditor's and Treasurer's office are open to the public, and they might have inquired into the state of his account. It was not the duty of the Auditor and Treasurer, who were neither parties nor privies to the bond, to hunt up the sureties and serve them with a copy of the Sheriff's account. *Ibid.*

29. In this contract with the sureties there was no warranty by the State that the Sheriff was not a defaulter; and an act of the Legislature extending to the Sheriff time of payment, is no fraud on the sureties, who only guaranty his future fidelity. Code, 3006. *Ibid.*

30. The objection that a Sheriff's bond was not executed until more than thirty days after the Sheriff's commission, and that it was not approved until some months after, and that it was not recorded by the Recorder in the separate book kept for its registry, but there being no such book, that it was recorded in another book, cannot avail the sureties in seeking to avoid liability. *State* v. *Bradly, Administrator, et al.*, 643.

31. The amount of taxes, which it is shown could not have been collected, will be allowed as a credit to an action against the sureties on a Sheriff's bond. *Ibid.*

32. Money deposited by a Sheriff in his official cacity is not liable to seizure in execution at the suit of his individual creditors.
Folger v. *Marigny et als.*, 727.

SHIPS AND SHIPPING.

1. In steamboat navigation on our rivers, where the trip, as from St. Louis to this city, is made in seven or eight days, and sometimes less, the owner of a boat would not be justified, even where there were warehouses, to detain a cargo a month or six weeks in order to make the necessary repairs, and continue the voyage.

Roe v. *Crescent Insurance Company*, 408.

2. As between the shipper and the master, the legal presumption arises from the bill of lading, that the goods were in good condition, but such presumption cannot affect third persons.

Brousseau v. *Ship Hudson*, 427

3. When a person receives a shipment of cotton, and gives a bill of lading in the ordinary form, he becomes liable as a common carrier.

Lengsfield v. *Jones*, 624.

4. The fact that plaintiff inspected the boats before the shipment does not exempt the carrier from liability for a loss occasioned by the unseaworthyness of the vessel. *Ibid.*

5. Ships and vessels are classed, by Art. 3253 C. C., among the objects susceptible of mortgage, but this is modified by Art. 3272, which declares that hypothecations of ships and other vessels are made according to the laws and usages of commerce. *Wickham* v. *Levistones*, 702.

6. The only privilege which exists on vessels, are those which are expressly recognized and enumerated in the Code, Art. 3152. The extreme term of the duration of privileges on steamers, when engaged in making voyages between this port and those of other States, is sixty days. *Ibid.*

7. Where the owner of a vessel makes a contract, by which he stipulates, in consideration of advances to be made by the other party, to give him the entire management and control of the vessel, with the right and authority to employ all the officers and crew necessary to navigate it, and to hold the vessel as security until the reimbursement of the whole amount of said advances, &c. *Held:* That such a contract cannot be construed as having the effect of a pledge on the vessel, nor can it be looked upon as creating a privilege on the vessel or its proceeds. Such a claim not being recognized as a privilege in Art. 3204 C. C. *Ibid.*

SIMULATION.

1. A simulated sale made by a father to a daughter and her husband, which is really a donation in disguise to the daughter, is without any more effect than if made to the daughter alone. *Dupuy* v. *Dupont*, 226.

2. The rule that simulated contracts of a father when attacked by his forced heirs are only to be set aside in so far as they impair the *légitime* of the heirs, does not seem to apply to the case of a simulated sale of land or slaves to a favorite child. Code 2419, 1305–6–7–8–9–10, 1326, 1488. *Ibid.*

3. The action *en declaration de simulation* may be instituted by the parties to the act, and their heirs and legal representatives, as well as by third persons, with this distinction, however, that the latter are allowed to have recourse to parol evidence to contradict the authentic act, whilst the for-

SIMULATION (*Continued.*)

mer are precluded from the exercise of this right. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

4. Heirs, except when suing to recover their *légitime*, stand in the same situation and enjoy the same and no other rights than those which were held by their ancestor. But when they sue for the recovery of their *légitime* they are considered as third persons, or creditors. This difference is the result of the recognized distinction between the general rights of heirs and their rights to the *légitime*, the one being derived from the ancestor, and the other from the law. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

5. The presumption of simulation established by Article 2456 of the Code is inoperative with respect to the parties to the act, and therefore to the heirs, in a case where the heirs derive their rights from the ancestor, a party to the act. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

6. An *indirect* donation is based upon a real contract, and is an advantage conferred upon the other contracting party under color of a real contract for the whole, whilst a *disguised* donation, whether it assumes the form of a direct sale to the party to be benefited, or of a sale to an interposed person, is wholly a simulation. The *indirect* donation is, therefore, a real contract, with the exception of the advantage indirectly conferred; but the *disguised* donation is a simulated contract. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

7. The indirect, or disguised donation, clothed with the form of a sale, if made to a stranger, would be good as a donation, if there were no prejudice to the *légitime*, but should the *légitime* be impaired, it would be subject to reduction. When such an advantage is conferred upon a co-heir, it is not only subject to reduction, but, in the cases pointed out by law, may be liable to collation. Where, however, such advantages are conferred upon incapable persons by a disguised donation, they are absolutely null, while by an indirect donation, they are simply reducible. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

8. The allegation in plaintiff's petition, that the husband is an interposed person for the benefit of his wife, does not deserve serious consideration, because the act of sale was passed to both husband and wife. (VOORHIES, J. with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

9. At the date of the sale to the death of the vendor the parties lived in the same house, from which it must be inferred that delivery accompanied the act of sale, for it is well settled, that where a vendor and vendee live in the same house, possession follows title. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

10. The relationship between the parties does not of itself constitute a badge of fraud or simulation. (VOORHIES, J., with whom concurred BUCHANAN. J., dissenting) *Ibid.*

11. A suit to set aside a conveyance from the husband to the wife, on the ground of fraud and simulation, is not a revocatory action, but in effect an action *en declaration de simulation.* *Dunn* v. *Woodward*, 265

See *Carson* v. *Johnson*, 757.

SLAVES AND SLAVERY.

1. The emancipation of a slave by last will only takes effect after the formalities prescribed by Article 187 of the Code have been fulfilled; that is to say, after a declaration shall have been made to a competent court; after that declaration shall have been advertised; and after the oppositions, if any be made, shall be determined. The declaration of intention to emancipate is to be made by the executor, or by the heir of the testator. BUCHANAN and VOORHIES, JJ., and MERRICK C. J.

Henriette v. *Barnes*, 453.

2. Since the statute of 1846 a slave taken from Louisiana to California does not thereby acquire freedom. BUCHANAN and VOORHIES, JJ., and MERRICK, C. J. *Ibid.*

3. A slave carried from Louisiana to California by her master, though she there acquires the status of a free person, cannot stand in judgment in this State, except in a suit for freedom. SPOFFORD, VOORHIES and LEA JJ., and MERRICK, C. J. *Ibid.*

4. If the court were to decree to the plaintiff, now in California, the legacies bequeathed to her, her freedom would be recognized, which would be final between the parties to this suit. What then would prevent her return to Louisiana? What force would there be in the Act of 1846, after her freedom had been recognized by the court? MERRICK, C. J., and VOORHIES, J. *Ibid.*

5. Under Article 3510 of the Code, a slave may acquire freedom by prescription. *Eulalie* v. *Long*, 453.

6. Article 3510 of the Code was not intended to introduce a mode of emancipating slaves, or of changing their *status*. It treats of a slave as being still a slave after the ten years enjoyment of his freedom. But it prohibits the master from restraining him. The public have an overruling interest in the question of his *status*; and the laws by which the manumission of slaves has always been so sedulously guarded from abuse, are all in vain, if the State can be compelled to recognize as unconditionally free, with liberty to remain in the State, and without regard to age, character, and other legal qualifications, all such slaves as their masters may choose to turn loose for the space of ten years. SPOFFORD, J., with whom concurred LEA, J. *Ibid.*

7. Colored persons, until they are recognized as free, or until they are emancipated, cannot maintain a suit for wages. It would be otherwise in the case of a free person illegally reduced to a condition of slavery.

Maranthe, Genie et al. v. *Hunter et al*, 734.

8. Decision in the case of the *State* v. *Harrison*, a slave, 11th An., respecting the constitutionality of the Act of 1855, relative to slaves and free colored persons, affirmed. *Ibid.*

9 An obligation to emancipate a slave twenty-five years hence, and to take all legal steps, and to incur all necessary charges incident to such emancipation, has reference, not to such legislation as was in force at the date of the contract, but to such as might be in force when the contract is to be carried into execution. *Ibid.*

See MORTGAGES—*Solibellas* v. *Consolidated Association*, 682.
See WILLS—*Heirs of Henderson* v. *Rost*, 541.
State v. *Harrison*, 722

STATUTES.

1. Statutes in derogation of common right should not be enlarged by construction. *Duchamp* v. *Butterly*, 67.

2. So much of the Act of 20th February, 1817, as upon a verdict of fraud against an insolvent, disqualifies him from holding any office of trust or profit under the government of this State, is repealed by the Act of 1855. *Stafford* v. *His Creditors*, 470.

3. In *Holmes* v. *Wiltz*, ante p. 439, it was held that the repealing clause appended to the revisory Acts of 1855 did not repeal such pre-existing statutory provisions as were re-enacted by the revisory statute. *Ibid.*

STREETS.

1. The owner of property and others interested will not be considered as having notice of the proceedings of the commissioners of estimate and assessment after the expiration of the delay fixed by the court for filing their report; and where the report was afterward filed and homologated, it will not bind them. *New Orleans, praying for the opening of Dryades street*, 458.

SUBROGATION.

1. Article 2156 of the Code requires that in conventional subrogations an actual subrogation *should be expressed and made at the same time as the payment.* It cannot be made in anticipation of the payment, for the payment is the essential basis of the subrogation. *Succession of Wilson*, 294.

2. Nor can a subrogation be validly made *after* the payment. *Ibid.*

3. *Facts:*—Not creating legal subrogation. *Fort* v. *Union Bank of Louisiana*, 708.

4. A third person, not bound for a debt, who pays it in discharge of the debtor, and receives at the time from the creditor a subrogation to his rights, can receive from the debtor only the amount so paid to the creditor. *Aliter*, if the transfers from the creditor were made in virtue of a sale or donation. *Roman* v. *Forstall*, 717.

SUBSTITUTIONS.

1. Testamentary disposition in the following words: "I give to my great grandchildren—*Kitty's* children and *Lucy's*, if she has any—all the balance of my property of all kinds; but be it known and understood, that *Elvira*, my daughter, is to have the care and management of it during her life in this world, and her and *Stewart* is to take possession of it and carry it on, and have the proceeds, if there be any, but shall not be bound to give a bond or security for anything. If *Elvira* and *Stewart* should die before *Kitty* and *Lucy*, then the property to fall into their hands to be carried on in the same way, and the proceeds to go to them. The property is not to be sold, but to be kept together until the heirs come of age; but as they come of age, they shall be entitled to share with their parents." *Held:* There is no prohibited substitution in such a disposition. The great grandchildren are the instituted heirs. They are certainly not charged with the return of the testator's estate to any third

SUBSTITUTIONS (*Continued.*)

person, nor to preserve it for any third person. The testator clearly expresses his intention that the property which he bequeathes to his great grandchildren should be kept together, and that there should be no partition of it until the heirs come of age. This disposition is expressly sanctioned by Article 1224 of the Civil Code.

McCalop v. *Stewart*, 106.

2. The dispositions in favor of the testator's daughter and her husband, and in favor of his granddaughters, the mothers of the instituted heirs, are not substitutions, but are usufructs within the purview of Article 1509 of the Code. *Ibid.*

SUCCESSION.

1. A surviving wife is called to the inheritance before the natural brothers or sisters. *Duplessis* v. *Young*, 120.
2. On the trial of an application for letters of administration, it is competent for the opponent to show that she was publicly acknowledged and held out to the world as the wife of the deceased; that all the property belonging to the succession was community property; that the opponent was ready to give security for the payment of all the debts of the succession, and that the creditors were willing to accept such security.

Succession v. *Pratt*, 201.

3. It would be competent for the court to protect the heirs by requiring the opponent, as pre-requisite to the exercise of her rights as usufructuary of the community property, either to advance a sufficient sum to pay the debts of the deceased, or produce the consent of the creditors to her assumption of the debts, and to her furnishing security for their payment, and such assumption should be accompanied by a release of the heirs from all liability. *Ibid.*
4. If the heirs of full age, the estate being solvent, and no separation of goods applied for, have so far accepted the succession, purely as to release its debts, the subsequent appointment of an administrator cannot revive them.

Stratton v. *Rogers*, 380.

5. The delivery of the effects of a deceased passenger to the agent of the administrator appointed in Massachusetts, before the appointment of a curator here, will discharge the master. *Walker* v. *Goslee*, 389.
6. Plaintiffs, heirs of A., in an action against his administrator to recover their shares of the succession, in their petition declare their heirship to be derived through their ancestor B., a predeceased brother of A., and, in the same connection style themselves "*heirs*" of B. *Held:* That under Art. 982 of the C. C. this was equivalent to an express acceptance of the succession of B., though that succession was not the subject matter of the litigation. *Truxillo* v. *Truxillo*, 412.
7. Representation is a legal fiction, the effect of which is to put the representative in the place, degree and rights of the party represented. It is true, a person may represent one whose succession he has renounced; but this is not the case of plaintiffs, *who declare in their petition, that they are the heirs of the party whom they represent.* *Ibid.*
8. A petition is a judicial proceeding in the sense of Article 932 of the Code. *Ibid.*

SUCCESSION (*Continued.*)

9. Plaintiffs claim nothing in the succession of B. They refer to him merely to show, that through him, they are entitled to inherit from his brother A. It is with respect to the succession of the latter only that they assume the quality of heir, in the manner intended by Art. 982 C. C. SPOFFORD, J. with whome concurred LEA, J., dissenting. *Ibid.*

10. This article was taken from Art. 778 of the Code Napoleon, the commentators upon which generally recognize the distinction upon which this case should turn, a distinction pointedly made in *Anderson* v. *Cox*, 6 An. 13. SPOFFORD, J., with whom concurred LEA, J., dissenting. *Ibid.*

12. The intervenors S. O. and E. G. St. H,. having, by the evidence adduced, to show there maternal descent, shown also their paternal origin, it was competent for the other parties in interest to show that the connection, of which the intervenors thus declared themselves the offspring, was an adulterous connection. *Succession of Peyran*, 694.

12. The avowed father having been, at the time of the conception of said intervenors, the husband of another woman and not of their mother, they fall within the prohibition of 914 C. C., and their claim to the succession of their mother was rightfully repelled. C. C. 201. *Ibid.*

See HEIR—*Fletcher* v. *Decoudreau*, 59.

See RES JUDICATA—*Truzillo* v. *Truzillo*, 412.

SUPERSEDEAS.

1. To entitle a party to the extraordinary remedy of a supersedeas to stay a writ of possession, issued from the District Court on a judgment of this court, he should show affirmatively that the writ of possession issued in contravention of the terms of the decree of this court. *Crane* v. *Allen*, 493.

SUPREME COURT.

1. Commissions allowed to a provisional syndic, and not opposed in the District Court, cannot be assigned as error in the Supreme Court. *Matthews & Finley* v. *Their Creditors*, 36.

2. It is too late, on an application for a re-hearing, to take advantage of the neglect of appellant to file his brief within two days after the cause was set for trial. The appellee should have moved for a continuance when the cause was called for argument. *Whitehead* v. *Tulane*, 302.

3. An amendment to the judgment of the lower court, by embracing within it the name of one of the opponents, accidentally omitted, is irregular. But if the record contains evidence which shows that judgment in the same form should be immediately pronounced, the decree will be affirmed by the Supreme Court. *Whipple* v. *Hertzberger*, 475.

4. The action of the District Court relative to the granting of new trials, in criminal causes, cannot be reviewed by the Supreme Court, unless brought before it in such a mode as to present for solution an unmixed question of law. *State* v. *Bass*, 478.

5. The Supreme Court has no jurisdiction over the conclusions of the lower court on the mixed questions of law and fact raised by an affidavit for a continuance in a criminal case. *State* v. *Kennedy*, 479.

SUPREME COURT (*Continued.*)

6. The Supreme Court, as a court of error, or an appellate court, for the consideration of questions of law only, is without authority to reverse the judgment of the lower court in a criminal case, except upon a clear showing that there has been error committed in the proceedings of the lower court, and that the appellant has been prejudiced by it *Ibid.*

7. The jurisdiction of the Supreme Court in cases of appeal attaches on the filing of the bond of appeal, and the inferior court thereafter has no authority to take any steps in such cases, except such as are necessary to transmit the record. An order by the inferior court granting an extension of time to prosecute the appeal, is a mere nullity.

State v. *Judge of the Fifth Dist. Court of N. O.* 728.

See CRIMINAL LAW—*State* v. *Johnson*, 422.
State v. *Kennedy*, 479.

SURETY.

1. A judgment had been obtained by plaintiff against J. T., with privilege on the interest of J. T. in certain goods belonging to the firm of J. T. & Co., which had been attached, and were bonded by J. T. & Co., who had intervened and claimed the goods. J. T. & Co. obtained a judgment recognizing their right to the goods, "subject to the payment of such sum of money as may be shown to be the value of the interest of defendant (J. T.) therein." In an action against the surety, on the bond of J. T. & Co. *Held:* that no judgment could be rendered until the amount of the interest of defendant, J. T., in the property attached was shown. *Fraser & Co.* v. *Thorpe*, 47.

2. Sureties have an equitable interest in the payment of the principal demand, and a judgment creditor has a right to permit an execution to issue at their instance. *Fluker* v. *Bobo*, 609.

See SHERIFF—*State* v. *Dunn*, 549.
State v. *Bradley*, 643.

SURRENDER.

1. Under proceedings had for a forced surrender, in which there was no prayer for imprisonment, the jury found a verdict of guilty, but the court refused to sentence the defendant to imprisonment. *Held:* that the Court did not err; the prayer for general relief, while it entitles the party to all the ordinary decrees or orders which the pleadings may justify, will not authorize the imprisonment of a debtor under a highly penal statute. *Leland & Co.* v. *Rose*, 69.

2. Plaintiffs sued for certain batture property, alleged to belong to the succession of their father. Defendants averred that the father had surrendered the property to his creditors in 1809. *By the Court:* The surrender no doubt gave his syndic the right to sell, but the title still remained in *Remy*. Old Code, page 294, Art. 17.

Remy v. *Municipality No.* 2, 148.

3. The property was never sold. The creditors received very nearly the full amount of their claims. As no creditor asserts any claim against the succession, and as *Remy* died (in 1821) in possession of the property, it is fair to conclude that his creditors were satisfied, if not paid in full.

Ibid.

SYNDIC.

See SURRENDER.
See EXECUTOR AND ADMINISTRATOR—*Succession of Pasquier*, 279.

TAXES AND TAX COLLECTORS.

1. Judgment for municipal taxes by default and confirmed, without proof that the property assessed in the name of the defendant belonged to him; *Held:* a legal presumption necessarily arises from the provisions of the assessment law, and it was the business of defendant to show the error in the roll, if error there was. *New Orleans* v. *Gottschalk*, 69.

2. Any neglect of duty on the part of the assessors, involving a want of ordinary care and diligence in the discharge of their duties, occasioning damage, would give rise to an action on the part of the State or the city against them to repair the loss occasioned by such neglect. Or the damage arising from such neglect may be set up by way of defence against the amount due the assessors.

Kathman v. *New Orleans*, 146.

3. In assessing property the title papers are not required to be produced to the Assessor when he makes the assessment; and the defendant should be permitted, in order to show omissions by the Assessors, to prove, by parol evidence, that certain individuals possessed real estate and had not been assessed. *Ibid.*

4. The law does not require absolute perfection in the assessment, as this in a large city like New Orleans would be impossible. The assessors are only held to use due diligence and care in ascertaining the property subject to taxation, and the names of the persons to whom it is to be assessed. *Ibid.*

5. The sum allowed by law to the assessors from the city is the amount due by the State; and if the Auditor has made an error in his calculation, it cannot prejudice the city. *Ibid.*

6. Although the assessment roll may be considered as not having the force and effect of a final judgment, yet a party will not be permitted in all cases to go behind it. On the contrary, he should not be permitted so to do, unless it be shown that the party had sought in vain, or was prevented by some valid cause from seeking the correction of the assessment roll in the manner pointed out by law.

New Orleans v. *Rousseau*, 195.

7. The deed of the Tax Collector can have no effect without the production of the assessment roll which stands in the place of a judgment.

Bonvous v. *Brown*, 214.

8. Although the Act of the Legislature has not declared that the delivery of the tax roll should have the force and effect of a final judgment, yet a party who has not made an effort to have the errors corrected, in the manner indicated by the Act, and seeks to go behind the assessment roll, should show some valid reason why he did not make an attempt to have it corrected while it was subject to correction; and, moreover, not only show that there has been an error made to his prejudice, but also show the precise amount he is entitled to have deducted on account of such error. *New Orleans* v. *Lesseps*, 251.

TAXES AND TAX COLLECTORS (*Continued.*)

9. Defendant was sued for the cost of a license for keeping a beer house, &c. He pleaded that he was protected by the statute which provides that "it shall not be lawful for any municipal corporation within this State, to levy any tax on persons engaged in selling articles of their own manufacture, manufactured within this State." *By the Court:* The evidence shows that the appellant keeps a beer saloon, in which he retails, by the glass, beer of his own manufacture. His manufactory and saloon are both situated on the same lot. It appears to us that the immediate sale of beer from a manufactury, and the retail of it in a public saloon, form distinct branches of business, trade or occupation. We do not think it was the intention of the law-maker to exempt from taxation such articles thus retailed to carry on a public saloon. Hence, we conclude that the appellant, as keeper of a beer-house or saloon, does not fall within the exemption of the statute.

New Orleans v. *Guth*, 405.

10. The Legislature, by the Act of 11th of March, 1854, p. 46, intended, in fixing the compensation of the Assessors, to include, under the term property, the capital which it was the duty of the Assessors to ascertain.

Kathman v. *New Orleans*, 457.

11. The term property, in its enlarged signification, includes capital.

Ibid.

12. The Parish Tax Collector is the proper person to collect the tax levied to pay the subscription of stock of a railroad company.

Parker v. *Scogin et al.* 629.

13. The 59th section of an ordinance of the Common Council of New Orleans, approved December 29th, 1855, which declares that "every manufacturer of cordials or syrups," shall be taxed "seventy-five dollars," is null and void, being in violation of a prohibitory law of the State. The Act of April 25th, 1853, p. 135, reënacted in the revisory statute of March 15th, 1855, section 3d, p. 326, having declared "that it shall not be lawful, hereafter, for any municipal corporation within this State, to levy any tax on persons engaged in selling articles of their own manufacture, manufactured within this State."

New Orleans v. *Mascaro*, 733.

14. This statutory prohibition is not repealed, so far as the city of New Orleans is concerned, by the Act of 20th of March, 1856, entitled "an Act to consolidate the city of New Orleans," &c., p. 136, and even were it so, the repeal could not give vitality to an ordinance which was void *ab initio.*

Ibid.

15. The exemptions specified in the Act of 1856, as exclusive, are confined to taxes upon property; sec. 36. The subject of exemption from taxation upon particular callings, is left where it stood before. The repealing clause in the Act of 20th of March, 1856, leaves the 3d section of the Act of March 15th, 1855, "relative to municipal corporations," in full force.

Ibid.

16. The Police Jury aforesaid, by an ordinance adopted 29th December, 1855, imposed a yearly tax "on each and every person keeping a dairy within

TAXES AND TAX COLLECTORS (*Continued.*)

the limits comprised within the upper line of this parish and Verret Avenue, a yearly tax of two dollars for each and every cow," &c. Under the Act of March 15th, 1855, p. 395, the said Police Jury may impose a tax "on all persons pursuing any occupation, trade or profession," and, therefore, may impose a tax on dairymen. But the tax must be levied on *all* dairymen. The ordinance in question, while professing to tax the occupation, really imposes a tax upon cows kept by dairymen within certain limits. Considered in that light, it is equally inconsistent with a just interpretation of the statute which conferred the power of taxation on said plaintiffs. It is not a tax on personal property to be preceded by an assessment, nor even on all cows within their jurisdiction. This is not only repugnant to the principles of equality which govern the exercise of the taxing power by the State, but was, evidently, not within the scope of the authority conferred by legislation on the said Police Jury. *Police Jury of the Parish of Orleans* v. *Nougues*, 739.

17. The 5th section of the general Act "relative to Police Juries," approved 9th April, 1847, (see Sess. Acts, p. 82,) was not repealed *quoad* said Police Jury by the aforesaid Act of 1855. *Ibid.*

18. This suit was brought to recover the amount of certain drafts, drawn by the captains of certain schooners, for the inspection, at sundry times, of said vessels at the Rigolets, the Atchafalaya and the Mississippi river, during the time the quarantine regulations were enforced in the year 1855. The defence rests on the ground that the Act of March, 1855, p. 47, did not contemplate the payment of fees for the inspection of vessels at the Rigolets and the Atchafalaya river; that the Board of Health were only authorized by the statute to claim fees for the inspection of vessels in the Mississippi river, and that only one of said vessels was inspected in the Mississippi river, and for that defendants had deposited the money in court. *By the Court:* There is not drawn in question the constitutionality or legality of any tax, toll or impost whatsoever, or of any fine, forfeiture or penalty imposed by a municipal corporation, and the amount in controversy is under $300. The case is, therefore, not within the provisions of Art. 62 of the Constitution of 1852, which confers on this court its jurisdiction. Conceding that the fee imposed by the Act of the Legislature is a tax, toll or impost, upon which no opinion is expressed, the only question this court can consider is the constitutionality of the laws or ordinances under which the tax, fine, toll or impost is levied, and not its application to the facts or the construction of such law by the inferior court.
Board of Health v. *Pooley, Nicol & Co*, 743.

19. The "fee" exacted of vessels undergoing inspection in time of quarantine, under the Act of 1855, is a tax. The question in this case is purely one of law, touching the legality of a tax, toll or impost, and as such this court is compelled to take jurisdiction of it, and to construe this law for the parties. SPOFFORD, J., dissenting. *Ibid.*

20. The tax, toll or impost levied upon the defendants' vessels was a legal exaction. SPOFFORD, J., dissenting. *Ibid.*

TAXES AND TAX COLLECTORS (*Continued.*)

21. The "fees" claimed by plaintiff are sanctioned by law, and the law imposing them is constitutional. LEA, J., dissenting. *Ibid.*

See BANKS AND BANKING—*New Orleans* v. *Southern Bank*, 41.
See CONSTITUTIONAL LAW—*Yeatman* v. *Crandall*, 220.
N. O. Draining Co. praying, &c, 338.

TUTORS AND TUTORSHIP.

1. A relation, who, if present in and a resident of the State, would have been entitled to the tutorship of a minor, cannot be permitted, after coming to the State, to displace the tutor regularly appointed.
Succession of Bronson, 24.

2. Where a sale of slaves is made to a minor, without the intervention of the tutrix, or a family meeting, the tutrix may sue for the price paid, upon a mere tender of the slaves at any time, whether they were subject to redhibitory vices or not. *McCall* v. *Henderson*, 209.

3. Tutors have by law the administration of the estates of their pupils, but their powers of administration do not embrace an authority to contract debts. Any one who deals with a tutor, at least any one who lends or advances money to a tutor for account of his ward or pays drafts, exceeding the funds in his hands to their credit, unless said tutor acts within the limits of a previous legal sanction, does so at his peril. The minors being under an absolute disability, it is incumbent on the party who seeks to recover from them, to show, that their indebtedness was contracted in accordance with the specified legal proceedings, or that the consideration of the indebtedness inured to their advantage, to the extent claimed.
Miltenberger v. *Elam, tutor, et als.*, 667.

See MINORS.
See PRINCIPAL AND AGENT—*Beatty* v. *McLeod*, 76.
See SALE—*Foulks* v. *Howes*, 448.

USAGE.

1. A usage regulating the enforcement of an obligation which violates the principle on which the obligation itself is based, and without which it would not exist at all, cannot be maintained.
Meeker v. *Klemm*, 104.

USUFRUCT.

1. Usufructs are not exempt from seizure, except in the single case of the usufruct, given during the marriage to the father and mother, of the estate of a minor child. C. C. 239. In all other cases it is subject to seizure and sale. C. C. 525, 547. *Davis* v. *Carroll et al.*, 705.

2. The seizure of all the right, title and interest of the debtor in and to the thing seized, is a sufficient seizure of the thing itself. *Ibid.*

3. If the donor reserves to himself the usufruct of the property donated, the donation is considered void, and if the vendor retain the possession of the thing sold, the sale is presumed to be simulated. With these presumptions in his favor, the judgment creditor of the donor may seize the property donated, without having obtained a judgment annulling the donation. C. C. 1520, 2456, 1915. C. P. 649, 654, 655. *Ibid.*

See COMMUNITY—*Succession of Viaud*, 297.

USURY.

1. A stipulation in the Act of Mortgage that the mortgagor, in the event the debt has to be made by suit, shall pay five per cent. to the attorney, is not usurious; and the circumstance that the holders of the note are attorneys at law is no bar to the recovery of the five per cent.

Race & Foster v. *Bruen*, 34.

2. Contract decreed to be usurious because borrower paid rent in addition to interest. *Hill* v. *Maddox*, 511.

3. It is not necessary to add to the plea of usury that the obligation sought to be avoided was given in error. The policy of the law was intended to extend relief in cases where there was no error.

Waters v. *Briscoe*, 639.

WARRANTY AND CALL IN WARRANTY.

1. A party who enjoins an execution, on the ground of ownership in himself of the property seized, and who, pending the injunction suit, makes a notarial conveyance of the same property to a third person, cannot be allowed to call such third person in warranty.

Whitehead v. *Tulane*, 302.

2. The exhibition of a certificate of mortgages, or the attaching of the same to an act of sale, does not relieve vendor from an express warranty of "all mortgages and incumbrances." *Bach* v. *Lakin*, 489.

3. Where the vendee calls his vendor in warranty, and there is a decree against the plaintiff in the action for improvements put upon the land, the distribution of the amount awarded must be made between the vendee and the warrantor, according to the estimated value of the improvements made by each. *Lejeune* v. *Barrow*, 501.

WILLS AND TESTAMENTS.

1. The will of the testator not having been dictated to the notary in the presence of three attesting witnesses, is null and void.

Mathis v. *Gerants*, 3.

2. A nuncupative will by public act declared explicitly that the three attesting witnesses were present when the will was dictated to the Recorder. The three witnesses, seven months after the execution of the will, testified that they were present at the time of the execution, but did not recollect hearing the testatrix dictate the dispositions, but believed they heard her, because they attested the will at the time. *By the Court:* This evidence is insufficient to rebut the presumption which exists in favor of the truth of an authentic act executed by a Parish Recorder in solemn form. *Succession of Young*, 65.

3. Nuncupative will by public act annulled because there was nothing in the context to show that the witnesses were present when the will was received by the notary. *Christine* v. *Verbois*, 108.

4. The rules for the opening and proof of testaments, commencing at Article 1639 of the Code, do not pronounce the penalty a nullity for their non-observance, and they nowhere say that other cases may not arise in which the strict letter of these rules may be inapplicable, and that the Judge

WILLS AND TESTAMENTS (*Continued.*)

may not receive in extraordinary cases other equally satisfactory proof that the requirements of the law have been fulfilled.

Succession of Clarke, 124.

5. The formalities required by law for the execution of wills are essential to their validity. But whenever these forms have been observed, there is then a valid will entirely independent of its probate, or any subsequent proceedings which may be commenced on the same. *Ibid.*

6. If a will is really valid, the irregular proof on which it may have been admitted to probate will not be permitted to affect the rights of parties under it. So the olographic will of *Daniel Clark* of 1811, which was admitted to probate without proof that the witnesses recognized the handwriting of *Daniel Clark* from having frequently seen him write and sign his name, as required by the old and new Code, if it had afterwards been attacked for want of this proof, would nevertheless, doubtless have been sustained on satisfactory evidence that it was entirely written, dated and signed by the testator. *Ibid.*

7. The loss or destruction of the will of *Daniel Clark* of 1813, and the long period of time which has elapsed since his death, justify a resort to secondary evidence, which would not have been necessary if the will had not been lost or destroyed, and if so long a period had not elapsed before an attempt had been made to admit it to probate. *Ibid.*

8. Article 1648 of the Code contemplates that the olographic will should be presented before the Judge before whom it is to be proven; yet it cannot be seriously contended that the loss or destruction of the will could prevent the legatee from establishing the will by secondary evidence. *Ibid.*

9. The rules established by the Code for the proof of olographic wills are imperative and prohibitory, and the court is without authority to admit to probate an olographic will not proved in the manner required by the Code. LEA, J., dissenting. *Ibid.*

10. Where a testator left $100,000 to the Mayor of the city, to be used in the construction of an orphan asylum in the city of New Orleans, and after his death his estate was so reduced as only to pay one-fourth of this amount—an amount insufficient to fulfil his intention—an investment of the sum at interest by the Mayor, with a view to raise the requisite amount, did not forfeit the legacy. *Girod* v. *Crossman*, 497.

11. For former decisions as to the construction of the same will, see 12 Rob. 549; 5 An. 441; 7 A. 692. In this case the court determined to abide by everything decided in the above recited cases, as having settled the law for the parties to this suit. *Heirs of Henderson* v. *Rost*, 541.

12. At the death of the testator the slaves, which he directed by his will to be emancipated, acquired instanter the condition of *statu liberi*, and every child of a woman who had been his slave followed the condition of his mother, and became free when she became free. Such child would be free at the time fixed for the emancipation of its mother, even had she died before that time. C. C. Art. 196. *Ibid.*

WILLS AND TESTAMENTS (*Continued.*)

13. Under the terms of the testator's will, and the above recited decisions of the Supreme Court, these *statu liberi* would become free at the expiration of the time designated by the testator without any formal manumission, but upon the express condition that, upon their refusal to go to Liberia at the time fixed for their emancipation, or upon their return after having gone thither, they should forfeit to the heirs of the testator the disposition of his will, and become slaves again. *Ibid.*

14. A nuncupative will, under private signature, may be written by the testator himself, or by another, but when written by another person, it must be "from his (testator's) dictation," or he must have "caused it to be written," in substance and form, as he presents it, declaring it to contain his last will, *ses dernieres volontés.* C. C. 1574.
Heirs of De Bardelabon v. *Averret et als.*, 636.

15. The testament falls by the birth of legitimate children of the testator posterior to its date." C. C., Art. 1698.
Succession of Parham, 646.

16. The terms "*caused it to be written*," in Art. 1574 C. C., mean that the testator must have himself dictated the provisions of a will reduced to writing by another. *Heirs of Bordelon* v. *Heirs of Baron*, 676.

17. A nuncupative will, written by one who does not understand the language in which the will is dictated, but who receives his instructions from the testator, through an interpreter, is invalid. *Ibid.*

18. A nuncupative will, under private signature, which has been read to the testator in a language which he could not comprehend without the aid of an interpreter, is invalid. *Ibid.*

19. It is necessary to the validity of such a will that the witnesses should understand the language in which it is written and read. *Ibid.*

See SUBSTITUTIONS—*McCalop* v. *Stewart*, 106.

WITNESS.

1. Artiticle 351 of the Code of Practice was intended to compel the answer of the party in the presence of the court and opposite party, and to compel him to answer from his recollection and knowledge of the facts in his own words, and in such language as occurs to him when thus interrogated. He cannot be permitted to prepare his answers beforehand and read them in the court. *Peters* v. *Gibson*, 97.

2. A party interrogated may refer to memoranda to assist his recollection, as other witnesses may. *Ibid.*

3. Where a person who was a witness on a former trial, was present at the second trial, it is not competent to show, by a bill of exceptions taken at the previous trial, that he had then refused to answer certain questions, without, at least, first propounding the questions to him.
Trimmel v. *Marvel*, 404.

4. Witnesses cannot be impeached by proof of particular facts, but only by proof of their general reputation for truth and veracity in the neigh-

WITNESS (*Continued.*)

borhood where they are known, otherwise a witness might be prejudiced without the possibility of defending himself. *Crane* v. *Allen*, 493.

5. A person who is a mere nominal party to the suit, is a competent witness. *Bryan* v. *Day*, 601.

6. Wherever a nominal party to a suit is liable for costs in his individual capacity, he is incompetent as a witness, although he may demand nothing for himself, but joins the plaintiff in a prayer for a Judgment in his (plaintiff's) favor. MERRICK, C. J. C. C. 2260. *Ibid.*

7. A defendant in execution is not a competent witness to prove ownership in a third person, of property seized as his own upon the trial of an issue of fraud or simulation in his transfer of such property. *Phœbe* v. *Vienne*, 688.

See PRACTICE—*Haughton* v. *Her Husband*, 200.